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Preface

California Continuing Education of the Bar published the first edition of California Civil Appellate Practice in 1966. It quickly became, and has since remained, an indispensable part of our civil practice series. We published a second edition in 1985. Now, developments in appellate law and procedure have caused us to take another look at the subject.

The third edition continues the purpose of both previous editions—to provide a concise and practical guide to the attorney handling or contemplating an appeal. Although some of the text in this edition is based on text in the last one, this volume represents a fresh approach to the subject of appellate law. We have added a new chapter on trial court remedies as alternatives to appellate review or to be used in conjunction with appellate procedures. In addition, we have greatly expanded the book's first chapter, which provides an overview of the appellate process in order to better assist the lawyer first venturing into the appellate world. Moreover, we have revised the book's format to better facilitate quick access to information useful to appellate practitioners at all levels of experience. Of particular note are the Judicial Perspectives in each chapter, provided by some of the most distinguished appellate jurists in the state and representing every appellate district in the state, as well as the California Supreme Court. We hope to augment these perspectives as we update the book on an annual basis.

Included in the book are a multitude of forms essential for effective appellate practice. In addition, sample forms, showing completed briefs and a petition for review, have been added to this edition. All forms are included in the computer disk that accompanies this book.

Many talented authors and consultants throughout California contributed to this book and suggested how material could be presented in new and original ways. We expect their legal points and practice tips to make appellate practice more effective and more satisfying for the lawyers who use these volumes. Detailed information about the book's contributors can be found in the following pages, titled About the Authors and Consultants.

Legal research analysts were Jess Alvarado, Raymond Cheung, Elliot Cohen, Enrique De Anda, Alan Flatt, Thomas W. Hatcher, Richard J. Link, Jeffrey Meyers, Lane Parker, Ken Scudder, Mindy Spatt, Amy E. Wheat, and Tova L. Zeff. The index was prepared by CEB's Indexing staff. Copy editing and production were handled by Cinda Ely. The book designer was Cheryl Ventimiglia. Composition was performed by CEB's Electronic Publishing staff.

April 2010 Update

CEB wishes to thank the following authors for their contribution to this update: Mitchell E. Abbott, Richards, Watson & Gershon, Los Angeles; the Honorable Kathleen M. Banke, California Court of Appeal, First Appellate District, San Francisco; Christina J. Imre, Sedgwick, Detert, Moran & Arnold, Los Angeles; and James C. Martin, Reed Smith, Los Angeles.

CEB Attorney Editors David Saunders (Managing Editor), Matthew Mandelbaum, and Norma Piatt and Legal Editors Julie Brook, Roberta Klein, Enrique De Anda, and Karen Nutter contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Elizabeth J. Asborno handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

Linda A. Compton
Practice Group Manager
Civil Litigation

Pamela J. Jester
Director

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Foreword

Appellate courts are different from trial courts. The rules are different. The process is different. The goals are different.

As the appellate courts' mission differs from that of trial courts, so do the skills required of appellate practitioners differ from those demanded of trial lawyers. The commendable ability of trial attorneys to "think on their feet" and to relate interpersonally with witnesses, jurors, and opposing counsel has little in common with the skill of appellate attorneys in combing trial records for error, constructing well-honed written legal arguments, and following the sometimes arcane rules and protocol of appellate procedure. As a consequence, an attorney skilled in litigation practice can be a novice in the realm of appellate advocacy. Yet, with proper guidance and preparation, any attorney can acquire the appellate skills necessary to produce briefs and arguments that serve the needs of both client and court.

The heavy workload of appellate courts today makes an attorney's mastery of the appellate system more important than ever. The most recent statistics compiled by the Judicial Council show that in 1993-1994 more than 17,500 notices of appeal were filed; the 88 justices of the Court of Appeal disposed of more than 16,800 appeals, including 11,500 by written opinion. In the same one-year period, more than 6800 matters were presented to the seven justices of the Supreme Court for their consideration, 1800 of which were petitions for review in civil cases. The clear meaning of these numbers is that, to succeed, the practitioner must be knowledgeable and effective in presenting his or her case on appeal.

Appellate practice is governed primarily by judicial rules of procedure. Despite the best efforts of the drafters, these rules may remain obscure to attorneys who do not practice regularly in the appellate setting. Even more challenging to practitioners is understanding how to approach the appellate court—whether the California Court of Appeal or the Supreme Court—that is, how to focus and present the case in both written and oral argument to be successful in the appellate forum.

This CEB text not only explains the rules of appellate procedure, it also provides practical guidance on the broader areas of concern: when to appeal; how to pursue review in the California Supreme Court; how to prepare the briefs; and how to present oral argument in the Court of Appeal or in the California Supreme Court. It is a valuable reference for lawyers of every level of experience who may represent a client.

Kathryn M. Werdegar
Associate Justice
California Supreme Court
June 1996

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About the Third Edition Authors

MITCHELL E. ABBOTT: Richards, Watson & Gershon, Los Angeles. A.B., 1972, University of California (Davis); J.D., 1975, University of Virginia. Certified Specialist, Appellate Law (State Bar of California Board of Legal Specialization). Mr. Abbott has been an appellate practitioner for over 20 years. Among his many cases are *Marriage of Barnes* (1987) 43 C3d 1371, 240 CR 855, and *Centinela Hosp. Ass'n v City of Inglewood* (1990) 225 CA3d 1586, 275 CR 901.

DAVID M. AXELRAD: Horvitz & Levy, Encino. B.A., 1972, Stanford University; J.D., 1977, Hastings College of the Law. Mr. Axelrad is a fellow of the American Academy of Appellate Lawyers and a member of the California Academy of Appellate Lawyers. An appellate lawyer exclusively since 1981, he is especially interested in appellate procedure and stays pending appeal. Among his many cases is *J.C. Penney Cas. Ins. Co. v M.K.* (1991) 52 C3d 1009, 278 CR 64.

KATHY M. BANKE: Reed Smith Crosby Heafey, Oakland. B.A., 1974, California State University (Sacramento); J.D., 1979, University of Colorado. A member of the California Academy of Appellate Lawyers, Ms. Banke specializes in civil appeals in a wide variety of areas. She has taught civil appellate advocacy at Hastings College of the Law and written extensively on the subject. Among her many cases are *Lehto v Allstate Ins. Co.* (1994) 31 CA4th 60, 36 CR2d 814, and *Strauss v Farmers Ins. Co.* (1994) 26 CA4th 1017, 31 CR2d 811.

MICHAEL M. BERGER: Berger & Norton, Santa Monica. Brandeis University (1960-1964); J.D., 1967, Washington University; L.L.M., 1968, University of Southern California. A certified appellate specialist, Mr. Berger is a past president of the California Academy of Appellate Lawyers and has written and lectured extensively on appellate and property law matters. Among his best known cases are *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378, and *State Farm Fire & Cas. Co. v Von der Lieth* (1991) 54 C3d 1123, 2 CR2d 183.

THE HONORABLE ELIHU M. BERLE: Superior Court of California, County of Los Angeles. B.A., 1965, Brooklyn College; M.B.A., 1966, University of Pennsylvania; J.D., 1969, Columbia University. Judge Berle has presided in central civil fast track and criminal courts departments, and has sat on assignment as justice pro tempore of the Court of Appeal, Second Appellate District. Before his appointment to the bench, Judge Berle was in the private practice of law specializing in civil litigation and appellate law.

ELLIOT L. BIEN: Bien & Summers, San Francisco. A.B., 1967, Columbia College; J.D., 1971, Columbia University; L.L.M., 1972, Harvard Law School. Mr. Bien is a Fellow of the American Academy of Appellate Lawyers, a member of the California Academy of Appellate Lawyers, and the founder and first chairman of the Committee on Appellate Courts, Bar Association of San Francisco. He has also written and lectured extensively on appellate matters.

RAYMOND A. CARDOZO: Reed Smith Crosby Heafey, San Francisco. B.A., 1989 Williams College; J.D., 1994, University of California (Berkeley). Mr. Cardozo has handled over 100 criminal and civil appeals and writs. He has taught moot court at Boalt Hall and written a number of articles on appellate practice. Among his many cases are *People v Blakeley* (2000) 23 C4th 82, 96 CR2d 451, and *People v Brown* (1999) 75 CA4th 916, 89 CR2d 589.

EFRAT M. COGAN is senior counsel in the Los Angeles office of Buchalter Nemer, where she is a member of the firm's Litigation and Appellate Practice Groups. Ms. Cogan specializes in complex commercial litigation and contract disputes, real estate and construction, copyright and unfair competition, class actions, professional liability, and constitutional law. She is a Certified Specialist in Appellate Law (State Bar of California Board of Legal Specialization) and has been named a Southern California Super Lawyer. She received her B.A. in 1984 from the University of California *Los Angeles), and her J.D. (Order of the Coif) in 1987 from the University of Southern California, where she was articles editor of the law review.

ROBERT M. DATO: Stephan, Oringher Richman & Theodora, Costa Mesa. B.A., 1980, San Diego State University; J.D., 1983, University of San Diego. A former research attorney to Presiding Justice David Sills, Fourth Appellate District, Division 3, and occasional writ attorney for the court, Mr. Dato is now a certified appellate specialist and has argued numerous appeals in California as well as in New York, Pennsylvania, Idaho, and elsewhere.

PETER W. DAVIS: Reed Smith Crosby Heafey, Oakland. B.S., 1965, University of Oregon; J.D., 1969, Hastings College of the Law. A past President of the California Academy of Appellate Lawyers, a Fellow of the American Academy of Appellate Lawyers, and Chair of the Ninth Circuit Advisory Committee on Rules of Practice and Internal

Operating Procedures, Mr. Davis has specialized in appellate practice for over 20 years and has handled more than 400 appeals and writs. He has written and lectured extensively on appellate issues and taught appellate advocacy at Hastings and at Santa Clara Law School.

PAUL D. FOGEL: Reed Smith Crosby Heafey, San Francisco. A.B., 1971 University of California (Berkeley); J.D., 1976, University of California School of Law (Los Angeles). Fulbright Fellow in American Law, University of Paris, France, 1979-1980. Senior Staff attorney to California Supreme Court Chief Justice Rose Bird, 1983-1987. Fellow, American Academy of Appellate Lawyers. Member, California Academy of Appellate Lawyers, Ninth Circuit Rules Committee, and California Appellate Rules Task Force. Certified Specialist in Appellate Law. Past Chair, Appellate Practice Section, Bar Association of San Francisco, State Bar Committee on Appellate Courts. Mr. Fogel specializes in appeals, writs, and post-trial motions.

JOSE H. GARCIA: Acer Legal Group, San Jose. B.A., 1978, and J.D., 1985, Loyola University of Los Angeles. Mr. Garcia specializes in appellate practice and has contributed to numerous programs. Among his many cases are *Ramirez v Plough, Inc.* (1993) 6 C4th 539, 25 CR2d 97, and *Evangelatos v Superior Court* (1988) 44 C3d 1188, 246 CR 629.

JAMES R. GOFF: Orange. A.B., 1962, and J.D., 1965, University of Southern California. Mr. Goff was a senior attorney to Presiding Justice Robert Gardner (ret.), Fourth Appellate District, Division 2, and is a certified specialist in appellate law, specializing in all aspects of civil appellate litigation. Among his many cases is *Secrest Machine Corp. v Superior Court* (1983) 33 C3d 664, 190 CR 175.

RONALD M. GREENBERG: Of Counsel, Berkes Crane Robinson & Seal LLP. A.B., 1961, University of Michigan; LL.B., 1964, Stanford University. Mr. Greenberg has handled many appeals, including *Moor v County of Alameda* (1973) 411 US 693, 36 L Ed 2d 596, 93 S Ct 1785. He was the 1995 recipient of the "World Lawyer Award" from the World Jurist Association and has contributed to numerous publications and programs.

HARVEY M. GROSSMAN: Los Angeles. A.B., 1951, and LL.B., 1954, University of California (Los Angeles). A former clerk to the late U.S. Supreme Court Justice William O. Douglas, Mr. Grossman has contributed to all three editions of California Civil Appellate Practice. He is a member of the California Academy of Appellate Lawyers.

BLAIR HOFFMAN: Staff Attorney, California Supreme Court. B.A., 1971, University of California (Santa Barbara); J.D., 1974, University of California (Davis). Before working for the state supreme court, Mr. Hoffman was a deputy attorney general specializing in appeals. Among his many cases as deputy attorney general are *Davis v Municipal Court* (1988) 46 C3d 64, 249 CR 300, and *Barker v Estelle* (9th Cir 1990) 913 F2d 1433.

DANIEL WEBB HOWARD: Gleaves, Swearingen, Potter & Scott, Eugene, Oregon. B.A., 1996, Ohio State University; J.D., 2000, University of California School of Law (Boalt Hall). Mr. Howard is a member of both the California and Oregon bars. Appellate matters have constituted a significant portion of his practice since his admission to the California bar in 2000.

CHRISTINA J. IMRE: Sedgwick, Detert, Moran & Arnold, Los Angeles. B.A., 1972, Mount St. Mary's College; M.A., 1974, University of Notre Dame; J.D., 1980, Loyola Law School, Los Angeles. Besides handling many civil appeals, Ms. Imre has served as a trial consultant in numerous cases in anticipation of appeal. She has also written and lectured extensively on appellate and insurance-related matters.

ELLEN LAKE: Oakland. B.A., 1966, Radcliffe College; J.D., 1970, Case Western Reserve University. A former clerk to California Supreme Court Associate Justice Raymond L. Sullivan, Ms. Lake has written and lectured extensively on appellate matters. Among her best known cases are *Ewing v Gill Indus.* (1992) 3 CA4th 601, 4 CR2d 640, *Luck v Southern Pac. Transp. Co.* (1990) 218 CA3d 1, 267 CR 618, and *Howell v State Farm Fire & Cas. Co.* (1990) 218 CA3d 1446, 267 CR 708.

JACQUES LeBOEUF: Law Offices of A. Charles Dell'Ario, Oakland. B.A., 1987, Brown University; J.D., 1992, Northwestern University School of Law. Mr. LeBoeuf has specialized in civil appeals and writs for 8 years, writing several dozen appellate briefs on topics ranging from civil rights and employment discrimination to stolen artwork and unexplained disappearances from trains. He has written and lectured on constitutional law, the appellate process, and legal writing, and he is a current co-chair of the Alameda County Bar Association's Appellate Practice Section.

JAMES C. MARTIN: Reed Smith Crosby Heafey, Los Angeles. B.A., 1974, Colorado College; J.D., 1978, University of Santa Clara. A member of the California Academy of Appellate Lawyers, Mr. Martin specializes in appellate practice and is a prolific author and lecturer. Among his many cases are *Tomaselli v Transamerica Ins. Co.* (1994) 25 CA4th 1766, 31 CR2d 224, and *Waller v Blue Cross* (9th Cir 1994) 32 F3d 1377.

JOSEPH P. MASCOVICH: General Appellate Counsel, Union Pacific Railroad Co. A.B., 1977, University of California (Berkeley); J.D., 1980, Hastings College of the Law. Mr. Mascovich has specialized in civil appeals and writs for the last 10 years and has taught appellate advocacy at Boalt Hall School of Law. Among his many cases are *San Francisco Bay Guardian, Inc. v Superior Court* (1993) 17 CA4th 655, 21 CR2d 464, and *Tanja H. v Regents of Univ. of Cal.* (1991) 228 CA3d 434, 278 CR 918.

GAIL Y. NORTON: Ropers, Majeski, Kohn & Bentley, San Francisco. B.A., 1973, University of California (Berkeley); London School of Economics and Political Science; J.D., 1977, Hastings College of the Law. A practitioner since 1977 and an appellate specialist since 1982, Ms. Norton has contributed to numerous panels on the subject. Among her many published appellate cases is *Regents of Univ. of Cal. v Superior Court* (Roettgen) (1996) 41 CA4th 1040, 48 CR2d 922.

WILLIAM T. RINTALA: Rintala, Smoot, Jaenicke & Rees, LLP, Los Angeles. A.B., 1961, Stanford University; J.D., 1967, University of California (Berkeley). A former clerk to Justice Draper (ret.), First Appellate District, Mr. Rintala specializes in business litigation and appeals, and has contributed to numerous programs and publications. Among his many cases are *Crawford v Board of Educ.* (1976) 17 C3d 280, 130 CR 724, and *Trust Co. Bank v MGM/UA Entertainment Co.* (11th Cir 1985) 772 F2d 740.

THE HONORABLE GEORGE P. SCHIAVELLI (RET.): B.A., 1970, Stanford University; J.D. 1974, UCLA School of Law. Judge Schiavelli is currently a member of the appellate group of Reed Smith Crosby Heafey, Los Angeles, and is affiliated with Alternative Resolution Centers as an arbitrator and mediator in a broad range of commercial disputes. From 1994 to 2000, Judge Schiavelli was a superior court judge in the County of Los Angeles and was presiding judge of the appellate division from 1999 to 2000. Judge Schiavelli has also served on numerous program panels for CEB and other organizations. He is currently a member of the California Judicial Council Appellate Advisory Committee.

ARTHUR E. SCHWIMMER: Los Angeles. A.B., 1961, Columbia University; LL.B., 1964, Brooklyn Law School. A past President of the California Academy of Appellate Lawyers, a Fellow of the American Academy of Appellate Lawyers, and a member of the Judicial Council Advisory Committee to Implement Proposition 32, which drafted new rules for the California Supreme Court, Mr. Schwimmer specializes in civil appeals. In the course of his career, he has lectured and written extensively on appellate practice. Among his many cases are *Weiner v Fleishman* (1991) 54 C3d 476, 286 CR 40, and *West Covina Hosp. v Superior Court* (1986) 41 C3d 846, 226 CR 132.

E. ELIZABETH SUMMERS: Bien & Summers, LLP, San Francisco. B.A., 1964, Stanford University; J.D., 1974, University of California (Berkeley). A member of the California Academy of Appellate Lawyers and founder of the Appellate Practice Section, Alameda County Bar Association, Ms. Summers has specialized in civil appeals and writs for 15 years. She has written and spoken frequently on subjects related to appellate practice. Among her better known cases are *Urbaniak v Newton* (1991) 226 CA3d 1128, 277 CR 354, and *Eddy v Sharp* (1988) 199 CA3d 858, 245 CR 211.

ROY G. WEATHERUP: Lewis Brisbois Bisgaard & Smith, LLP, Los Angeles. A.B., 1968, and J.D., 1972, Stanford University. A member of the California Academy of Appellate Lawyers and the BAJI committee responsible for producing the "Approved Jury Instructions," Mr. Weatherup specializes in appellate practice on which he has lectured extensively. He has been responsible for more than 1000 appellate briefs in over 700 cases, resulting in more than 150 published opinions. Among his many cases are *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116, and *Sindell v Abbott Labs.* (1980) 26 C3d 588, 163 CR 132.

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About the 2010 Update Authors

MITCHELL E. ABBOTT: Richards, Watson & Gershon, Los Angeles. A.B., 1972, University of California, Davis; J.D., 1975, University of Virginia. Certified Specialist, Appellate Law (State Bar of California Board of Legal Specialization). Mr. Abbott has been an appellate practitioner for more than 20 years.

HON. KATHLEEN M. BANKE: California Court of Appeal, First Appellate District, San Francisco. B.A., 1974, California State University, Sacramento; J.D., 1979, University of Colorado. A former member of the California Academy of Appellate Lawyers, Justice Banke specialized in civil appeals in a wide variety of areas. She has taught civil appellate advocacy at Hastings College of the Law and written extensively on the subject.

CHRISTINA J. IMRE: Sedgwick, Detert, Moran & Arnold, Los Angeles. B.A., 1972, Mount St. Mary's College; M.A., 1974, University of Notre Dame; J.D., 1980, Loyola Law School, Los Angeles. Besides handling many civil appeals, Ms. Imre has served as a trial consultant in numerous cases in anticipation of appeal. She has also written and lectured extensively on appellate and insurance-related matters.

JAMES C. MARTIN: Reed Smith, Los Angeles. B.A., 1974, Colorado College; J.D., 1978, University of Santa Clara. A member of the California Academy of Appellate Lawyers, Mr. Martin specializes in appellate practice and is a prolific author and lecturer.

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Consultants

Attorneys:
Feris M. Greenberger; Greines, Martin, Stein & Richland;
Beverly Hills
Ian Herzog; Santa Monica
Edward J. Horowitz; Los Angeles
Gideon Kanner; Professor of Law, Emeritus, Loyola Law School; Of Counsel, Berger & Norton; Santa Monica
Wendy Cole Lascher; Lascher & Lascher; Ventura
Robert L. Liston; Clerk of the Court, Third Appellate District
Gerald Z. Marer; Of Counsel, Jackson, Tufts, Cole & Black;
San Jose
Robin Meadow; Greines, Martin, Stein & Richland; Beverly Hills
Robert A. Olson; Greines, Martin, Stein & Richland; Beverly Hills
Gregory P. Orland; Deputy City Attorney; Los Angeles
Susan M. Popik; Chapman, Popik & White; San Francisco
Marc J. Poster; Greines, Martin, Stein & Richland; Beverly Hills
Barbara W. Ravitz; Greines, Martin, Stein & Richland;
Beverly Hills
Roy G. Weatherup; Haight, Brown & Bonesteel; Santa Monica
Jurists:
Associate Justice Kathryn M. Werdegar; California Supreme Court
Justice Richard Aldridge; Second Appellate District
Justice Carl Anderson; First Appellate District
Justice James A. Ardaiz; Fifth Appellate District
Justice Patricia Bamattre-Manoukian; Sixth Appellate District
Justice Coleman A. Blease; Third Appellate District
Justice Arthur Gilbert; Second Appellate District
Justice Margaret Grignon; Second Appellate District
Justice Joan Dempsey Klein; Second Appellate District
Justice William A. Masterson; Second Appellate District
Justice Timothy A. Reardon; First Appellate District
Justice Charles Vogel; Second Appellate District
Justice Miriam Vogel; Second Appellate District
Justice Edward J. Wallin; Fourth Appellate District
The Honorable Abby Soven; Los Angeles Superior Court

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Selected Developments

April 2010

Chapters 7, 9, and 12 have been reorganized. We have reorganized and updated the material in these chapters to make them easier to use.

Appeal lies from order dismissing action, not from order sustaining demurrer without leave to amend. This settled rule arose in the recent supreme court case of *Sheehan v San Francisco 49ers Ltd.* (2009) 45 C4th 992, 89 CR3d 594, in which an appeal was properly taken from the trial court's dismissal of the action with prejudice following its sustaining of the defendant's demurrer without leave to amend. See §2A.12.

Objection to alleged jury polling must be made when apparent, or it will be considered waived. In *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 92 CR3d 862, the supreme court held that the defendant's objection to the verdict, which was based on a jury polling defect, was waived when the defendant failed to object at the time the verdict was rendered. See §2A.32.

No appeal of judgment by stipulation. The court in *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 121, 94 CR3d 109, explains that "the issue is not whether parties may stipulate to a judgment in order to secure appellate review.... [T]here must be a properly filed motion for the appellate court to review." In that case, the stipulated judgment providing that the trial court would have granted summary judgment, if one had been made, had to be reversed. See §3.16.

Orders denying motion for sanctions are appealable as collateral orders. In *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617, the court disagreed with courts suggesting that an order must direct payment of money or performance of an act to qualify as a collateral order. The *Muller* court argued that these limitations place an "unnecessary strain" on the collateral order doctrine. See §§3.24, 3.47.

Settling party has no right to appeal even if the settlement agreement purports to preserve the party's right to appeal. In *Watkins v Wachovia Corp.* (2009) 172 CA4th 1576, 92 CR3d 409, the class representative's voluntary settlement of her individual claims deprived her of standing to represent the class on appeal, despite her contention that, as part of the settlement, she purportedly retained the right to pursue her appeal with respect to the class claims. See §4.14.

Courts may construe designation of the record on appeal to be the notice of appeal. Although noting that courts may construe a designation of the record as a notice of appeal, the court in *Bosetti v United States Life Ins. Co.* (2009) 175 CA4th 1208, 1224, 96 CR3d 744, declined to do so because the designation of the record in that case neither indicated nor suggested an intention to appeal the dismissal. See §7.14.

Prison-delivery rule, governing filing of the notice of appeal by self-represented prisoners, applies to civil cases. The supreme court has held that the "prison-delivery" rule, which provides that a prisoner's notice of appeal in criminal cases is considered timely filed if delivered to prison authorities within the filing period, also applies to appeals by self-represented prisoners in civil cases. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595. See §§7.19, 10.11.

Service of minute order granting motion to trigger time period for filing a notice of appeal. In *Bi-Coastal Payroll Serv., Inc. v California Ins. Guar. Ass'n* (2009) 174 CA4th 579, 586, 94 CR3d 562, the court reiterated that a minute order that fails to strictly comply with the requirements for a notice of entry of judgment cannot trigger the 60-day time period to file a notice of appeal. That the order contains the words "Notice of Entry of Order" does not suffice; the order must be entitled "Notice of Entry." See §7.45.

Only *valid* motion for reconsideration of an appealable order extends the time to appeal. An invalid motion for reconsideration, which was filed without the required declaration of counsel, does not extend the time in which to appeal the underlying order. See *Branner v Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 96 CR3d 690, in §7.85.

Changes in rules on fees in superior court appellate division cases. If the amount claimed in the case is more than $10,000, the filing fee is now $330; if the amount claimed is $10,000 or less, the fee is now $205. Govt C §70621(a)-(b). Under new Cal Rules of Ct 8.818(a)(1), effective July 1, 2009, if the trial court previously issued an order

granting a party's request to waive court fees and costs in a case, and if that fee waiver is still in effect, court fees for an appeal to the appellate division in that case are waived by that order, and the party is not required to file a new fee waiver application. See §§10.22, 10.52.

Modified judgment earns interest from original date of entry. Applying supreme court precedent, in *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527, the court held that because the judgment at issue was never reversed, only modified upward, it began drawing interest on the date of the original judgment. See §17.64.

New court rule on waivers of costs of petition for review in supreme court. Under Cal Rules of Ct 8.26(b)(3), effective July 1, 2009, if the petitioner seeks a waiver of the court costs for a petition for review, he or she should submit the application for waiver along with the petition. See §22.21.

Supreme court answered certified question from the Ninth Circuit on insurance issue. In response to the Ninth Circuit's question on the appropriate test for determining whether an insured is "engaged in the business of renting or leasing motor vehicles without operators" under former Ins C §11580.9(b), the supreme court stated that, as long as all the statutory requirements are otherwise met, renting or leasing activities of commercial vehicles in the course of *any* business can qualify for the conclusive presumption that the insured's coverage is excess. *Sentry Select Ins. Co. v Fidelity & Guar. Ins. Co.* (2009) 46 C4th 204, 208, 92 CR3d 639. See §23.5.

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Cutoff Dates and CEB Citation

Cutoff Dates

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1

Entering the Appellate World

Christina J. Imre

I. RIGHT TO APPELLATE REVIEW
- A. Right of Direct Appeal §1.1
- B. Discretionary Writ Review §1.2

II. FUNCTION OF APPELLATE REVIEW: DIFFERENT ROLES OF TRIAL AND APPELLATE COURTS
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I. RIGHT TO APPELLATE REVIEW

§1.1 A. Right of Direct Appeal

Right to appeal is governed by statute. Appellate jurisdiction is conferred by the California Constitution. Cal Const art VI, §11. However, the *right* to appeal is granted and governed by statute. Code of Civil Procedure §904.1 is the primary statute governing what is appealable. There is *no* constitutional right to appeal. *Griffin v Illinois* (1956) 351 US 12, 18, 100 L Ed 891, 898, 76 S Ct 585 (federal Constitution does not require state to provide appellate courts or right to appellate review); *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 939, 100 CR3d 752 (right to appeal is wholly statutory). Generally, aggrieved parties may appeal final judgments and certain orders expressly made appealable by statute. Interlocutory judgments and orders are generally not appealable. See §§3.11-3.25.

When right is available. On appeal, the party aggrieved by the appealable judgment or order has a right to review if certain conditions are satisfied, such as filing a timely notice of appeal, procuring an adequate appellate record, filing the necessary briefs, and paying the appropriate fees. The court of appeal has no discretion not to hear the matter. But if an appeal is taken from a nonappealable order, the court may dismiss the appeal because it lacks jurisdiction to hear it. See §3.5.

Issue of appealability. As a general rule, trial court orders made during the course of the case are not immediately appealable. The aggrieved party usually awaits entry of the final judgment and appeals from the judgment. On appeal from the final judgment, an appellant may raise the intermediate trial court rulings as error. CCP §906. This can be a trap for the unwary, however, because certain orders are *immediately* appealable. CCP §904.1; see §3.4. Failure to make a timely appeal from an immediately appealable order can result in an unintended waiver of the right to appellate review of the order. CCP §906; see §3.4. Thus, whenever the trial court makes a ruling the aggrieved party wishes to challenge, counsel must promptly evaluate whether the order is appealable in its own right.

Discretionary writ review. Even if the order is not immediately appealable (*i.e.,* the aggrieved party cannot require immediate appellate review as a matter of right), he or she may be able to obtain discretionary appellate review via an extraordinary writ petition, as discussed in §1.2. In addition, review of some orders may be available only by means of a writ petition. Failure to seek a statutorily mandated writ regarding such an order may waive review of the order for all purposes, including appeal from the final judgment. See, *e.g.,* CCP §877.6(e). Compare *Sierra Craft, Inc. v Magnum Enters., Inc.* (1998) 64 CA4th 1252, 1256, 75 CR2d 681 (denial of summary judgment motion reviewable only by writ petition), with *Federal Deposit Ins. Corp. v Dintino* (2008) 167 CA4th 333, 344, 84 CR3d 38 (denial of summary judgment motion reviewable on appeal, notwithstanding failure to pursue writ petition). This book focuses on review by appeal and discusses review by writ only as an alternative to appeal. For a comprehensive discussion of writ review, see California Civil Writ Practice (4th ed Cal CEB 2008).

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§1.2 B. Discretionary Writ Review

Review of nonappealable ruling. When no statute makes an order appealable, the only immediate option for obtaining appellate review is by extraordinary writ petition. Unlike appeals, which appellate courts must accept, writ petitions are subject to the court's discretion. Writ petitions are basically of two types: writs expressly authorized by statute, and "common law" writs of mandate, prohibition, and certiorari. For a comprehensive discussion of writ review, see California Civil Writ Practice (4th ed Cal CEB 2008).

Need for writ review. Writs typically allow the court of appeal to correct error when the petitioner has no immediate right of appeal, no adequate remedy at law, and a beneficial interest in the outcome. CCP §§1068-1069, 1086, 1103. For example, when the trial court ordered production of documents that the petitioner believed were protected by the attorney-client privilege, petitioner cannot wait until a judgment is eventually entered and then appeal from the judgment; the documents will already have been produced and the damage done. An eventual right to appeal the final judgment would be an inadequate remedy. The same is true when a court has ordered production of documents in which a nonparty claims privacy rights. The nonparty has no right of appeal at all; writ review is generally the only available remedy. In either situation, only the court of appeal's intervention will preserve the petitioner's rights.

Writ review is relatively rare. Because writ review is discretionary and the requirements exacting, the granting of writ review is somewhat rare. In 2007-2008, 9705 original proceedings were filed in the courts of appeal, and 551 majority opinions were issued in those proceedings, or 6 percent of original proceedings decided by a majority opinion. Judicial Council of California, 2009 Court Statistics Report, *Courts of Appeal* Tables 1, 10 (2009).

JUDICIAL PERSPECTIVE: Districts and divisions within districts have different views about writs. If you know your court, you will be better able to predict the odds.

Effect of grant or denial of writ. When the court of appeal summarily denies a writ petition, the denial should not be construed as the appellate court's approval of the lower court order. Summary denial without comment is not a ruling on the merits and does not preclude rearguing the same issues in a later appeal, unless otherwise provided by statute. *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728; *Rosato v Superior Court* (1975) 51 CA3d 190, 230, 124 CR 427. However, an opinion after the *granting* of writ review may have law of the case implications. Moreover, if the court of appeal denies the writ petition with an explanation of reasons, this may or may not be law of the case, depending on the circumstances. See *Kowis v Howard, supra*.

For further discussion, see Civ Writ Prac §§22.17, 22.23.

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II. FUNCTION OF APPELLATE REVIEW: DIFFERENT ROLES OF TRIAL AND APPELLATE COURTS

§1.3 A. Trial Courts

As a general rule, trial courts engage in fact finding with an eye to resolving the particular dispute at issue. Their predominant focus is to apply the law to the particular set of facts presented. In trial proceedings, the judge or jury hears evidence, determines credibility, and resolves disputed factual questions. The trial itself is largely an oral proceeding in which evidence is offered so that the fact finder may resolve the issue before the court.

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B. Courts of Appeal

§1.4 1. Distinguished From Trial Courts

Appeal is not retrial. Contrary to popular belief, the appeal is not an opportunity to retry the facts of the case. The appellate court will neither reweigh evidence nor redetermine credibility or other fact-based questions.

Appellate court generally will not consider new issues. In keeping with its mandate to review the lower court's proceeding for legal error and to determine whether a factual determination is supported by substantial evidence, the court does not ordinarily consider issues that the party failed to preserve for appeal by failing to raise them in the lower court. An exception to this rule is when the appellant seeks to raise a new legal issue for the first time on appeal. The primary, but not sole, circumstance permitting the raising of a new legal issue is when the pertinent facts are undisputed, because no prejudice arises from the adversary's inability to introduce contrary evidence. *Raphael v Bloomfield* (2003) 113 CA4th 617, 621, 6 CR3d 583. This is generally a matter of discretion. *Canaan v Abdelnour* (1985) 40 C3d 703, 722 n17, 221 CR 468, overruled on other grounds in *Edelstein v City & County of San Francisco* (2002) 29 C4th 164, 183, 126 CR2d 727; *Bayside Timber Co. v Board of Supervisors* (1971) 20 CA3d 1, 5, 97 CR 431. In contrast, the appellate court will not consider a new legal issue if the appellant's failure to raise it in the trial court deprived the opposition of the opportunity to present evidence relevant to the issue. *Richmond v Dart Indus.* (1987) 196 CA3d 869, 879, 242 CR 184.

Appellate court generally does not hear or consider new evidence. Except in rare cases (see CCP §909; §§11.76-11.80), the appellate court hears no evidence and takes no testimony, nor will it consider evidence that was not presented to the lower court. In other words, the appellate panel will not permit the parties to introduce new evidence for the first time on appeal. See *Estate of Schluttig* (1950) 36 C2d 416, 423, 224 P2d 695. The reason for this rule is because, as noted, the appeal is not a second chance to try the case; the appellate court examines whether the type of error warranting reversal occurred at trial. If the party could have presented additional evidence below but did not, the court of appeal usually will not consider it.

JUDICIAL PERSPECTIVE: If legislative history is treated as "evidence," it may constitute an exception to the rule that new evidence will not be considered. If the issue involves interpretation of a statute and a party obtains additional legislative history materials, some courts grant a request for judicial notice or a motion to augment the record. In addition, the court may provide an opportunity for both sides to file supplemental briefs, if the case is already briefed, and consider all available information in aid of its effort to construe the statute. See Cal Rules of Ct 8.252.

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§1.5 2. Function of Courts of Appeal

Function is error correction. The appellate court's function is error correcting rather than fact finding. The court of appeal will review the trial or court proceedings to decide whether error occurred and whether that error is of the type that warrants reversal of the judgment.

To evaluate error, appellate court must apply appropriate standard of review. In keeping with its goal of reviewing the record for error, appellate courts operate under established guidelines, presumptions, and standards of review. These are discussed in detail in chap 5. In evaluating the prospects on appeal, always consider the standard of review the court will apply to decide the case.

The substantial evidence rule usually precludes the appellate court from disturbing the fact finder's determination of the truth of a disputed fact after trial. However, the court *may* find that legal error occurred in the taking of evidence that prevented appellant from obtaining a fair trial. For example, when the trial court committed prejudicial error in excluding evidence that appellant offered on a disputed fact question, the appellate court may reverse and remand for a retrial if it is reasonably probable that the jury would have reached a different result had it heard the excluded evidence. See §17.26.

The appellate court will review other issues under the appropriate standard of review. When, for example, the issue is presented on appeal from a judgment granting summary judgment or from an order of dismissal entered after a demurrer was sustained without leave to amend, the court applies a de novo standard to the purely legal issue. See §5.4. Many other trial court rulings are reviewed under the abuse of discretion standard. In such situations, the court of appeal will not disturb the trial court's exercise of discretion unless there has been a prejudicial abuse of discretion. Judicial discretion is broad but not unlimited, and it must be exercised in a non-arbitrary fashion in accordance with applicable legal criteria. *Horsford v Board of Trustees of Cal. State Univ.* (2005) 132 CA4th 359, 393, 33 CR3d 644. Convincing the appellate court that the trial court abused its discretion is usually difficult. See §§5.23-5.28.

JUDICIAL PERSPECTIVE: As a practical matter, when the decision below is entirely fact-based and there is evidence to support the trial court's decision, we often affirm even though we might have reached a different result in the first instance. Similarly, it is usually an uphill battle to persuade us that there was an abuse of discretion. On the other hand, with an issue of law you get a second bite of the apple.

Reversible or prejudicial error. A common misconception is that the appellate court will reverse if it finds *any* error in the trial below. This is incorrect. All trials contain some error. Appellate courts begin with the presumption that the judgment is correct and look for *prejudicial* error. See §§5.12, 5.29. In general, this means that the error must have affected appellant's right to a fair trial. When a legal error occurred in the taking of evidence, but the evidence overwhelmingly supports the judgment, the evidentiary ruling probably will not be considered prejudicial. But if the evidence is close on a disputed issue and the trial court erroneously excluded relevant and admissible evidence on that issue, the error may result in a reversal. See *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 18 CR2d 923. Moreover, a judgment correct on one theory will not be reversed because of error affecting another theory. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 19, 112 CR 786 (ruling correct in law will not be reversed simply because it was given for the wrong reason).

Even if the trial court committed prejudicial error, the court of appeal may nonetheless decline to consider it when appellant waived the error in the court below. See §§5.42-5.45. Or, if the court finds that appellant's own actions in the trial court invited the error, appellant cannot raise it on appeal. See §5.42. Similarly, if the record on appeal does not adequately reflect the error, the court of appeal will not consider it. See §5.40.

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§1.6 3. Decisionmaking in Courts of Appeal

Decisions based primarily on written word. Unlike trial courts, appellate courts operate mostly by the written word. Except in rare cases, the court hears no evidence and takes no testimony. With guidance from the parties' appellate briefs, the court reviews the transcript of the lower court proceeding and then schedules oral argument.

Appellate court decision. Unless the parties are granted time to file supplemental briefs or unless there is some extraordinary reason to do otherwise, the cause will be deemed "submitted" at the close of oral argument or earlier if oral argument is waived by all parties. The court of appeal is required to issue an opinion within 90 days after submission. Cal Const art VI, §19; see Govt C §68210. The opinion should be certified for publication if it meets the criteria for a published decision in Cal Rules of Ct 8.1105(c), *i.e.,* it

> (1) establishes a new rule of law; (2) [a]pplies an existing rule of law to a set of facts significantly different from those stated in published decisions; (3) [m]odifies, explains, or criticizes with reasons given, an existing rule of law; (4) [a]dvances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule; (5) [a]ddresses or creates an apparent conflict in the law; (6) [i]nvolves a legal issue of continuing public interest; (7) [m]akes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law; (8) [i]nvokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or (9) [i]s accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

For discussion of publication of opinions, see chap 21.

Published decisions have precedential value and are binding on the trial courts. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321. In contrast, an unpublished opinion generally may not be relied on in other cases. Cal Rules of Ct 8.1115. It has no precedential value beyond that particular case. Cal Rules of Ct 8.1115(a)-(b). For further discussion of publication rules, see chap 21.

JUDICIAL PERSPECTIVE: In some divisions, deciding whether to publish is up to the authoring justice. See chap 21. In other divisions, two or all of the justices must agree. As the Judicial Council's statistics show (Judicial Council of California, 2009 Court Statistics Report, *Courts of Appeal* Table 9 (2009), available online at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf), some divisions publish many more opinions than others. Ultimately, many factors go into the determination of whether to publish. For example, if the case is not well briefed or if it has a particularly convoluted set of facts, these factors may tip the scales against publication. If you are considering a request to the court to publish an opinion not certified for publication, remember that the supreme court is *less* likely to grant review when the opinion is *not* published. Do not allow your ego to affect your client's best interests.

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§1.7 C. Supreme Court

Petition for review provides access to supreme court. Although the supreme court has original jurisdiction in a few instances (Cal Const art VI, §§10-11) and may consider a decision on request to it by certain federal and state courts under Cal Rules of Ct 8.548, access to the state supreme court is usually obtained by petition for review of the court of appeal decision. See CCP §902; Cal Rules of Ct 8.500(a)(1).

In granting a petition for review, supreme court is a policy-making body. Like appellate courts, the supreme court performs an error-correcting rather than a fact-finding function, but with a difference: The supreme court is also a policy-making body. The seven-justice court lacks the resources to review every erroneous appellate court decision. Instead, in deciding whether to grant a petition for review, the supreme court usually looks for broad issues of public policy with ramifications beyond the circumstances of the particular case and seeks to resolve conflicts in the appellate courts' published decisions. See Cal Rules of Ct 8.500(b)(1)-(3).

For example, a petition for review that questions whether a certain type of conduct is actionable may present an institutional or a policy issue with ramifications beyond the particular case. But when the petitioner claims only that a case-specific error occurred that was affirmed in an unpublished decision, the court is less likely to grant review even if it believes a legal error occurred that prejudiced the party's case. The court simply lacks the resources to review all claims of case-specific error.

Supreme court may order publication or depublication of appellate court opinions. The supreme court also performs an important role in the publication or depublication of appellate opinions. If a party (or nonparty) believes that an unpublished appellate decision satisfies the criteria for publication under Cal Rules of Ct 8.1105(c), a request may be made to the court that issued the opinion that publication be ordered. Cal Rules of Ct 8.1120(a). If the issuing court denies the request, it must forward the request to the supreme court for a final decision. Cal Rules of Ct 8.1120(b)(1). The supreme court may then grant or deny the request. Cal Rules of Ct 8.1120(c). However, the supreme court's order to publish a decision in the official reports may not be considered an expression of the court's opinion of the correctness of the result or of the law as expressed in the opinion. Cal Rules of Ct 8.1120(d).

On request or on its own motion, the supreme court may also order depublished an opinion certified for publication by the appellate court. Cal Rules of Ct 8.1125. Again, the court's depublication order "is not an expression of the court's opinion of the correctness of the result of the decision or of any of the law stated in the opinion." Cal Rules of Ct 8.256(d).

Unlike decisions in the court of appeal, all supreme court decisions appear in the official reports. Cal Rules of Ct 8.1105(a).

For discussion of the publication of opinions, see chap 21.

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III. APPELLATE COURT SYSTEM

A. Courts of Appeal

§1.8 1. Jurisdiction

Extent of jurisdiction. The California courts of appeal have appellate jurisdiction in all cases in which superior courts have original jurisdiction (except criminal cases in which the death penalty has been pronounced) and "in other causes prescribed by statute." Cal Const art VI, §11. This constitutional mandate is implemented by CCP §904.1, which provides that appeals may be taken from most superior court judgments (CCP §904.1(a)), certain postjudgment orders (CCP §904.1(a)(2), (4)), a variety of prejudgment orders (CCP §904.1(a)(3), (5)-(9), (11)-(13)), and orders made appealable by the Probate Code (CCP §904.1(a)(10)).

Original jurisdiction. The appellate courts also have original jurisdiction over writ proceedings for petitions for writ of mandate, certiorari, and prohibition, and writ proceedings authorized by statute. Cal Const art VI, §10; see California Civil Writ Practice, chaps 15-16 (4th ed Cal CEB 2008).

Statutes are exclusive source of authority. Statutes defining appealability and review are the exclusive source of the appellate court's power to alter the outcome of a case. Unless a statute authorizes an appeal, the court of appeal lacks jurisdiction to hear the matter as an appeal. *Efron v Kalmanovitz* (1960) 185 CA2d 149, 157, 8 CR 107.

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§1.9 2. Organization

Districts. California has six appellate districts, broken down by geographical area. These districts range in size from 7 justices in the Sixth District to 31 justices in the Second District. The offices of the districts are located in San Francisco (First District), Los Angeles (Second District, Divisions 1-5, 7-8), Ventura (Second District, Division 6), Sacramento (Third District), San Diego (Fourth District, Division 1), Riverside (Fourth District, Division 2), Santa Ana (Fourth District, Division 3), Fresno (Fifth District), and San Jose (Sixth District).

Divisions. Three of the districts, the first, second, and fourth, are divided into divisions. Each division consists of a presiding justice and two or more associate justices. Cal Const art VI, §3. Although the divisions usually share facilities, including the clerk's office, they operate fairly autonomously and each has the power of a court of appeal. Cal Const art VI, §3.

Panels. Appeals and writ matters in each district or division are heard by panels of three justices. Cal Const art VI, §3. A panel is a temporary body made up of justices in the district or division who are assigned to a particular case or are hearing cases together for a limited time. For example, if an appeal is assigned to a division with five sitting justices, three of the five will be assigned to hear the case, unless a judge pro tem is appointed to the panel.

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Source: Civil Litigation/California Civil Appellate Practice/1 Entering the Appellate World/§1.10 3. Operation

§1.10 3. Operation

Governing rules. Generally, the court's operating rules for appeals are found in Cal Rules of Ct 8.1-8.1018 and 10.1000-10.1030. These rules address a wide variety of appellate matters, such as the time for filing notices of appeal, preparation and designation of the record on appeal, briefing, extensions, oral argument, petitions for rehearing and review, original proceedings, and appellate court administration. Rules on appeals to the superior court are found in Cal Rules of Ct 8.800-8.1018. Rules on publication of appellate opinions are in Cal Rules of Ct 8.1105-8.1125. Miscellaneous rules applicable to all courts are in Title 1 (see Cal Rules of Ct 1.1-1.150), Title 2 (see Cal Rules of Ct 2.150, 2.890-2.894, 2.950-2.954, 2.1058), Title 3 (see Cal Rules of Ct 3.20, 3.50-3.58, 3.1900), Title 9 (see Cal Rules of Ct 9.35-9.44), and Title 10 (see Cal Rules of Ct 10.503-10.504, 10.611-10.613). It is important that counsel become familiar with all applicable Rules of Court. Moreover, each appellate district has its own local rules and some divisions within a district have their own operating procedures. These local rules may differ widely from court to court.

Court personnel. Personnel in the district include the individual justices assigned to the district or division, permanent staff research attorneys, law clerks, "externs," and a clerk's staff to handle administration, as well as library staff and computer staff among others.

Each district is managed by an administrative presiding justice who oversees the administration of the legal and staff functions. Likewise, divisions in the districts have a presiding justice who performs similar functions in the division.

Research attorneys may be assigned to a central staff or to a particular justice. In some districts, a senior staff attorney screens the appeals, either assigning the appeal to the central staff or forwarding it to the panel to which the case has been assigned. Some districts assign both civil and criminal cases to central staff; others assign only criminal cases to central staff. Some assign the more complex criminal cases to staff, others the more routine cases. In some districts, staff lawyers are assigned to a particular division; in others they work for the entire court.

The clerk's office is a valuable and helpful resource on points of court policy and procedure.

JUDICIAL PERSPECTIVE: In a multidivision district, questions directed to the deputy clerk for the division to which your case is assigned will usually get you the answer you need.

Assignment of cases and opinions. Assignment to a particular division, panel within a division, or individual justice is usually random, unless other factors require a specific assignment. Some districts assign subsequent appeals on the same case to the same panel. In the second appellate district, once a writ petition or motion is filed and assigned to a division, all subsequent matters in that case go to the same division. Individual workloads and familiarity with the issues may also be considered. Once a case is assigned to a particular division it cannot be reassigned except by order of the supreme court or, in some instances, by the presiding judge of the appellate division. Cal Rules of Ct 10.1000. When transfer is warranted, the court of appeal itself usually requests it.

Each justice works in his or her own way. Some divide the cases among themselves and their staff, writing some from scratch each month and editing or rewriting those written by their staff. Some justices go through the briefs and assign cases based on the strengths of a particular staff member; others let the staff work on whatever they want. In some panels, the justice assigns the appeal to an attorney or a student clerk to prepare a calendar memorandum to inform the panel on issues in the case and to form the basis of the court's ultimate opinion. The calendar memorandum often takes the form of a tentative opinion. Except in the Fourth District, Division 2 (San Bernardino), the tentative opinion is not distributed to the parties.

Most divisions hold conferences before and after oral argument to consider the case. If the members of the panel agree with the "tentative" draft prepared by the author, the tentative draft becomes the opinion of the court. If there is disagreement, the author may redo the opinion if persuaded that the original disposition was incorrect. If not, another member of the panel will take over the case.

Workload. California's courts of appeal operate under a staggering workload. During fiscal year 2007-2008, there were 23,675 contested matters pending, 15,494 notices of appeal filed, 13,970 records on appeal filed, and 10,880 dispositions by written opinion. The median time from filing the notice of appeal to filing an opinion was 448 days. Judicial Council of California, 2009 Court Statistics Report, *Courts of Appeal* Tables 6-7 (2009), available online at

http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf. As a result, attorneys should limit the size of the record as much as possible or consider using an appendix under Cal Rules of Ct 8.124 (see §§9.81-9.105), recognize that delay is a relevant settlement consideration (see §15.23), and keep issues narrow and focused.

JUDICIAL PERSPECTIVE: The current workload makes it more important than ever to do a first-rate editing job on all briefs. Issues buried in the midst of turgid prose will likely be missed. Incomplete or confusing statements of the facts will cloud the legal issues. And when you are grumbling about the lack of style and grace in today's appellate opinions, remember that Justice Cardozo wrote fewer than 25 cases per year, compared with today's average output of 150 cases per justice per year, plus the consideration of twice that number as a non-author panel member.

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B. Supreme Court

§1.11 1. Jurisdiction

Governing authority. The California Supreme Court's jurisdiction to review cases is set forth in Cal Const art VI, §12. The supreme court may review an appellate court decision in any cause. The court may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal division to another. Cal Const art VI, §12.

Discretion to grant review. Unlike courts of appeal, which must hear all appeals properly before them, the supreme court generally has discretion over the civil cases it accepts. Under Cal Rules of Ct 8.500(b), the supreme court may grant review when:

- Necessary to secure uniformity of decision or to settle important questions of law;
- The appellate court lacked jurisdiction of the cause;
- The appellate court decision lacked the concurrence of the required majority of qualified judges; or
- Necessary to transfer the matter to a different court of appeal for further proceedings.

As a practical matter, only the first criterion has much practical significance. Generally, the supreme court will not grant review to consider an issue that the petitioner failed to timely raise in the court of appeal. Cal Rules of Ct 8.500(c)(1).

Original jurisdiction. The supreme court also has the power to entertain original proceedings seeking extraordinary relief in the nature of certiorari, mandate, or prohibition. Cal Const art VI, §10. For further discussion, see California Civil Writ Practice §§27.2-27.11 (4th ed Cal CEB 2008).

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§1.12 2. Organization

The supreme court consists of six associate justices and one Chief Justice. Cal Const art VI, §2. The seven justices act as a collegial body and have equal powers, except that the Chief Justice chairs the Judicial Council (Cal Rules of Ct 10.2(b)) and has certain administrative powers. Although the court is based in San Francisco, it also hears oral argument at regular sessions in Los Angeles and Sacramento and maintains clerk's offices in those locations.

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§1.13 3. Operation

Assignment of petitions for review. Petitions seeking review in civil cases are divided among the associate justices, who in turn assign the petitions and briefs to their own staff members. The staff attorney responsible for the particular petition prepares a conference memorandum summarizing the legal issues presented by the petition and recommending a disposition. The justice responsible for the conference memorandum normally reviews the staff member's draft and approves the final form. The justice can recommend either a grant or denial of review, or, if in doubt, can circulate the memorandum without a recommendation. Conference memorandums are circulated prior to the court's regular weekly conference.

Weekly conference. At the weekly conference, the justices discuss the petitions for which memorandums have been circulated unless the memorandum's author has recommended an unqualified denial and no other justice requests discussion of the case. The justices then vote on whether to grant or deny the petition. The petition must receive four affirmative votes for the court to review the case. Cal Rules of Ct 8.512(d).

Assignment of cases after petitions have been granted. If the petition receives four votes, the Chief Justice assigns the case to a justice to prepare a calendar memorandum, which typically takes the form of a draft opinion. After oral argument on the case, the matter is assigned to one of the justices in the majority, typically the same justice who prepared the calendar memorandum, to write the opinion. The opinion is then circulated among the other six justices, who may sign the opinion, make suggestions, or call for a conference to discuss the case. For a detailed description of the procedures of the supreme court, see §22.4.

Workload. In 2007-2008, more than 5900 petitions for review were filed, of which nearly 1500 were civil cases. Judicial Council of California, 2009 Court Statistics Report, *Supreme Court* Table 2 (2009).

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IV. SEQUENCE OF APPELLATE PROCESS

A. Direct Appeals

§1.14 1. Jurisdiction

The appeal from a superior court judgment or appealable order is begun by filing the notice of appeal in the superior court. The notice of appeal "opens the door" to the appellate court. It invests the appellate court with jurisdiction and divests the trial court of jurisdiction over all but collateral matters and certain postjudgment matters. The trial court retains only limited jurisdiction to hear matters "not affected by the judgment or order" from which the appeal was taken. CCP §916(a).

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§1.15 2. Deadlines

Notice of appeal must be timely filed. Because the notice of appeal is jurisdictional, it must be timely filed. The deadlines for filing notice of appeal are in Cal Rules of Ct 8.104. If the notice is filed early (*i.e.,* before entry of the judgment but after its rendition), the notice of appeal is valid and will be deemed to have been filed immediately after entry of judgment. Cal Rules of Ct 8.104(e)(1). A notice of appeal filed before rendition of the judgment but after the judge has announced the intended ruling may, in the appellate court's discretion, be treated as timely filed. Cal Rules of Ct 8.104(e)(2). If the notice of appeal is filed late, however, the court lacks jurisdiction to consider it. The court of appeal cannot grant relief from a late filing and must dismiss the appeal. Cal Rules of Ct 8.104(b). See §7.31.

Extensions. The rules contemplate extensions of time to file a notice of appeal under certain circumstances, including when a party's valid motion for a new trial is denied, or when a party files a valid motion to vacate a judgment. Cal Rules of Ct 8.108. For a summary of extensions of time to file a notice of appeal, see chart in §7.51 and discussion in §§7.52-7.101.

CAUTION: These deadlines can be a trap for the unwary. The rules should be thoroughly reviewed to ascertain the applicable deadline, and the notice should be filed well in advance. The notice of appeal should not be mailed to the superior court for filing, especially when the deadline is fast approaching. Extensions of these deadlines run from the service date giving notice of action by the trial court and are not simply an additional period of time from the original deadline. For example, if the trial court acts before the expiration of the jurisdictional period for ruling on a motion for a new trial, the extension of the time for filing a notice of appeal runs from the date of service of the trial court's order, not from the end of the original period. Cal Rules of Ct 8.108(b)(1)(A).

JUDICIAL PERSPECTIVE: To avoid problems, file as early as possible and try to avoid last-minute filings. When calendaring the date, have at least one other lawyer check your calculation against the rules and the calendar to be sure you have counted correctly.

Filing of "notices of unavailability" discouraged. In an attempt to control the course of the appellate process, including the timing of deadlines, counsel sometimes file a "Notice of Unavailability." However, in *Carl v Superior Court* (2007) 157 CA4th 73, 77, 68 CR3d 566, the court explained that there is no authority for filing such a document and that "[g]iven the inherent flexibility of the California Rules of Court regulating appellate practice, any party who feels the uncomfortable pinch of an oncoming deadline may seek appropriate relief."

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B. Overview of Appellate Process

§1.16 1. Notice of Appeal; Contents

Basic requirements. As discussed in greater detail in chap 7, the notice of appeal must specify the judgment or order being appealed from. No particular language is required. It must be written and signed by appellant or appellant's attorney and filed with the superior court from which the appealed judgment or order originated. Cal Rules of Ct 8.100(a). There is no such thing as an oral notice of appeal.

Courts generally construe notice of appeal broadly. Under Cal Rules of Ct 8.100(a)(2), the notice of appeal "must be liberally construed" and is considered sufficient "if it identifies the particular judgment or order being appealed." Because most nonappealable pretrial orders are merged into the judgment, a notice of appeal from "the judgment" generally preserves appellant's right to raise all errors. CCP §906. However, if appellant seeks review of appealable orders in addition to the judgment, the notice of appeal should specify each order from which the appeal is taken. For example, if appellant is appealing from the judgment and from an order denying judgment notwithstanding the verdict, the notice should so state, and should include the date of the order or other particularizing information.

For a thorough discussion of the contents of the notice of appeal, see §§7.8-7.14.

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§1.17 2. Cross-Appeals

When necessary. Ordinarily, the party who prevailed in the trial court (the respondent on appeal) need not file a cross-appeal. The goal of a respondent's brief is to preserve the judgment that appellant is attacking. However, if respondent wishes to change the judgment or order, or contends that the case should be returned to the trial court for further proceedings, a cross-appeal may be necessary. For filing deadlines for a cross-appeal, see Cal Rules of Ct 8.108(f). For discussion of cross-appeals, see chap 8.

Protective cross-appeal of grant of new trial. A classic use is a protective cross-appeal after a new trial is granted. For example, when a judgment is entered in plaintiff's favor after trial, defendant may move for a new trial. If the trial court grants defendant's motion, the plaintiff may appeal because orders granting new trial are appealable. If the appellate court reverses the order granting new trial, the original judgment will be reinstated unless defendant has filed a protective cross-appeal challenging that judgment. The defendant cannot merely wait to see how the appellate court will rule on the new trial order, because by the time the court rules on plaintiff's appeal, defendant's time to appeal from the originally entered judgment will have expired. In this example, the only way for defendant to challenge the original judgment is to file a timely notice of cross-appeal. See §§2.37, 8.8.

JUDICIAL PERSPECTIVE: This is a very important point. More often than one would expect, a cross-appeal is not filed and the court is forced to reinstate the judgment when the order granting a new trial is reversed (which is not uncommon because it is one of the easiest areas for the trial court to make a mistake in).

Procedure. The procedure for filing a cross-appeal is set forth primarily in Cal Rules of Ct 8.108(f). That rule extends the time for a party to file a notice of appeal until 20 days after the clerk mails notification that another party has filed a notice of appeal. This time allows a party who is ambivalent about appealing to wait to make a final decision until after the opponent appeals, and permits the party who has obtained an order for new trial to file a protective cross-appeal from the judgment if the posttrial order is later reversed on appeal.

Except for the time extension, the procedural rules for cross-appeals are generally the same as for appeals. See Cal Rules of Ct 8.100(f). Because there are really two appeals in a cross-appeal situation, additional appellate briefs are permitted. See §8.42.

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3. Designation of Record

§1.18 a. Nature and Function

Purpose. The designation of the record identifies the documents to be included in the record on appeal. Because the appellate court will not consider any matters not in the record, it is critically important that the designation specify all items the party needs to raise or rebut an issue on appeal. For a thorough discussion of this subject, see chap 9.

Components. The record on appeal usually has two parts: a reporter's trial transcript of whatever oral proceedings pertain to the appeal (see Cal Rules of Ct 8.130), and the written record of relevant documents from the trial court file (see Cal Rules of Ct 8.122). Appellant's counsel may request the superior court clerk to assemble and photocopy the court documents in a "Clerk's Transcript" on appeal or, under Cal Rules of Ct 8.124, may assemble these documents in a "Rule 8.124 Appendix." Cal Rules of Ct 8.121, 8.122, 8.124. As discussed in §1.21, electing an attorney-prepared appendix in lieu of clerk's transcript under Rule 8.124 may, in some counties, expedite the appeal considerably.

Filing. The designation of the record may be filed in the superior court concurrently with the notice of appeal, or within 10 days after the notice of appeal is filed. Cal Rules of Ct 8.121(a).

Augmentation of record. When a party omits an item from the designation, the procedure for obtaining relief is a motion to augment the record on appeal. Under Cal Rules of Ct 8.155, the reviewing court may order that any part of the original superior court file be transmitted to it, or that oral proceedings be transcribed that were omitted from the record designation. These items then become part of the record on appeal. Nonetheless, counsel should try to ensure that the designation is as complete as possible at the outset.

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§1.19 b. Reporter's Transcript

Contents. The reporter does not usually transcribe certain portions of the trial unless the designation of record specifies otherwise. These portions include any document includable in the clerk's transcript under Cal Rules of Ct 8.122. Cal Rules of Ct 8.130(e)(3). The designation should identify each day of the proceedings with enough specificity that the reporter knows exactly what is requested. The designation should include all proceedings needed to present an adequate appellate record for the court of appeal to decide the case. See §§9.24-9.30.

JUDICIAL PERSPECTIVE: When the appeal is from a pretrial judgment or order, a reporter's transcript may or may not be necessary. But it usually helps to designate it so that you can refer to it if it includes the judge's reasons.

Note also that, under Cal Rules of Ct 8.130(a)(4), respondent may not counterdesignate a reporter's transcript if appellant elects to proceed without one. Instead, respondent must move the court to augment the record with the reporter's transcript under Cal Rules of Ct 8.155. See §9.120.

Cost; required documents. When a reporter's transcript is requested, appellant must submit with the designation of the record a deposit for the estimated costs of preparation (calculated according to a formula specified by rule or by the reporter's written estimate), a written waiver of advance payment from the reporter, a copy of a Transcript Reimbursement Fund application (see Cal Rules of Ct 8.130(c)(1)), or a certified copy of the transcript. Cal Rules of Ct 8.130(b)(1), (3). If the party does not submit the deposit, or a proper substitute, then the clerk will issue a notice of default under Cal Rules of Ct 8.140. Cal Rules of Ct 8.130(d)(2). See §9.77. After the default notice is mailed, the party has 15 days to cure the default. Cal Rules of Ct 8.140(a).

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c. Trial Court Documents

§1.20 (1) Clerk's Transcript

Contents. The clerk's transcript consists of papers filed or lodged with the clerk, minutes, written instructions (whether given or refused), exhibits (whether admitted or refused), and the specific items enumerated in Cal Rules of Ct 8.122(b). See §§9.68-9.69.

No need to include everything. Care should be taken not to designate every piece of paper in the trial court file simply because it is there. For example, if the trial court overruled a demurrer early in the case and the ruling will not be an issue on appeal, the demurrer-related documents probably need not be included. However, on close questions, the attorney should err on the side of inclusion, to make sure the record adequately reflects the errors appellant intends or may later decide to raise on appeal. Note that exhibits, although considered part of the clerk's transcript, are generally not copied into the transcript unless the designation specifies which ones are to be included. Any exhibits vital to appellant's case should be listed in the designation so that they will be readily available for the court of appeal to review during briefing. Otherwise, the court of appeal may not have access to them until just before oral argument—after appellate briefing has been completed.

JUDICIAL PERSPECTIVE: Documentary exhibits are the only ones capable of inclusion in the clerk's transcript, and because exhibits are usually kept separately from the superior court file, the clerk may not have easy access to them. This is one more reason to use a Cal Rules of Ct 8.124 appendix whenever possible—you can include your own copies. See §1.21.

Cost. The clerk will notify the appellant of the estimated costs of preparing the original and one copy of the transcript within 30 days after the designation has been filed. Cal Rules of Ct 8.122(c)(1)(A). These estimated costs must be deposited within 10 days of the date the clerk mails the notice of estimated costs, unless otherwise provided by law or unless the party submits an application for, or an order granting, a waiver of the cost under Cal Rules of Ct 3.50-3.58. Cal Rules of Ct 8.122(c)(3). See §§9.75-9.78. The same default procedures for failure to procure the reporter's transcript apply for failure to procure the clerk's transcript. Cal Rules of Ct 8.140. See §1.19.

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§1.21 (2) Appendix in Lieu of Clerk's Transcript

Under Cal Rules of Ct 8.124, appellant may elect to proceed by way of an attorney-prepared appendix in lieu of a clerk's transcript. There are often strategic or practical reasons for doing so. For one thing, many counties have a significant backlog of cases awaiting assembly of the record on appeal. Most clerk's offices assemble appellate records in the order in which the notice of appeal was filed. As a result, it can take many months for the clerk's office to assemble and photocopy the transcript, significantly delaying resolution on appeal, which is a particular problem in appeals from money judgments in which interest continues to run. Electing the Rule 8.124 appendix gives the attorney greater control over when the record will be completed. Appellant will still have to await completion of the reporter's transcript, but the Rule 8.124 method means one less thing to wait for, especially if the reporter has already prepared dailies of some or all of the trial proceedings. For further discussion of the Rule 8.124 appendix and objections to its use, see §§9.81-9.105.

JUDICIAL PERSPECTIVE: In-house copying is usually cheaper than the cost of a clerk's transcript. That fact, plus the control you have over the record (*e.g.,* to ensure that all documents are included, no pages are omitted or are upside down) make the appendix far superior to a clerk's transcript.

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§1.22 d. Counterdesignation

The responsibilities for procuring the record fall largely on appellant's shoulders, as the party challenging the judgment or order. However, the rules provide for respondent to request additions to the record appellant has designated. Within 10 days after service of appellant's designation of the record, respondent may file a counterdesignation, requesting additional materials for inclusion in the record. Cal Rules of Ct 8.130(a)(3) (reporter's transcript), 8.122(a)(2) (clerk's transcript). Respondent is responsible for paying for the additional costs. Cal Rules of Ct 8.130(b)(1), 8.122(c)(1)(B). Unless the court orders otherwise, the costs of transcript preparation are recoverable by the prevailing party on appeal. Cal Rules of Ct 8.278(a)(1), (d)(1)(B). Respondent also has the option of electing appendixes in lieu of the clerk's transcript. Cal Rules of Ct 8.124. For further discussion, see §9.84.

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§1.23 4. Stays of Enforcement

Not all judgment or orders are automatically stayed. Common misconceptions often arise about the effect of a judgment or order during appeal. Some superior court judgments or orders are automatically stayed by the perfecting of an appeal, *e.g.,* a mandatory injunction, but others are not, *e.g.,* a prohibitory injunction. See §6.19. If the judgment or order is not automatically stayed, a party may want to seek a stay of its enforcement.

Money judgments. If appellant appeals from a money judgment, obtaining a stay of enforcement of that judgment, while not technically required to pursue the appeal, is usually a practical necessity, because filing a notice of appeal does not stay enforcement of a money judgment. CCP §917.1. Without a stay of enforcement, respondent may execute on the judgment at any time during pendency of the appeal. See §6.28. Once respondent has satisfied the judgment by execution, the appeal itself may even become moot and subject to dismissal. Thus, the ability to post security can be a critical consideration in preserving the right to appeal from a money judgment. Appellant's counsel will need to take immediate steps to ensure that respondent does not execute on appellant's assets while the appeal is being perfected. See CCP §917.1.

Several alternatives are available to accomplish this goal. Some trial courts request counsel to sign a form stipulation at the outset of trial to stay enforcement of any ultimately entered judgment until the time for hearing on posttrial motions has expired. In other courts, the prospective appellant may request a temporary stay of enforcement from the trial judge. CCP §918. The trial court may grant a temporary stay for up to 10 days after the last day on which a notice of appeal could be filed. CCP §918(b). Appellant may also request that respondent stipulate not to enforce the judgment until a specified time to give appellant time to post security. If these options fail, appellant may have to post security and file the notice of appeal earlier than planned. In some circumstances, a writ of supersedeas may be appropriate. See §§6.69-6.74. For discussion of stays of enforcement and related forms, see chap 6. For sample forms of an application for a temporary stay of enforcement, stipulation of waiver of an appeals bond, and a notice of undertaking, see App H.

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§1.24 5. Awaiting Record on Appeal

Briefs cannot be filed until completed record is filed. Once the notice of appeal is filed and the record designated, the parties then have to wait for the record to be prepared. Appellate briefing cannot begin until the completed record is filed in the appellate court. Cal Rules of Ct 8.212(a), 8.216(a). See §1.25. Depending on the size of the record and the clerk's or reporter's backlog, the time to prepare the record can be considerable. In deciding whether to appeal and the type of record to elect, counsel should contact the local court and reporter for an estimate of the delay. Because interest will run on a money judgment while the appeal is pending, this may be a factor to consider in deciding how to designate the record.

JUDICIAL PERSPECTIVE: Such delays represent another reason for using an appendix under Cal Rules of Ct 8.124. See §1.21.

Appellant should carefully monitor record preparation. While awaiting the record's completion, appellant's counsel should make it a practice to regularly contact the reporter's or clerk's office, or both, for progress reports. It is the appellant's responsibility to try to move the process along or at least to diligently monitor progress. Good file memorandums of contacts with reporters and clerks should be kept. If, as sometimes happens, the respondent moves to dismiss the appeal for appellant's failure to procure a record (see §11.57), appellant's counsel will then have careful documentation to demonstrate that everything possible was done to move the appeal along.

Use time wisely while waiting for record to be prepared. Although briefing cannot be commenced at this time, counsel for both parties should use the time to acquaint or refamiliarize themselves with the case, identify issues, and get a jump on the briefing schedule. As discussed in §1.25, appellate court rules provide that once the record is filed, the appellant normally has only 40 days to file the opening brief. Cal Rules of Ct 8.212(a)(1)(A). The time for filing other briefs is similarly short. Though there is a procedure for stipulations or court-requested extensions, wise use of the time while awaiting completion of the record can provide a good head start on the process.

JUDICIAL PERSPECTIVE: If the appeal is from a summary judgment or an order of dismissal following a demurrer, there is no reason to defer preparation of the opening brief. All you need do is fill in the record references when the clerk's transcript is completed.

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6. Appellate Briefing

§1.25 a. Deadlines

General rule. Once the record on appeal is filed with the reviewing court, the appellate briefing schedule begins. The appellate process contemplates three briefs except in cases of cross-appeals:

(1) Appellant's opening brief is due within 40 days after the filing of the record (or the reporter's transcript if appellant elected an appendix under Cal Rules of Ct 8.124) or within 70 days after filing the Rule 8.124 election if no reporter's transcript was designated. Cal Rules of Ct 8.212(a)(1).

(2) Respondent's brief is due 30 days after appellant's opening brief was filed. Cal Rules of Ct 8.212(a)(2).

(3) Appellant's reply brief is due 20 days after respondent's brief. Cal Rules of Ct 8.212(a)(3).

For thorough discussion of these deadlines, see §§12.105, 12.133, and 13.27.

Extension of time. By stipulation, the parties may extend each of these times for a maximum of 60 days. The stipulation to extend the briefing time is not effective unless it is filed before the period sought to be extended expires. Thereafter, the time may only be extended by the court for good cause. Cal Rules of Ct 8.212(b)(3)(B).

JUDICIAL PERSPECTIVE: Absent a need for speedy review, most courts grant the same periods available by stipulation to parties who are unable to obtain a stipulation. See Cal Rules of Ct 8.212(b)(3)(A).

If deadline for opening brief is missed. If appellant fails to file an opening brief within the time prescribed or extended, the clerk issues a notice advising that, if the opening brief is not filed within 15 days after the notice was mailed, the appeal may be dismissed unless good cause is shown for relief. Cal Rules of Ct 8.212(b)(4), 8.220(a). Within those 15 days, "a party may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may impose the sanction under [Cal Rules of Ct 8.220(c)] without further notice." Cal Rules of Ct 8.220(d).

If deadline for respondent's brief is missed. If respondent's brief is not filed within the prescribed or extended time, the clerk will issue a notice advising that, if the brief is not filed within 15 days after the notice is mailed, the court may decide the appeal on the record, appellant's opening brief, and any oral argument by appellant. Cal Rules of Ct 8.212(b)(4), 8.220(a)(2), (d). If respondent's brief is not filed within the 15-day period, the court "may decide the appeal on the record, the opening brief, and any oral argument by the appellant." Cal Rules of Ct 8.220(a)(2).

If reply brief deadline is missed. Because appellant's reply brief is optional, no warning notice will issue if appellant fails to file one.

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§1.26 b. Appellant's Opening Brief

Appellant must file its own or join in and adopt another's opening brief. Every appellant must file an opening brief. Cal Rules of Ct 8.200(a)(1). Failure to do so may result in dismissal of the appeal. Cal Rules of Ct 8.220(a)(1). In cases with multiple appellants, one appellant may join in another's brief or adopt by reference any brief in the same or companion cases. Cal Rules of Ct 8.200(a)(5).

JUDICIAL PERSPECTIVE: Note, however, that unless your client stands in precisely the same posture as another appellant, it can be very risky to join in another appellant's opening brief.

Statement of case; statement of appealability. Appellant's opening brief must contain a statement of the case, explaining the nature of the action or proceeding, the relief sought, a summary of the material facts and the judgment or ruling of the trial court. Cal Rules of Ct 8.204(a)(2). Any statement to a matter on the record must be supported by a citation to the volume and page number of the printed record. The same specificity must be used if any part of the record is submitted in an electronic format. Cal Rules of Ct 8.204(a)(1)(C). The opening brief must also contain a statement of appealability, *i.e.*, "state that the judgment appealed from is final, or explain why the order is appealable." Cal Rules of Ct 8.204(a)(2)(B). For a thorough discussion of these and other briefing rules, see chap 12.

JUDICIAL PERSPECTIVE: The first thing in your brief should be a one-paragraph statement explaining very briefly the nature of the case. For example: "In this breach of contract action, the plaintiff-seller appeals from a summary judgment granted in favor of the defendant-buyer on statute of limitations grounds." Without this sort of introduction, what follows is meaningless. Although an introduction may not be expressly provided for in any rule, nothing in the rules prohibits it.

Opening brief should raise all major issues on appeal. The opening brief is a crucial document. It is the principal vehicle by which appellant's case is argued before the court. Appellant should raise all key points and issues in the opening brief. As a general rule, the court will not permit appellant to raise new issues in the reply that could have been raised before, because of the likelihood that respondent will be "sandbagged" and deprived of an opportunity to rebut. *Blatt v Farley* (1990) 226 CA3d 621, 627, 276 CR 612; *Neighbours v Buzz Oates Enters.* (1990) 217 CA3d 325, 335 n8, 265 CR 788.

Care in drafting. Care must be exercised in drafting and redrafting to forcefully and clearly convey why the judgment or order should be reversed. Bear in mind that appellant lost in the trial court, and the appellate court applies certain presumptions in favor of the status quo. Thus, the opening brief must be persuasive and capable of convincing the court that an injustice was committed which warrants reversal. For further advice on preparing the opening brief, see chap 12.

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§1.27 c. Respondent's Brief

Respondent must file its own or join in and adopt another's opening brief. Like appellants, respondents must file a brief or join in that of another respondent or adopt by reference any brief in the same or companion cases. Cal Rules of Ct 8.200(a)(2), (5). If respondent fails to file a respondent's brief, the court may consider the statement of facts in appellant's opening brief to be true and decide the case on the record, the opening brief, and any oral arguments by the appellant. Cal Rules of Ct 8.220(a)(2). California Rules of Court 8.204 does not set out specific content requirements for respondent's brief.

JUDICIAL PERSPECTIVE: An appellant should not run to the bank too soon. A respondent's failure to file a brief does not guarantee a reversal. Cases under Rule 8.220(a)(2) are decided on the merits, not by default.

Respondent's brief must stand alone as a cohesive and persuasive argument. Because respondent prevailed in the trial court, he or she has only this single written document to persuade the appellate court that the trial court ruled correctly. Respondent's brief should never simply adopt appellant's statement of facts or law of the case. It should stand as an independent document, telling the court everything it needs to know about the appeal and why it should be decided in respondent's favor. Because appellant gets the last word in the reply brief, respondent's brief should anticipate appellant's reply arguments. The respondent's brief should take full advantage of the presumption that the lower court's judgment was correct. If appellant asserts legal error but fails to demonstrate that it was *prejudicial*, respondent's brief should make sure that that point is hammered home. For a thorough discussion of respondent's brief, see chap 13.

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§1.28 d. Appellant's Reply Brief

Always file reply brief. As the losing party in the trial court, appellant is entitled to the last word in the briefing process. Cal Rules of Ct 8.200(a)(3). Although filing an appellant's reply brief is optional (Cal Rules of Ct 8.200(a)(3)), one should always be filed unless there is a valid strategic reason not to do so. Even if respondent's brief fails to come to grips with issues raised in appellant's opening brief, a short reply to point that out should be considered. When appellant's opening brief deliberately avoids responding to respondent's anticipated counterarguments, or when respondent's legal or factual misstatements need to be corrected, a reply brief may be crucial.

JUDICIAL PERSPECTIVE: In a current court, *i.e.,* one without a backlog, the justices sometimes start working on cases before appellant's reply brief is filed. If you receive a notice setting your case for oral argument before the reply brief is file, you can still file it. But don't expect an extension of time!

Contents. The reply brief should respond to arguments or issues raised by respondent and cite any subsequently decided applicable authority. Appellant should not raise issues for the first time in the reply brief that were not raised by the opening brief. *Smith v Board of Med. Quality Assur.* (1988) 202 CA3d 316, 329 n5, 248 CR 704. But if appellant does raise a new issue at this point, respondent may request that the court not consider the new issue or request an opportunity to respond. For a more thorough discussion of the reply brief, see §§12.123-12.133.

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§1.29 7. Oral Argument

Scheduled by court. Oral argument procedures are governed by Cal Rules of Ct 8.256. Once briefing is completed, the court of appeal often asks whether oral argument is requested. Sometimes, the court assumes it is requested and asks for time estimates or waivers. Oral argument, however, is available as a matter of right. *Lewis v Superior Court* (1999) 19 C4th 1232, 1253, 82 CR2d 85; *People v Brigham* (1979) 25 C3d 283, 285, 157 CR 905. The right is implicit in Cal Const art VI, §§2-3 and Cal Rules of Ct 8.256, 8.524. Parties are entitled to the presence at oral argument of each judge who will participate in deciding the appeal. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 872, 187 CR 557. Once argument is requested, the clerk issues a notice of the date and time it will be heard. Unless otherwise ordered, counsel for each party is given 30 minutes. Cal Rules of Ct 8.256(c)(2).

Waiver. The right to oral argument is waivable. See Cal Rules of Ct 8.256(d)(1). Some courts of appeal expressly ask whether argument is waived, or they instruct the parties that they must specifically *request* oral argument. Before deciding to waive oral argument, counsel for appellant, in particular, should consider the matter carefully. Appellant's burden is usually greater than respondent's, and oral argument is appellant's last chance to persuade the court.

JUDICIAL PERSPECTIVE: Most appellate lawyers are of the view that argument should never be waived, even if all you do is show up to inquire whether there are any questions. I believe that this is the better view.

For a thorough discussion of oral argument, see chap 16.

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§1.30 8. The Opinion

Deadline for issuance. Once the cause is submitted after oral argument or if argument is waived, the court has 90 days in which to issue an opinion. See Govt C §68210. In rare circumstances, courts have been known to vacate the submission and resubmit the cause, in which event the time begins to run anew. The court must issue a written order stating its reasons for doing so. Cal Rules of Ct 8.256(e)(1).

Contents. The opinion that issues is in written form and must name the participating justices, including the author of the majority opinion, and must include any dissents or concurrences. Cal Rules of Ct 8.264(a)(2). It usually discusses the facts and the parties' contentions on appeal, together with the court's reasons for its decision. The court will specify the disposition on appeal (*e.g.*, affirmance, reversal for new trial or with directions to dismiss, modification of the judgment or order).

Publication. The opinion will state either that it is directed for publication in the Official Reports or is "not for publication." For discussion of publication rules, see §1.6, chap 21.

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§1.31 9. Petition for Rehearing

Timing. After the court issues a decision, a party may petition for rehearing within 15 days after the decision is filed. Cal Rules of Ct 8.268(b)(1). A party must not file an answer to the petition unless requested by the court, in which case the answer must be served and filed within 8 days after the court's order requesting an answer is filed. Cal Rules of Ct 8.268(b)(2).

Result rarely different after rehearing. An appellate court rarely grants petitions for rehearing on cases it has just decided after full briefing and argument. A petition for rehearing normally will not be granted if the court does not request an answer from the respondent. Cal Rules of Ct 8.268(b)(2). Even in rare cases when a rehearing is granted, it does not mean the ultimate outcome will be different; appellate courts often modify their opinion to address an omitted point or a newly decided case with no change in the result. In fact, small errors are frequently cleaned up in an order denying the petition. Sometimes a rehearing is granted and the opinion is reissued verbatim.

Generally, new issues not considered. Courts of appeal generally do not consider points raised for the first time in a petition for rehearing. However, there are exceptions. For example, a rehearing must be granted when the opinion turned on a point or an issue not briefed by the parties (Govt C §68081), or when the losing party raises lack of subject matter jurisdiction, because jurisdictional issues may be raised at any time. *Davis v Myre* (1964) 228 CA2d 616, 39 CR 682; *Kee v Becker* (1942) 54 CA2d 466, 129 P2d 159. Another example is when a new supreme court case comes down right after the court of appeal's opinion is filed. See §19.11.

Reasons for rehearing. Despite the low odds of obtaining a rehearing, there may be practical or tactical reasons to file a petition for rehearing. In some circumstances, a rehearing may be a preliminary step to supreme court review. Under Cal Rules of Ct 8.500(c)(2),

> [a] party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue of fact in a petition for rehearing.

Thus, the opinion should be carefully read as soon as it is received to evaluate whether any material omission or misstatement might be cause for a petition for rehearing. See §19.8.

For a thorough discussion of rehearing, see chap 19.

JUDICIAL PERSPECTIVE: New justices are frequently surprised about petitions for rehearing—not that they are filed or at the frequency with which they are filed but at the astonishing tone many of them take, such as: "You stupid idiots! How could you be so dumb?" This approach is not the best way to get us to reconsider our position.

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§1.32 10. Remittitur

Just as the notice of appeal opens the door to the appellate courts, remittitur closes it. Remittitur is the document that the reviewing court clerk transmits to the court from which the appeal is taken. It constitutes notification to the lower court that the reviewing court's decision is now final. See §18.1. Issuance of remittitur simultaneously divests the reviewing court of jurisdiction and reinvests it in the lower court. See §18.3. See also Cal Rules of Ct 8.272, 8.386, 8.499.

For a thorough discussion of remittitur, see chap 18.

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11. Review in California Supreme Court

§1.33 a. Petition for Review

A California Supreme Court review is a two-step process, of which the first step is a formal petition for review, requested by the party that is dissatisfied with a decision or a summary denial of a writ. Cal Rules of Ct 8.500-8.512. If the petition is granted, the second step is the briefing on the merits. See §1.34.

Purpose of petition. The petition has a different focus from other appellate briefs. Its primary function is to persuade the supreme court that the case warrants review because it presents a decisional conflict or a policy issue of substantial importance. Because of the nature of its institutional function as a policy-making branch of government and its limited resources, the supreme court will not grant review simply because an injustice was done or a legal error was committed in a particular case. See *People v Davis* (1905) 147 C 346, 350, 81 P 718.

Time for filing. A petition for review must be served and filed within 10 days after the court of appeal decision is final. Cal Rules of Ct 8.500(e)(1).

NOTE: For the purposes of Rule 8.500(e)(1), the date of finality is not extended if it falls on a day on which the clerk's office is closed.

The deadline to file a petition may not be extended, but the chief justice may excuse a party from failing to timely file a petition if the time for the court to order review on its own motion has not expired. Cal Rules of Ct 8.500(e)(2). Any answer to the petition must be served and filed within 20 days after the petition is filed. Cal Rules of Ct 8.500(e)(4). Any reply must be served and filed within 10 days after the answer is filed. Cal Rules of Ct 8.500(e)(5).

Contents. In general, the petition should express the issues presented for review "in terms of the facts of the case but without unnecessary detail." Cal Rules of Ct 8.504(b)(1). The petition "must begin with a concise, nonargumentative statement of the issues presented for review." Cal Rules of Ct 8.504(b)(1). A party opposing review may file an answer and request the court to consider additional issues if review is granted. Cal Rules of Ct 8.500(a)(2), 8.504(c). Care should be taken in drafting the "issues presented" and any "additional issues." If the court accepts review, briefs on the merits and oral argument will be confined to "those issues fairly included in them," unless otherwise ordered. Cal Rules of Ct 8.516(a)(1). However, despite this specification of issues, the court may, on "reasonable notice," order oral argument on fewer or additional issues or on the entire cause. Cal Rules of Ct 8.516(a)-(b).

Granting review is discretionary. Under Cal Rules of Ct 8.500(b), the court may grant review of a court of appeal decision:

- When it appears necessary to secure uniformity of decision or the settlement of important questions of law;
- When the court of appeal lacked jurisdiction;
- When, because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified judges; or
- For the purpose of transferring the matter to the court of appeal.

Most petitions are granted to resolve important policy issues or to resolve a conflict in the case law. The supreme court rarely grants review. In 2007-2008, 6 percent of petitions for review (for both civil appeals and writs) were granted. Judicial Council of California, 2009 Court Statistics Report, *Supreme Court* Table 5 (2009).

Effect of grant of review. Generally, the effect of granting review is that the appellate court opinion is vacated and not citable as authority, although the supreme court may permit the opinion to remain published pending the outcome of review in order to permit tracking. Cal Rules of Ct 8.1105(e).

Options available other than grant of review. In lieu of an outright grant of review, the supreme court has available other options. It may order the court of appeal's opinion depublished (Cal Rules of Ct 8.1105(e)(2)) or, if other cases are pending before the court that present the same issue, the court may issue a "grant and hold" order on the new case (Cal Rules of Ct 8.512(d)(2)). The new case will be "held" until the opinion in the lead case is filed. When that case is final, the new case may either be returned to active status in the supreme court and decided or be

retransferred to the court of appeal for reconsideration in accordance with the lead opinion. Cal Rules of Ct 8.528. The court also has the option of dismissing review. Cal Rules of Ct 8.528(b).

For a thorough discussion of the petition for and grant of review, see chap 22.

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§1.34 b. Briefing; Decision on the Merits

If the supreme court grants review, the parties then begin the second step of supreme court review: briefing on the merits. Within 30 days after the supreme court files the order granting review, the petitioner must file either a new brief on the merits or the brief it filed with the court of appeal. Cal Rules of Ct 8.520(a)(1), (4). Within 30 days after the petitioner files its opening brief or the time to do so expires, the opposing party must file either a new answering brief on the merits or its prior brief to the court of appeal. Cal Rules of Ct 8.520(a)(2), (4). Petitioner may file a new reply brief or the reply brief it filed with the court of appeal within 20 days after the opposing party's brief is filed. Cal Rules of Ct 8.520(a)(3)-(4). In contrast with court of appeal procedures, deadlines for filing briefs on the merits may be extended only by the Chief Justice's order under Cal Rules of Ct 8.60 and not by stipulation of the parties. Cal Rules of Ct 8.520(a)(5). In general, relying on previous briefs is not recommended. Because the supreme court is reviewing the appellate court's decision, it is better is to draft a new brief on the merits that is specifically keyed to particular points in the court of appeal's opinion. For further discussion, see §22.55.

Oral argument procedure is generally the same as in the court of appeal. See Cal Rules of Ct 8.524. Once the cause is submitted after oral argument, or if argument is waived (see Cal Rules of Ct 8.524(h)(1)), the court has 90 days in which to issue an opinion. See Govt C §68210. In rare circumstances, courts have been known to vacate the submission and resubmit the cause, in which event the time begins to run anew. The court must issue a written order stating its reasons for doing so. Cal Rules of Ct 8.524(h)(2). Unlike appellate court opinions, all supreme court opinions are published in the official reports. Cal Rules of Ct 8.1105(a).

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C. Discretionary Writ Review

§1.35 1. Nature of Writ Review

What is a writ? When the right of direct appeal is not available, the aggrieved party may be able to obtain writ review from the court of appeal. A writ is an order issued by a reviewing court directing the lower court to perform an act or prohibiting it from certain acts.

Common law and statutory writs. California has two basic types of writs. First are civil common law writs (basically mandate, prohibition, and certiorari). The state supreme court, courts of appeal, and superior courts have original jurisdiction over such writ petitions. Cal Const art VI, §10. Second are writs specifically authorized by statute. The fact that the legislature allows a writ petition to be taken from certain orders does not mean the court of appeal is *required* to grant the petition, only that it is *authorized* to do so. Statutory writs are basically the same procedural vehicles as common law writs. See California Civil Writ Practice, chap 16 (4th ed Cal CEB 2008).

Writ review is discretionary. Extraordinary writ review is equitable and wholly discretionary. Even if the trial court order is clearly incorrect, the court of appeal need not grant the writ petition. In fact, only 7 percent of writ petitions were disposed of by written opinions. See Judicial Council of California, 2009 Court Statistics Report, *Courts of Appeal* Table 13 (2009). The appellate court cannot grant writ review in every case of legal error, because to do so would interfere with the orderly administration of justice, convert appellate courts into "nisi prius tribunals," *i.e.,* trial courts, and lead to "appellate gridlock." *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66.

For a comprehensive discussion of discretionary writ review, see Civ Writ Prac.

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Source: Civil Litigation/California Civil Appellate Practice/1 Entering the Appellate World/§1.36 2. Basic Criteria for Writ Review

§1.36 2. Basic Criteria for Writ Review

To obtain writ review, certain minimum "eligibility" standards must be met. The petition must demonstrate that:

- The petitioner has "no adequate remedy at law" (see §1.37); and
- The petitioner must have a "beneficial interest" in the lawsuit (see §1.38).

In deciding whether to grant a writ petition, courts of appeal also consider other factors, such as the importance of the legal issue presented to the legal community, whether the petition presents an issue of first impression, and whether the writ record is sufficiently developed to permit adequate treatment of the issue. For further discussion, see California Civil Writ Practice, chap 15 (4th ed Cal CEB 2008).

JUDICIAL PERSPECTIVE: One factor that can affect whether a writ petition is considered is the "luck of the draw." You might have an issue the panel you draw is waiting to grab.

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§1.37 a. No Adequate Remedy at Law

Need to demonstrate no other adequate remedy at law. The petition must demonstrate that petitioner has no other adequate remedy at law. CCP §§1068 (certiorari), 1086 (mandate), 1103 (prohibition). An immediate right of direct appeal by the aggrieved party is usually considered an adequate remedy at law. Except in unusual circumstances, the fact that the appellate process may be lengthy or expensive does not generally justify writ review. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951; *Mitchell v Superior Court* (1950) 98 CA2d 304, 219 P2d 861. When immediate appellate review is available, a showing of undue hardship or a compelling public interest demanding immediate resolution may be necessary to justify writ review. *Havemayer v Superior Court* (1890) 84 C 327, 398, 24 P 121; *American Friends Serv. Comm. v Procunier* (1973) 33 CA3d 252, 109 CR 22, disapproved on other grounds in *Englemann v State Bd. of Educ.* (1991) 2 CA4th 47, 59, 3 CR2d 264. Because final judgments and postjudgment orders are generally appealable, writ review is usually sought when a party is challenging a pretrial order.

Irreparable injury will be suffered. It helps if the petitioner is able to show that, if the court of appeal does not grant the writ petition, he or she will suffer an immediate and irreparable injury—the type of injury that cannot be corrected by a later appeal. A pretrial ruling on a discovery matter is a classic example. Ordinarily, discovery rulings may be reviewed on appeal from the final judgment, but when the pretrial order requires disclosure of documents claimed to be privileged, writ review is appropriate. The party ordered to produce documents cannot wait to appeal from the judgment, because by then the documents will have been produced and the damage will have become irreparable.

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§1.38 b. Petitioner's Beneficial Interest

Unlike appeals, in which appellant must be an aggrieved party, in writ reviews the petitioner need not be a party to the case at all. CCP §§1068 (certiorari), 1086 (mandate), 1103 (prohibition). But the writ petition must demonstrate that petitioner is directly and prejudicially affected by the order. See *Burlingame v Justices Court* (1934) 1 C2d 71, 75, 33 P2d 669. When, for example, the trial court orders production of records in which a nonparty claims privacy rights, he or she may file a writ petition seeking to overturn the court's order (usually after first seeking redress in the trial court). Indeed, writ review is usually a nonparty's only remedy to review the trial court's order, because nonparties generally have no standing to appeal. See *Playboy Enters., Inc. v Superior Court* (1984) 154 CA3d 14, 201 CR 207 (nonparty has standing to seek writ review of discovery order against it).

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3. Common Law and Statutory Writs

§1.39 a. Common Law: Mandate, Prohibition, and Certiorari

Writs distinguished. In common law, the basic "extraordinary" writs are mandate, prohibition, and certiorari. (For discussion of writs of supersedeas, see §1.40.) The difference among the three lies in the purpose for which the writ is sought. In general, writs of mandate (or mandamus) will issue to correct the lower court's abuse of discretion or to compel performance of a ministerial duty. CCP §1085. A writ of prohibition issues to prevent a judicial act in excess of the court's jurisdiction. CCP §1102. Writs of certiorari were designed to correct an already completed judicial act done in excess of the lower court's jurisdiction. CCP §1068.

Labeling of writ. With the passage of time, the technical distinction among these three common law writs has largely blurred. The fact that a petitioner labels a writ for "prohibition" instead of "mandate" is usually not a ground for denial. Given the fine distinctions sometimes involved, prudent counsel will often title the writ "petition for writ of mandate, prohibition, certiorari, or other appropriate relief" as a precaution. Some lawyers use "petition for extraordinary relief."

Deadline for filing. There is no specific deadline for filing a common law writ petition. However, because writ relief is equitable and requires an immediate and, as a practical matter, irreparable injury, the writ petition should be filed as soon as feasible after the questioned order or ruling is made in order to avoid a claim of laches. A petitioner who delays too long in filing the writ sends a message to the court of appeal that the threatened injury is not immediate. Courts of appeal apply a rule of reasonableness in evaluating whether a petition is timely. Generally, a writ petition should be filed as soon as possible, ordinarily no later than 60 days after the order or ruling is made. For further discussion, see California Civil Writ Practice §§18.61-18.76 (4th ed Cal CEB 2008).

JUDICIAL PERSPECTIVE: Petitions filed after 60 days are almost always denied, unless there is a *very* good reason for delay. Always file at earliest possible time and explain any delay beyond a week.

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§1.40 b. Writ of Supersedeas

A writ of supersedeas is another form of common law writ. It performs an entirely different function from writs of mandate, prohibition, and certiorari. Supersedeas is not designed to correct a judicial error—rather, its function is to preserve the status quo pending appeal. CCP §923; Cal Rules of Ct 8.112(a). The court of appeal will not pass on the merits of the underlying case in a writ of supersedeas (but will certainly try to get an idea of the merits in deciding whether to issue the writ). *In re Dorer* (1971) 15 CA3d 675, 93 CR 384. When, for example, the trial court denies an appealing party's request for a temporary stay of enforcement of a money judgment that is being appealed, appellant may have no choice but to file a writ of supersedeas to prevent respondent from executing on the judgment. See §6.71.

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Source: Civil Litigation/California Civil Appellate Practice/1 Entering the Appellate World/§1.41 c. Statutory Writs

§1.41 c. Statutory Writs

Definition. Although the legislature has statutorily authorized certain writs, this does not mean that the court of appeal is required to grant a writ petition filed under that authority. The appellate court still has discretion to deny the petition. The principal difference between statutory and common law writs is that statutory writs have a specific filing deadline, usually a short one. Many courts treat the failure to file a statutory writ within the time allowed by statute as a jurisdictional defect, and will decline to consider the petition on that ground.

Examples. Examples of statutory writs include:

- **Summary judgment/adjudication.** An order *denying* summary judgment, or granting or denying summary adjudication of issues, may be reviewed by peremptory writ. CCP §437c(m)(1). (In contrast, an order *granting* summary judgment is not reviewable by writ. Because it contemplates entry of a final judgment, a direct appeal will lie. CCP §437c(m)(1).) The statute requires that the petition be filed within 20 days after service of written notice of entry of the order, although the trial court may extend this time on request up to 10 days. CCP §437(m)(1). The authorities are split on when to start counting the days, *i.e.,* from the "minute order" or "notice of entry." See *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827.
- **Expungement of lis pendens.** A petition for writ of mandate will lie when the trial court grants or denies a motion to expunge a lis pendens. A writ of mandate is the *only* remedy because the order is not appealable. In other words, failure to seek writ review of the order waives it for all purposes. CCP §405.39. The petition must be filed within 20 days after service of written notice of the order. The trial court may extend this time by 10 days, but the petition must be filed within 30 days. CCP §405.39.
- **Superior court motion for change of venue.** The superior court's order granting or denying a motion for change of venue may be reviewed by a writ of mandate petition. The filing deadline is 20 days after service of written notice of the order. The court may for good cause extend this time for one additional period not exceeding 10 days. CCP §400.
- **Motion to quash service.** An order denying a motion to quash service of summons is reviewable by petition for writ of mandate. The filing deadline is 10 days after service of written notice of entry of the order. The deadline is subject to a maximum 20-day extension by the trial court, for good cause shown. In any event, the petition must be filed before the defendant files a responsive pleading in the trial court. A responsive pleading will be deemed a general appearance, in effect waiving the party's right to challenge lack of personal jurisdiction. CCP §418.10(c). Note that, under CCP §418.10(e)(2), a defendant or cross-defendant making a motion to quash service under §418.10(c) is "not deemed to have generally appeared until entry of the order denying the motion."
- **Motion to stay or dismiss for forum non conveniens.** Code of Civil Procedure §418.10(c) provides for review by writ of mandate of orders denying a motion to stay or dismiss for inconvenient forum. The same deadlines apply as on denial of a motion to quash. Note that, under CCP §418.10(e)(2), a defendant or cross-defendant making a motion to quash service under §418.10(c) is "not deemed to have generally appeared until entry of the order denying the motion."
- **Good faith settlement determinations.** If the trial court grants a motion that a settlement was made in good faith under CCP §877.6(e), or finds that the settlement was not in good faith, the only way to obtain immediate appellate review is by petition for writ of mandate. The petition must be filed within 20 days after service of written notice of the determination, subject to a 20-day extension from the trial court. CCP §877.6(e). The court of appeal must rule on whether to hear the writ within 30 days after receipt of all materials to be filed by the parties. CCP §877.6(e)(1). If the court grants a hearing, it has precedence over all other civil matters except "matters to which equal or greater precedence on the calendar is granted by law." CCP §877.6(e)(2).
- **Motion to disqualify judge.** The *exclusive* way to review a ruling on a motion to disqualify a judge is by a timely petition for writ of mandate. *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717. The trial court's disqualification determination is not an appealable order and cannot be reviewed on appeal from the later judgment. It "may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served

within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in [CCP §1013(a)]." CCP §170.3(d). The 10-day writ period applies both to peremptory challenges of the judge under CCP §170.6 and to challenges for cause under CCP §170.3. *People v Hull* (1991) 1 C4th 266, 2 CR2d 526. See *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 5 CR3d 532 (challenged judge had jurisdiction under CCP §170.4(b) to order declaration of prejudice stricken from record).

NOTE: Code of Civil Procedure §170.3(d) expressly provides that only a *party* may bring a writ petition challenging a judge's disqualification order, which is a departure from the usual writ rule that even a nonparty may seek writ review as long as a beneficial interest is demonstrated. *PBA, LLC v KPOD, Ltd., supra*. In *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1349 n4, 32 CR3d 717, the court noted concerns that a nonparty could never challenge a judge or referee even if contempt proceedings were initiated against that nonparty witness.

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4. Writ Procedures

§1.42 a. Parties

In contrast with direct appeals, the respondent court is named as a party in the writ petition. Thus, typical writ proceedings have three parties: the petitioner, the respondent court (which made the alleged error), and the real party in interest (the prevailing party in the lower court). Generally, the respondent court does not file an answer to the petition; that is left to the real party in interest. See California Civil Writ Practice §18.18 (4th ed Cal CEB 2008).

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Source: Civil Litigation/California Civil Appellate Practice/1 Entering the Appellate World/§1.43 b. Timing

§1.43 b. Timing

Statutory writs. When the writ is authorized by statute, the statute will specify the deadline—usually a short one. See §1.41. The statute that authorizes the writ ordinarily permits the trial court to grant a limited extension of the time for filing.

Common law writs. Common law writ petitions do not have specific filing deadlines. However, because writ relief is equitable, the court of appeal expects the petition to be filed promptly. A petitioner who unreasonably delayed may be barred by laches when the opponent was prejudiced by the delay. *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 255 CR 13. The rule of thumb for filing common law writs is *no later* than 60 days after entry of the erroneous order. If a petition is filed later, it should explain why the delay was unavoidable. Moreover, depending on the circumstances, even a petition filed within the 60-day period may still be treated as untimely. When, for example, the petition challenges the production of privileged documents, but the documents have already been turned over, the court of appeal may view the petition as late or moot. See California Civil Writ Practice §15.66 (4th ed Cal CEB 2008).

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§1.44 c. "Alternative" Versus "Peremptory" Writs

For writs of mandate and prohibition, the court of appeal may issue either an alternative or a peremptory writ. When it issues a "peremptory" writ, the court has granted the relief the petitioner requested. In contrast, an "alternative" writ is essentially an order to show cause why the relief should not be granted. For further discussion, see California Civil Writ Practice §§22.23-22.29 (4th ed Cal CEB 2008).

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§1.45 d. Oral Argument

As a general rule, the court will hear oral argument when it has issued an alternative writ. Whether oral argument will occur on a peremptory writ varies by court. The oral argument procedure is basically the same as that in direct appeals. For a discussion of oral argument, see chap 16. For discussion of oral argument specifically related to writs, see California Civil Writ Practice §§24.8-24.13 (4th ed Cal CEB 2008).

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5. Decision

§1.46 a. Summary Denials

Denial without discussion or opinion. When the court declines to hear a writ petition, it usually issues a summary denial without discussing its reasons. No opinion is required, because the matter is technically not a "cause." Cal Const art VI, §14; *People v Medina* (1972) 6 C3d 484, 489, 99 CR 630 (disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 896, 12 CR2d 728).

Not a ruling on the merits. The mere fact that the court of appeal summarily denied the writ petition is not indicative of the court's views on the merits of the issue presented. Summary denial of a writ petition without comment is not a ruling on the merits and does not preclude reargument of the same issues in a later appeal. *People v Medina, supra; Rosato v Superior Court* (1975) 51 CA3d 190, 230, 124 CR 427. A summary denial is immediately final, and the court loses jurisdiction on issuing it. Cal Rules of Ct 8.490(b)(1). Thus, unlike the situation in direct appeals, the court of appeal cannot entertain a writ petition for rehearing, because it lacks jurisdiction to do so.

No remittitur. The appellate court does not issue remittitur on summary denials of writ petitions.

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§1.47 b. Issuance of Writ

If the court issues an alternative writ or a peremptory writ in the first instance, the court will issue an opinion. Subject to supreme court review, the opinion becomes law of the case and res judicata. *Loeb v Berman* (1933) 217 C 716, 20 P2d 685; *Richer v Superior Court* (1976) 63 CA3d 748, 134 CR 52. A decision after issuing an alternative writ or peremptory writ in the first instance becomes final 30 days after filing. Cal Rules of Ct 8.490(b)(2). At that point, remittitur will issue. Cal Rules of Ct 8.499.

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§1.48 6. Review in California Supreme Court

Review in the supreme court is available after a court of appeal decision on a writ petition. Cal Rules of Ct 8.500(a)(1). The procedure is basically the same as in direct appeals. See Cal Rules of Ct 8.500. The petition for review is due within 10 days after the appellate decision becomes final. Cal Rules of Ct 8.500(e)(1).

NOTE: For the purposes of Rule 8.500(e)(1), the date of finality is not extended if it falls on a day on which the clerk's office is closed. Thus, the deadline will vary, depending on whether the appellate court summarily denied the writ petition (decision final immediately) or issued an opinion on the merits (decision final 30 days after issuance).

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V. DECIDING WHETHER TO APPEAL

A. Procedural Considerations

§1.49 1. Appealability and Standing

In deciding whether to appeal from an adverse judgment or order, counsel must first and foremost ascertain whether the judgment or order is appealable. By statute, only final judgments and specified orders may be appealed. CCP §904.1. For further discussion, see chap 3. Because the notice of appeal is jurisdictional, an appeal that is not timely filed will be subject to dismissal. See Cal Rules of Ct 8.104(b). Only aggrieved parties have standing to appeal. CCP §902. For a thorough discussion of appealability and standing, see chaps 3 and 4, respectively.

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§1.50 2. Applicable Standard of Review

The standard of review is the degree of deference that the appellate court grants the trial court's ruling or order being challenged. The specific standard that the appellate court will apply depends on the nature of the ruling or order at issue and the procedural posture of the case. In evaluating the prospects of success on appeal, a clear idea of the applicable standard of review is critical. Moreover, in drafting appellant's brief, counsel must know what standard of review the appellate court will apply because that standard will control how to present the statement of facts and how to frame the brief overall. Note also that, generally, the judgment being appealed has a presumption of correctness. In other words, if the lower court decision was correct on any legal ground, it will be affirmed, even if the reasons cited are wrong. See *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 19, 112 CR 786; for further discussion, see §§5.14-5.15.

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§1.51 a. Substantial Evidence Rule

If appellant is appealing from a final judgment after a trial on the merits, the appellate court ordinarily applies the "substantial evidence" rule to the issue of whether the evidence supports the verdict. This obstacle is often difficult for appellant to overcome. If there is substantial evidence to support the judgment, the appellate court will affirm it. *Marriage of Mix* (1975) 14 C3d 604, 614, 122 CR 79; *Estate of Teed* (1952) 112 CA2d 638, 644, 247 P2d 54. The court will not reweigh evidence or redetermine credibility questions and in fact will apply presumptions in favor of the correctness of the judgment. *Nestle v City of Santa Monica* (1972) 6 C3d 920, 101 CR 568. The appellate court will defer to the fact finder on disputed factual questions because (a) it reviews only the written record on appeal and (b) the fact finder was in a better position to evaluate witness credibility. *Maslow v Maslow* (1953) 117 CA2d 237, 243, 255 P2d 65. Thus, the substantial evidence rule generally bars appellants from rearguing the evidence. When the evidence was in conflict, a claim that the fact finder reached the "wrong conclusion" carries little weight under the substantial evidence test.

In contrast, the substantial evidence rule will not bar appellant from contending in an appropriate case that, even when construed in respondent's favor, the evidence fails to support the judgment as a matter of law, *e.g.*, there was a "failure of proof" or the trial court committed prejudicial error in excluding appellant's relevant evidence or in admitting respondent's irrelevant evidence. See, *e.g., Krause v Apodaca* (1960) 186 CA2d 413, 9 CR 10.

For further discussion, see §5.18.

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§1.52 b. Abuse of Discretion Standard

Numerous trial court rulings are reviewed under the "abuse of discretion" standard. This standard, too, is difficult to meet. The appellate court will not disturb the trial court's exercise of discretion unless that discretion was clearly abused, resulting in a miscarriage of justice. *Clavey v Lord* (1891) 87 C 413, 25 P 493. The abuse of discretion standard is applied in a wide variety of situations, including the trial court's granting or denying a continuance (*Rebney v Wells Fargo Bank* (1990) 220 CA3d 1117, 1141, 269 CR 844), leave to amend (*Hayutin v Weintraub* (1962) 207 CA2d 497, 507, 24 CR 761), sanctions (*Bergman v Rifkind & Sterling, Inc.* (1991) 227 CA3d 1380, 278 CR 583), granting a motion for new trial (*People v Ault* (2004) 33 C4th 1250, 1272 n15, 17 CR3d 302), and certain dismissals for delay in prosecution (*Brown v Superior Court* (1970) 7 CA3d 366, 368, 86 CR 670). See §§5.23-5.28.

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§1.53 c. De Novo Review

When the matter does not concern a disputed question of fact, but presents a pure question of law, the appellate court conducts an independent, or de novo, review in which the court of appeal grants no deference to the trial court's determination but decides the matter anew. *Estate of Coate* (1979) 98 CA3d 982, 986, 159 CR 794. Examples of situations in which the appellate court will conduct de novo review include an order of dismissal based on the sustaining of a demurrer without leave to amend (*Noguera v North Monterey County Unified Sch. Dist.* (1980) 106 CA3d 64, 66, 164 CR 808), the review from a final judgment or order granting summary judgment or judgment on the pleadings, and the interpretation of writings and statutes (*DiCola v White Bros. Performance Prods.* (2008) 158 CA4th 666, 674, 69 CR3d 888 (order granting summary judgment)). See §5.17.

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3. State of the Record

§1.54 a. Appellate Record Must Reflect Error

Because an appeal is not an opportunity to retry the case and because the appellate court reviews for legal error only, the court considers only error shown in the written record on appeal. *Fox v Federated Dep't Stores* (1979) 94 CA3d 867, 872 n3, 156 CR 893. Thus, the record must be carefully analyzed to see whether a meritorious issue exists for appeal. For discussion of the record on appeal, see chap 9.

Conduct preliminary review. Ideally, appellate counsel scrutinizes the record *first* and *then* recommends whether to appeal. Unfortunately, the record is seldom available at the time the notice of appeal must be filed. However, even without benefit of the entire record, counsel should make a preliminary review before the appeal is filed or at least before the expense of procuring the record is incurred. A preliminary review entails reviewing trial court documents such as motions and jury instructions, talking to trial counsel, and possibly doing some legal research. Prudent counsel may wish to evaluate the case again after the record is obtained before incurring the additional expense of briefing.

Review record for error. In evaluating the state of the record, care must be taken to ensure that critical objections and conferences appear in the Reporter's Transcript. If an error occurred during an unreported sidebar or chambers conference, it is not reviewable on appeal unless a settled statement can be obtained. By the same token, an appellant cannot raise the trial court's refusal to give a particular instruction unless the record reveals the content of the requested instruction. If appellant contends that the trial court erred in excluding certain of appellant's evidence, the record must demonstrate what the excluded evidence would have shown, usually by means of an "offer of proof." Evid C §354. The offer of proof must demonstrate the substance, purpose, and relevance of the excluded evidence. Appellant must show the reviewing court how the exclusion *prejudiced* appellant's case. *Enis v Specialty Auto Sales* (1978) 83 CA3d 928, 939, 148 CR 255; *Hilts v County of Solano* (1968) 265 CA2d 161, 171, 71 CR 275.

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§1.55 b. Error Must Be Prejudicial

It is not sufficient for appellant to simply show that an error occurred below. All trials contain some error, most of it harmless. To constitute reversible error, the error must have been prejudicial, which means that it is reasonably probable that, but for the error, the outcome would have been more favorable to appellant. See *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243. For further discussion, see §§5.29-5.39.

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§1.56 c. Issue Must Be Preserved for Appeal

Issues may be considered waived if not preserved for appeal. Failure to preserve an issue for appeal can be fatal. For example, if appellant did not object to inadmissible evidence (either when the evidence was offered or by motion in limine) or move to strike it, the error will be deemed waived on appeal. See *California State Auto. Ass'n Inter-Ins. Bureau v Antonelli* (1979) 94 CA3d 113, 122, 156 CR 369.

Doctrine of invited error. The doctrine of invited error may also bar appellant from raising an issue. An appellant who "opened the door" by introducing certain evidence cannot complain that the admission of related evidence was erroneous or prejudicial. Appellant must also take care in submitting and reviewing jury instructions and verdict forms and cannot complain that an instruction or form was erroneous if he or she offered something substantially similar. *Hensley v Hensley* (1987) 190 CA3d 895, 899, 235 CR 684; 9 Witkin, California Procedure, *Appeal* §§389-393 (5th ed 2008).

Excessive or inadequate damages. A motion for new trial is not a prerequisite to raising issues on appeal *except* for the issues of excessive damages and inadequate damages. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 918, 114 CR 622. But a motion for new trial must be made whenever the party wishes to argue on appeal that the court made a *factual* error in calculating damages. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 122, 135 CR 802; *Baker v Pratt* (1986) 176 CA3d 370, 382, 222 CR 253. This rule applies regardless of whether the case was tried by a jury or by the judge sitting as the finder of fact.

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§1.57 4. Venue

Counsel evaluating the prospects on appeal will want to know which appellate court will hear the matter. The courts of appeal sit in panels of three justices. In districts that sit in permanent divisions, once the division assignment is made counsel may wish to evaluate previous published decisions by that division on similar issues. The venue can also make a significant difference in the length of the appellate process. Depending on the particular court's backlog, it can take a year or more from the time the final brief is filed until oral argument is scheduled.

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§1.58 B. Consideration of Merits and Outcome

Analyze merits of appeal. Assuming that the record adequately reflects the issues to be raised, appellant's counsel should review the record and conduct an objective evaluation of the merits of the appeal, bearing in mind the applicable standard of review. Note also that a frivolous appeal raises a serious risk of sanctions for the client and the attorney. Appellate specialists routinely tell clients that they will not assert a position that they believe is frivolous.

Consider appellate specialist. Counsel who tried the case and will also handle the appeal may find that consulting an appellate specialist will provide a helpful "reality check." In addition to being familiar with the particular court that will decide the case, an appellate specialist can help supply an objective evaluation and sometimes give new or different insights on how best to frame the issues on appeal. Moreover, all issues noted in this chapter, such as standard of review, existence of prejudicial error, and standing, are a foreign country to most trial lawyers; but the appellate specialist is right at home. Lawyers without appellate expertise may not only misjudge the appeal's merits but focus on the wrong issues. Also, few trial lawyers are skilled at the kind of legal writing required in an environment where the appeal will almost always stand or fall on the briefs. The appellate specialist also has the capacity to work on one or a small number of briefs at a time and can therefore devote the time required to prepare a high quality appellate brief. In contrast, a trial attorney usually cannot block out the required time, because other work is required simultaneously in a large number of cases in a trial practice.

JUDICIAL PERSPECTIVE: An appellate specialist may not be able to win every case, but he or she is more likely to make the best possible presentation of the facts and the strongest legal arguments (and, in a weak case, to help avoid sanctions for a frivolous appeal). Appeals are very different from trials; and the appellate specialist, unlike the trial lawyer, is usually at his or her best on paper. Consider at least a consulting arrangement, if possible, to avoid large-scale mistakes.

Consider intangible factors. Moreover, even when error can be demonstrated as a technical matter, counsel must also consider other, less tangible factors, such as whether the trial court reached the correct result despite the claimed errors, the type of picture the facts present (favorable or not), and where the court's natural sympathies will lie. As a rule of thumb, courts like to reach a fair result; judges are human. If your client is a monster, that fact may well influence the outcome of a close case on the law and possibly even a not-so-close case.

JUDICIAL PERSPECTIVE: If correct on any theory, we must affirm. See §§5.14-5.15. Like most things, however, correctness may be in the eye of the beholder. Judges are people, and no one likes to see an injustice. Judges must, however, follow the law. Try to find a way to permit the court to fix an injustice while following the law.

Consider results of appeal. Careful consideration must also be given to what is the best possible result that can be obtained by an appeal. For example, a claim of prejudicial error in the taking of evidence can, at best, result in the appellate court's reversal for a new trial. If there is a good chance a new trial could put appellant in a worse position (*e.g.,* larger verdict), rather than a better one, even a successful appeal could turn out to be a Pyrrhic victory.

In an important minority of cases, usually involving institutional litigants, the prospective appellant should carefully consider the prospect of making "good law" and the risk of making "bad law." For example, after an insurance company has suffered an adverse judgment in a coverage case, a published opinion of an appellate court may affect thousands of cases, for good or for ill. Similarly, a manufacturer held liable in a case arising from the use its product may face thousands of other cases involving the same product, which might be affected by a published decision on appeal.

The likely result on appeal also affects the decision on whether to contest an appeal. Sometimes, the trial court is obviously wrong or very probably wrong. If you know you will probably be reversed, why should your client devote months or years and spend thousands of dollars needlessly?

Consider potential settlement. Under the right circumstances, filing a notice of appeal can be a significant factor in moving a matter toward resolution. For example, defendants facing sizable punitive damages judgments have had success using the pendency of the appeal as leverage in reaching a settlement, at a discount from the judgment, in

light of the transaction cost, delay, and uncertainty of outcome associated with the appellate process. Many appellate districts have mediation and settlement programs staffed by justices or trained appellate mediators to facilitate negotiations. See chap 15.

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C. Monetary Considerations

§1.59 1. Ability to Post Bond

If appealing from a money judgment, appellant will often need to post security to stay enforcement of the judgment pending the outcome on appeal. See CCP §§916-936.1. This can be expensive. Depending on the circumstances, the undertaking on appeal must be 1½ to 2 times the amount of the judgment. See §6.29. The annual cost of the bond can also be considerable, as can the cost of a letter of credit to obtain the bond. However, if appellant prevails, the cost of the bond and letter of credit may be recoverable unless the superior court finds the bond to have been unnecessary. CCP §995.250; Cal Rules of Ct 8.278(d)(1)(F).

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§1.60 2. Cost of Record

Particularly if the appeal is taken from a judgment after a lengthy trial, appellant's ability to pay for the cost of the record must be considered. Although the prevailing party on appeal generally recovers certain costs, including reasonable costs of record preparation (see Cal Rules of Ct 8.278(d)(1)(B)), these are costs that appellant must pay up front. However, expense is not a good reason to skimp on what items to include in designation of the record. If the record on appeal does not adequately reflect the error claimed, the court of appeal will not consider it. For discussion of costs and waivers, see §§9.34-9.40 (reporter's transcript), §§9.75-9.78 (clerk's transcript), §§9.103-9.105 (appendix).

Moreover, if respondent counterdesignates additional items for inclusion in the record, respondent is responsible for the additional costs. Cal Rules of Ct 8.130(b)(1), 8.122(c)(1)(B).

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§1.61 3. Delays in Appellate Process

In deciding whether to appeal, consider the length of the process. While the appeal is pending, interest on a money judgment runs at 10 percent annually. CCP §685.010. Thus, how long the appeal will take and whether appellant can reasonably afford the likely delays involved can be an important factor. Because many superior courts have a large backlog of requests for the clerk's transcript on appeal, counsel may prefer to elect a Rule 8.124 appendix in lieu of a clerk's transcript. See Cal Rules of Ct 8.124. See also §1.21. Even when the appendix is chosen, it can take many months for the reporter to complete the reporter's transcript on appeal. Because the appellate briefing process cannot begin until the entire record is completed, delays in completing the record can substantially delay the appeal. In some appellate courts, it currently takes a year or more after briefing is completed before the case is set for oral argument.

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2

Trial Court Remedies

Christina J. Imre

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I. AVAILABILITY OF POSTTRIAL REMEDIES

§2.1 A. Trial Court Jurisdiction After Judgment

Once judgment is entered in a case, the trial court's power to substantively alter that judgment is narrowly circumscribed. After entry of the judgment, the trial court retains jurisdiction for a limited period to hear posttrial motions, such as:

- **Motion for new trial (CCP §657).** In a new trial motion, the trial court is empowered to reweigh the evidence, act as a "thirteenth juror," and order new trial on some or all issues in the case. See discussion in §§2.3-2.38. The trial court's authority to grant a new trial is quite broad. A new trial order will not be set aside on appeal as long as a "reasonable or even fairly debatable justification" is shown for the order. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 387, 93 CR 769; *Whitlock v Foster Wheeler, LLC* (2008) 160 CA4th 149, 159, 72 CR3d 369. When a party contends that certain types of error were made in calculating damages resulting in excessive or inadequate damages, the party *must* make a new trial motion to preserve the right to raise the issue on appeal. See discussion in §2.9.
- **Motion for judgment notwithstanding verdict (CCP §629).** On a motion for judgment notwithstanding the verdict, the trial court may enter a different judgment when, for example, the evidence is insufficient as a matter of law to support the judgment. See discussion in §§2.39-2.51.
- **Motion to vacate judgment (CCP §663).** In a motion to vacate the judgment, the court may enter a different judgment when the original judgment is inconsistent with the factual findings in the special verdict or decision. See discussion in §§2.52-2.60.

Under CCP §473, the court retains jurisdiction to hear a motion for relief from a judgment taken against a party through mistake, inadvertence, surprise, or neglect. Trial courts also have inherent power to correct clerical errors in their judgments and to vacate void judgments. *Southern Cal. White Trucks v Teresinski* (1987) 190 CA3d 1393, 1408, 236 CR 159. However, the court's authority to correct clerical errors in a judgment cannot be used to modify the judgment substantively. *Rochin v Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1238, 79 CR2d 719; *Aspen Int'l Capital Corp. v Marsch* (1991) 235 CA3d 1199, 1204, 286 CR 921. This chapter discusses motions for new trial, for judgment notwithstanding the verdict, and to vacate judgment. A brief discussion of motions to stay enforcement of judgment is also included. For a more detailed discussion of stays, see chap 6. On posttrial procedures generally, see California Trial Practice: Civil Procedure During Trial §§25.78-25.89 (3d ed Cal CEB 1995).

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§2.2 B. Posttrial Remedies

Posttrial remedies are effective in attacking judgment. It is clear from the discussion in §2.1 that even before the appeal the losing party has remedies available to directly challenge the trial court judgment. These posttrial motions should be considered as the first line of attack on the judgment. In appropriate circumstances, they can be a potent weapon to turn defeat into victory or at least preserve the party's right to raise an issue on appeal. They can also provide strategic advantages not otherwise available.

Posttrial remedies can create record on appeal, help establish standing, and preserve issues. Likewise, posttrial motions can be an effective tool for creating a record for appeal that would not otherwise exist (*e.g.,* juror misconduct established by affidavits offered on motion for new trial). Similarly, a nonparty may sometimes use a posttrial motion to obtain standing to appeal. See discussion in §2.60. In addition, a party may raise a new legal issue as long as the question is purely one of law applicable to undisputed facts. See discussion in §2.10.

Consider posttrial remedies as soon as possible. Because time frames for most posttrial remedies are short, and strict compliance with the statutes is mandatory, each of these potential avenues should be considered and evaluated at the earliest possible time.

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II. NEW TRIAL MOTIONS

A. Nature and Purpose

§2.3 1. Purpose of Motion

The purpose of a new trial motion is to obtain a retrial of some or all issues because of error in the original trial resulting in a miscarriage of justice. See Cal Const art VI, §13; CCP §§656-657. This purpose is in contrast with that of motions for judgment notwithstanding the verdict (JNOV), which are often filed concurrently with new trial motions. In JNOV motions, the moving party seeks a new and different judgment because the evidence is insufficient to support the original judgment as a matter of law. See §2.40.

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§2.4 2. Authority for Motion

The court's authority to hear a new trial motion is wholly statutory. The grounds the court is permitted to consider are enumerated in CCP §657. The motion may be made or granted only on one or more of the grounds specified in that section. See §2.18. The moving party must be "aggrieved" and the party's "substantial rights" must be "materially affected." CCP §657.

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§2.5 3. Availability of Motion

A new trial is available after trial and decision by either a jury or by the court sitting as the finder of fact (CCP §656) and after certain other judgments (*e.g.,* judgment after order granting summary judgment, nonsuit, directed verdict, demurrer sustained without leave to amend, and judgment on the pleadings). See, *e.g., Carney v Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305; *Olson v County of Sacramento* (1969) 274 CA2d 311, 322, 79 CR 136; *Green v Del-Camp Inv.* (1961) 193 CA2d 479, 481, 14 CR 420. At least one court has held that a new trial motion based on excessive damages is available as a matter of law after a default judgment. *Don v Cruz* (1982) 131 CA3d 695, 704, 182 CR 581. It is questionable whether a new trial motion is available after default or confessed judgments, because these are not determinations on the merits. See *Carney v Simmonds, supra; Finnie v District No. 1 Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n* (1992) 9 CA4th 1311, 1316, 12 CR3d 348. For further discussion of grounds for a new trial motion, see §2.17.

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§2.6 4. Trial Court Function as Trier of Fact

Generally, in ruling on a motion for new trial, the court "sits … as an independent trier of fact." *Lane v Hughes Aircraft Co.* (2000) 22 C4th 405, 412, 93 CR2d 60. The trial court may judge witness credibility and the probative force of testimony, weigh the evidence, and draw reasonable inferences other than those drawn by the trier of fact at trial. *Yarrow v State* (1960) 53 C2d 427, 434, 2 CR 137. The court is required to weigh the evidence and in doing so may disbelieve witnesses and draw inferences contrary to those supporting the verdict. *Casella v SouthWest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 1159, 69 CR3d 445.

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§2.7 5. Order of Full, Partial, or Conditional New Trial

Depending on the circumstances, the trial court may grant either a partial new trial on specified issues (*e.g.,* liability or damages) or a retrial of the entire action. See discussion in §2.35. The court may also order a conditional new trial when, for example, it finds that the damages awarded by the jury were excessive or inadequate. In that situation, rather than simply reducing or increasing the amount of the jury's verdict, the court will order a new trial conditioned on the adverse party's acceptance of a remittitur or additur in an amount the court deems fair and reasonable. If the party rejects remittitur or additur, a new trial is ordered. If the party accepts, the judgment is modified accordingly and the new trial is denied. See discussion in §2.36.

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§2.8 6. Effect of New Trial Order on Previous Trial

The effect of an order granting new trial is to set aside the previous trial, "as though no trial had ever been had." *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 252, 92 CR2d 70.

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B. Strategic Considerations

§2.9 1. When New Trial Motion Necessary

Motion is prerequisite to raising issues of inadequate or excessive damages on appeal. A motion for new trial is not a prerequisite to raising issues on appeal except for the issues of inadequate or excessive damages. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 918, 114 CR 622. A motion for new trial is required whenever the appellant wishes to argue on appeal that the court made a *factual* error in calculating damages. When ascertaining the amount of damages "requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal." *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 122, 135 CR 802. See also *Baker v Pratt* (1986) 176 CA3d 370, 382, 222 CR 253 (because appellant did not challenge trial court's factual assumptions about damages in new trial motion, "he may not raise the issue on appeal"). This rule applies whether the case was tried before a jury or before a judge. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co., supra*.

Motion not prerequisite to appeal of legal error in calculating damages. In contrast, a new trial motion is not necessary to preserve a challenge on appeal to the damage award when the trial court made a legal error in calculating damages. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co., supra*. If there is any doubt about whether the error is *legal* or factual, or if there is any basis for challenging the size of the damages award on factual grounds, a motion for new trial should be filed to ensure that the issue is preserved for appeal.

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§2.10 2. When New Trial Motion Advisable

Motion provides trial court with opportunity to reweigh evidence. Even when filing a new trial motion is not required as a prerequisite to raising an issue on appeal, there are often good reasons for filing one. The trial court has broad discretion to grant such a motion. It may reweigh evidence, reassess credibility, disbelieve witnesses, and act as a 13th juror. *Collins v Lucky Mkts., Inc.* (1969) 274 CA2d 645, 652, 79 CR 454. In contrast, the appellate court does not reweigh evidence, but confines its evidentiary review to whether substantial evidence supports the judgment. On standards of review, see chap 5. Reviewing courts are particularly deferential to an order granting a new trial. *People v Ault* (2004) 33 C4th 1250, 1260, 17 CR3d 302. Thus, particularly in close cases, the trial judge's power to grant a new trial may be used to snatch victory from the jaws of defeat.

Motion is opportunity to raise new legal theories. A party may also use a new trial motion to raise legal theories that were not presented during trial, as long as the new theories raise an issue of law on undisputed facts. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15, 1 CR2d 805. Raising the new legal argument in the new trial motion often has the added benefit of "flushing out" the opposition's counterarguments, and giving the moving party, as prospective appellant, a preview of the opposition's position on appeal. It allows appellant to use the opening brief to anticipate respondent's arguments and rebut them in advance, but it also gives the trial court an opportunity to "bullet-proof" its rulings on the verdict.

Consider motion when error relates to factual matter not in record, such as juror misconduct. Counsel should consider a new trial motion when there is a factual matter demonstrating error that would not otherwise be reflected in the record. A typical situation is that of juror misconduct. Improper deliberations in the jury room or the fact that a juror was biased are rarely reflected in the record. It is up to counsel for the aggrieved party to move for new trial and submit affidavits establishing that misconduct occurred (and, in appropriate circumstances, that the party and party's lawyer were unaware of the misconduct). Otherwise, there will be no record of it on appeal. See §§2.25-2.26.

Motion helps "aggrieved" nonparty establish standing to appeal. New trial motions may even be used as a vehicle by a nonparty to give the nonparty standing to appeal from the judgment. However, the procedure may be used only if the nonparty is "aggrieved." See §2.60.

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C. Procedure

§2.11 1. Components of New Trial Motion

The moving party's new trial motion consists of three basic parts:

- The notice of intention to move for new trial (see §§2.12-2.20);
- A supporting memorandum (see §§2.21-2.22); and
- When applicable, supporting affidavits or declarations (see §§2.23-2.26).

Documentary evidence, such as exhibits offered or admitted during trial, and portions of the reporter's transcript, may also be submitted. See §2.18.

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2. Notice of Intention to Move for New Trial

§2.12 a. Jurisdictional Deadline

Trial court's jurisdiction to hear motion. It is the "notice of intent to move for new trial" that gives the trial court jurisdiction to hear the motion. The court lacks the power to grant a new trial sua sponte. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 899, 215 CR 679. The failure to timely file the notice of intention is fatal to the party's ability to have a new trial motion determined. If the notice of intent (as distinct from the memorandum in support of the motion) is filed late, the trial court lacks jurisdiction to hear the motion, and any new trial order entered is void. *Douglas v Janis* (1974) 43 CA3d 931, 936, 118 CR 280; *Kientz v Harris* (1953) 117 CA2d 787, 791, 257 P2d 41; *Faeh v Union Oil Co.* (1951) 107 CA2d 163, 169, 236 P2d 667. Thus, it is critical to accurately calculate the deadline and timely file the notice of intent.

Court must rule on motion within required time or lose jurisdiction. Likewise, the trial court has only a limited time to rule on a motion for new trial, generally 60 days after service of written notice of entry of judgment or the filing of the first notice of intention to move for new trial. CCP §660; see discussion in §2.33. If the court fails to rule within that time it loses jurisdiction to do so, and any granted new trial order is void. See discussion in §2.33. If the court does not rule within 60 days, the motion is deemed denied by operation of law. CCP §660.

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§2.13 (1) Calculating Deadline

Three possible deadlines. Code of Civil Procedure §659 provides three possible deadlines for filing and serving the notice of intention:

(1) Before the entry of judgment;

(2) "[W]ithin 15 days of the date of mailing notice of entry of judgment" either by the court clerk or by "service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest"; or

(3) In cases in which another party first moves for new trial, each other party has "15 days after the service of such notice upon him to file and serve a notice of intention to move for a new trial."

Prevailing party can control deadline. Because it is typically the prevailing party and not the clerk who gives notice of entry of judgment, that party can control the deadline for the loser to file a notice of intent. As a matter of practice, the prevailing party will usually want to give notice of entry promptly in order to start the time running.

No extensions available for service by mail. Note that CCP §659 expressly states that these times *cannot* be extended for service by mail, and that the time cannot be extended by court order or stipulation of the parties. Because the time for filing the notice of intention to move for new trial is jurisdictional, do not simply mail the notice to the court, especially toward the end of the 15-day period. Be sure the notice is hand-delivered and file-stamped.

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§2.14 (2) Filing Notice of Intention Before Entry of Judgment

As a practical matter, notice of intention is rarely filed before entry of judgment. Although the statute permits it, a notice of intention to move for new trial after a jury verdict is rarely filed "before entry of judgment," because such judgments are ordinarily entered within 24 hours after rendition of the verdict unless otherwise ordered. See CCP §664. The "before entry of judgment" alternative usually applies in nonjury trials and in certain medical malpractice cases under the Medical Injury Compensation Reform Act (MICRA) (Stats 1975, chs 1-2) when the judgment must be periodized.

Notice of intent filed before decision is void. Although the notice of intention may be filed "before entry of judgment," it should not be filed prematurely, because a notice of intent filed before the decision is void. The trial court cannot rule on a new trial motion based on a premature notice; such proceedings are "ineffective for any purpose." *Ruiz v Ruiz* (1980) 104 CA3d 374, 379, 163 CR 708. For example, filing a notice of intent after the trial court announces its intended decision but before the statement of decision is filed is "premature" (*i.e.,* void). *Ehrler v Ehrler* (1981) 126 CA3d 147, 152, 178 CR 642. Moreover, although filing of a notice of intention to move for new trial ordinarily extends the party's time to appeal if the new trial motion is denied, there is no extension of time to appeal unless a valid notice of intention was served and filed. Cal Rules of Ct 8.108(b). See discussion in §2.38.

JUDICIAL PERSPECTIVE: Another example of prematurity is filing the notice of intention after a liability verdict in favor of plaintiff but before a damage verdict.

File notice after decision. Thus, to avoid a prematurity problem, the notice of intention must be filed after the court's or jury's decision. "New trial" is defined in CCP §656 as a reexamination of an issue of fact "after a trial *and decision*" (emphasis added). The party is not "aggrieved" until there has been a decision. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 460, 20 CR 321.

When decision occurs. In jury trials, the "decision" is the jury's verdict. *Auto Equity Sales, Inc. v Superior Court, supra*. In court trials, the question of when there is a "decision" for new trial purposes depends on whether a statement of decision has been requested. CCP §632. See discussion in §§2A.43-2A.46. If not, there is no decision until the court signs and files the judgment, and until then, the court may alter its intended or tentative decision. See Cal Rules of Ct 3.1590(b), (h), (*l*). When a statement of decision is requested, the "decision" for purposes of a notice of intention to move for new trial is the signed and filed statement of decision. *Ehrler v Ehrler, supra; Ruiz v Ruiz, supra*.

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§2.15 (3) What Constitutes Notice of Entry of Judgment

Check local rules and policies. What constitutes "entry" depends on the particular court. In most courts, the judgment is entered when the trial court signs the original and it is filed with the clerk. See CCP §668.5. In others, judgments are still entered by copying them into the judgment book. CCP §668.

Notice of entry must be written. Under CCP §659, the notice of entry of judgment must be written. A copy of the judgment conformed to reflect the date of entry has been deemed sufficient. *Ramirez v Moran* (1988) 201 CA3d 431, 436, 247 CR 117.

Service and filing. Ordinarily, the party submitting the judgment to the court should serve notice of entry of the judgment on all appearing parties and file the original, together with a proof of service, with the court. CCP §664.5. On the importance of giving notice of entry of judgment at the earliest possible time, see §2.13.

For a detailed discussion of notice of entry of judgment, see chap 7.

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§2.16 b. Contents of Notice of Intention to File for New Trial

The notice of intention should:

- Identify the moving party;
- State the statutory grounds for the motion (see §2.17); and
- Specify whether the motion will be based on affidavits, the court's minutes, or both (see §2.18).

It should be titled "Notice of Intention to Move for New Trial," not "Motion for New Trial." If the notice of intent is defective, it cannot be amended after the statutory time. Thus, in *Sitkei v Frimel* (1948) 85 CA2d 335, 337, 192 P2d 820, the court of appeal reversed a grant of new trial when the applicable ground was raised in a late-filed amended notice. See also *Faeh v Union Oil Co.* (1951) 107 CA2d 163, 169, 236 P2d 667.

When the notice is filed, the hearing date should be left blank. In contrast with pretrial motions, the court or clerk sets the date and time and notifies the parties. CCP §661. The purpose of notice of intention is to establish jurisdiction and advise the opposing party that a new trial is sought.

For forms of the notice of intention to move for new trial, see §§2.64-2.65.

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§2.17 (1) Grounds for New Trial

Categories. The grounds on which new trial may be sought are enumerated in CCP §657. Motions must be brought on one or more of these broad categories of grounds:

- Irregularity in the proceedings of the court, jury, or adverse party, or irregularity of any court order or abuse of discretion by which either party was prevented from having a fair trial. CCP §657(1).
- Jury misconduct. CCP §657(2).
- Accident or surprise that ordinary prudence could not have guarded against. CCP §657(3).
- Newly discovered material evidence that the party could not have discovered with reasonable diligence and produced at trial. CCP §657(4).
- Excessive or inadequate damages. CCP §657(5).
- Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. CCP §657(6).
- Error in law, occurring at the trial and excepted to by the moving party. CCP §657(7).

A new trial may also be granted for the reporter's death or disability or for the loss or destruction of the reporter's notes. CCP §§657.1, 914.

For a detailed discussion of the grounds for new trial, see California Trial Practice: Civil Procedure During Trial §§25.27-25.50 (3d ed Cal CEB 1995).

Exercise extreme caution when specifying grounds. Because the notice of intent is jurisdictional, failure to raise a specified ground will result in a waiver of the right to raise that ground. The motion can be granted only on a ground that is specified in the motion. See *McCarty v Department of Transp.* (2008) 164 CA4th 955, 983, 79 CR3d 777. As a precaution, many practitioners list all potentially applicable statutory grounds in the notice of intention. See *Grant v Hall* (1969) 274 CA2d 624, 629, 79 CR 219. Doing so preserves the party's ability to raise grounds discovered after the notice of intent is filed but before any affidavits in support of the motion are due. For example, given the short time frame in which to file the notice of intent, counsel for moving party may be unaware of potential jury misconduct when the notice is due. If the notice of intent failed to specify jury misconduct as a ground, misconduct cannot be raised even if counsel could not have learned about the misconduct before the notice was due. Stating every potentially applicable statutory ground in the notice avoids this pitfall.

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§2.18 (2) Supporting Documents

When the motion is based on factual grounds specified in CCP §657(1)-(4), the motion must be made on affidavits. CCP §658. "[O]therwise, it must be made on the minutes of the court." CCP §658. However, failing to state whether the motion will be made on affidavits or court minutes is not material as long as the ground for the motion is stated clearly. Because certain new trial grounds (*e.g.,* juror misconduct) can be based only on affidavit and other grounds (*e.g.,* insufficient evidence, excessive damages) only on the minutes, if the ground is clear from the notice of intention, the court can usually infer the basis. *Nichols v Hast* (1965) 62 C2d 598, 601, 43 CR 641.

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§2.19 (3) Fees

Take care to ensure that the appropriate fee is tendered along with the notice of intention to move for new trial. Code of Civil Procedure §411.20 requires payment of delinquent filing fees within 20 days after receipt of notice from the clerk or before any other trial or hearing scheduled prior to the expiration of the 20-day period; otherwise, the filing will be voided. See *Hu v Silgan Containers Corp.* (1999) 70 CA4th 1261, 1266, 83 CR2d 333.

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§2.20 (4) Serving the Notice

Each adverse party must be served within the 15-day period. CCP §659. This requirement is jurisdictional. Failure to timely serve an adverse party cannot be cured by the party's appearance at the hearing. *Spruce v Wellman* (1950) 98 CA2d 158, 161, 219 P2d 472. When there is more than one adverse party, failure to serve one of them can deprive the court of the power to grant a new trial as to any party except to the extent the court can act without jeopardizing the rights of the unserved party. *Avalos v Welty* (1965) 237 CA2d 545, 547, 47 CR 447.

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3. Supporting Memorandum

§2.21 a. Deadline

The moving party's memorandum in support of the motion is due within 10 days after the notice of intention to move for new trial is filed. Cal Rules of Ct 3.1600.

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§2.22 b. Reasons for Filing

Memorandum in support of the motion for new trial should be included. Unlike the notice of intention, a supporting memorandum is not jurisdictional. The trial court may grant the motion even without a supporting memorandum (*Phillips v Barron* (1958) 158 CA2d 316, 319, 322 P2d 506), but failing to file one is dangerous for several reasons:

- **It avoids risk of denial without hearing.** The court may deny the motion without a hearing on the merits if a supporting memorandum has not been filed. Cal Rules of Ct 3.1600.
- **It allows counsel to address specific points.** The supporting memorandum gives counsel the opportunity to pinpoint why the motion should be granted, with reference to particular items of evidence or error.
- **It allows counsel to affect court's specification of reasons.** It is especially important because, if the trial court grants the motion, the court must provide a specification of reasons. CCP §657; see §§2.34-2.36. Although the trial judge must prepare the specification of reasons personally, and may not merely adopt that of the moving party, the memorandum is the only practical way to advise the court of the party's position. In addition, the court's specification of reasons may include or refer to wording from the party's memorandum (*i.e.,* as distinct from merely incorporating the reasons without discussion) provided that the specification is the product of the court's own mental processes. *Lane v Hughes Aircraft Co.* (2000) 22 C4th 405, 415, 93 CR2d 60; *Eltolad Music, Inc. v April Music, Inc.* (1983) 139 CA3d 697, 707, 188 CR 858.
- **It allows counsel to remind court of jurisdictional deadlines and new trial standards.** Moreover, because the requirements for granting a new trial are exacting, many practitioners use the supporting memorandum to specifically advise the court of the deadlines within which the court must act and to outline the many criteria for an adequate specification of reasons in support of the requested order granting new trial.

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4. Affidavits or Declarations

§2.23 a. Deadline

Affidavits or declarations in support of the motion for new trial are due within 10 days after the notice of intention was filed. This time may be extended by any judge, for good cause shown or by written stipulation of the parties for an additional period not exceeding 20 days. Within that period, the moving party must also file and serve on all other parties any affidavits intended to be used. CCP §659a. On the deadline for counteraffidavits, see §2.27.

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§2.24 b. When Affidavit or Declaration Necessary

Whenever one of the new trial grounds specified in CCP §657(1)-(4) is relied on, the motion "must be made upon affidavits." CCP §658. In other words, when a party raises irregularity in the proceedings or in the court's order, abuse of discretion, jury misconduct, accident, surprise, or newly discovered evidence as grounds for a new trial, the appropriate affidavit or declaration must be submitted.

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c. Juror Misconduct

§2.25 (1) Juror Affidavits

Affidavits essential when moving for new trial based on juror misconduct. When the claimed ground for new trial is juror misconduct (CCP §657(2)), the only way to present the issue to the court is by affidavit or declaration. There is no right to take live testimony from jurors at the hearing for a new trial. *Linhart v Nelson* (1976) 18 C3d 641, 644, 134 CR 813; *Maple v Cincinnati, Inc.* (1985) 163 CA3d 387, 392, 209 CR 451. Note that in criminal cases, the trial court has discretion to permit juror testimony during an evidentiary hearing. *People v Hedgecock* (1990) 51 C3d 395, 415, 272 CR 803.

Allowable content of juror affidavits. Evidence Code §1150(a) permits juror affidavits to impeach the verdict in certain circumstances. The statute provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Thus, only affidavits describing overt, objectively ascertainable juror acts may be considered. Declarations may recount statements, conduct, or events "open to corroboration by sight, hearing, and the other senses." *In re Hamilton* (1999) 20 C4th 273, 294, 84 CR2d 403; *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 625, 84 CR3d 285.

Examples. Declarations showing an express jury agreement or even extensive discussion evidencing an implied agreement to increase an award by improperly adding attorney fees and costs are admissible. *Krouse v Graham* (1977) 19 C3d 59, 80, 137 CR 863; *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 506, 90 CR2d 502. In contrast, declarations showing that the jurors "confused the concepts of comparative negligence and preponderance of the evidence" merely reflect deliberative error, not reversible misconduct. *Ford v Bennacka* (1990) 226 CA3d 330, 332, 276 CR 513. Declarations showing that the internal thought processes of a juror were biased are not admissible to impeach a verdict. *In re Hamilton* (1999) 20 C4th 273, 294, 84 CR2d 403. Likewise, declarations stating that the jurors "specifically found" that plaintiff suffered no lost profits and concluding that the jury intended the damage award to compensate for pain and suffering simply relate the jurors' mental processes, none of which are objective and verifiable. *Cove, Inc. v Mora* (1985) 172 CA3d 97, 99, 218 CR 7.

Care in drafting affidavit or declaration. Juror affidavits or declarations must be drafted with care. Not only must they describe overt, objectively ascertainable acts, they must be in admissible form. Juror declarations must be based on personal knowledge, not hearsay. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 105, 95 CR 516. However, the fact that a declaration or affidavit contains some inadmissible matter is not a ground for declining to consider the remainder. *Krouse v Graham* (1977) 19 C3d 59, 81, 137 CR 863; *Drust v Drust* (1980) 113 CA3d 1, 9, 169 CR 750. But the court should consider only the admissible material. See *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 681 n1, 18 CR2d 923.

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§2.26 (2) Attorney and Party "No Knowledge" Affidavits

When required. In addition to juror affidavits, the moving party and attorney must file affidavits demonstrating that they had no knowledge of the misconduct until after the trial has concluded. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516. This rule is designed to prevent a party aware of misconduct from gambling on the outcome at trial by holding the misconduct card in reserve. *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 186, 269 CR 240. The rule applies only to jury misconduct occurring *before* deliberations. When misconduct occurs *during* deliberations, no affidavit is necessary. *Krouse v Graham* (1977) 19 C3d 59, 82, 137 CR 863.

Time requirements. "No knowledge" affidavits must be filed within the time limits in CCP §659a. See §2.23.

Opposing party should promptly raise the failure to file affidavit. Although filing of the moving party's "no knowledge" affidavit is mandatory, an opposing party who fails to object to its absence cannot raise this defect for the first time on appeal. *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 187 n4, 269 CR 240.

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§2.27 d. Counteraffidavits

Deadline for counteraffidavits. The responding parties have 10 days after the moving party's service to serve and file counteraffidavits. This time may be extended by the court, for good cause shown, or by the parties' written stipulation, for an additional period not to exceed 20 days. CCP §659a.

When movant's affidavits show juror misconduct. When the moving party has submitted affidavits showing juror misconduct, it is critical that the opponent consider submitting counteraffidavits. If the moving party's affidavits contain proper and admissible matters, they may be considered admitted absent a challenging counteraffidavit. See *Ballard v Uribe* (1986) 41 C3d 564, 594, 224 CR 664; *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 681 n1, 18 CR2d 923.

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§2.28 5. Additional Motions for New Trial

Responding party might need to consider its own new trial motion. Under CCP §657, a party can limit its new trial motion to adverse parts of the judgment. If a limited new trial is sought, the other parties must decide whether to file a new trial motion of their own or whether to file a notice of appeal.

Time for filing and service. After a party has filed a notice of intention to move for new trial, the other aggrieved parties have 15 days after the filing date to serve and file their own notice of intention. CCP §659.

For a detailed discussion of the effect of a motion for partial new trial on the other parties' rights, see chap 7.

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6. Hearing and Ruling on New Trial Motion

§2.29 a. Time of Hearing

Date of hearing. After the time for filing counteraffidavits has expired, the clerk will bring the motion to the trial judge's attention. The judge then sets the time for oral argument, "if any," and the clerk gives 5 days' notice by mail of argument. CCP §661. However, as a matter of practice, many trial courts set a date soon after the new trial motion is filed. Note that, unlike the practice in pretrial motions, the moving party does not give notice of the date. Giving notice is the court clerk's responsibility.

Continuances. Although CCP §661 does not preclude a continuance of the hearing date, if one is needed, it should be short. This is because, as discussed in §2.33, the trial court has only a 60-day window in which to rule on the new trial motion, after which it otherwise loses jurisdiction and the motion is deemed denied by operation of law.

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§2.30 b. Must Be Heard by Same Judge

The motion for new trial must be heard and ruled on by the same judge who presided at the trial. If that judge is unable to hear the motion or is absent from the county on the hearing date, the motion is heard and determined by another judge of the same court. CCP §661; but see *Dell'Oca v Bank of New York Trust Co.* (2008) 159 CA4th 531, 542, 71 CR3d 737 (permissible under CCP §661 for judge to hear and determine motion while absent from California as long as another judge present in county signs order).

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§2.31 c. No Live Testimony Permitted

The trial court generally does not consider live testimony. In particular, the court will not permit jurors to testify. When jury misconduct is claimed, the court will consider only affidavits or declarations. *Linhart v Nelson* (1976) 18 C3d 641, 644, 134 CR 813; *Maple v Cincinnati, Inc.* (1985) 163 CA3d 387, 392, 209 CR 451. However, if a party offers live testimony at the new trial hearing in violation of this rule, the other party must object. Failure to object waives the right to assert this error as a ground for reversal on appeal. *Bardessono v Michels* (1970) 3 C3d 780, 794, 91 CR 760.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.32 d. Precedence Over Other Matters

§2.32 d. Precedence Over Other Matters

The hearing and disposition of new trial motions have precedence over all other matters except criminal cases, probate matters, and cases already on trial. "It shall be the duty of the court to determine the same at the earliest possible moment." CCP §660.

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§2.33 e. Jurisdictional Window of Time to Rule on Motion

Court has limited time to rule. New trial motions are given priority because the trial court has limited time in which to rule on them. Under CCP §660, the court's jurisdiction expires 60 days after the earliest of the three following times:

- The clerk's mailing of notice of entry of judgment under CCP §664.5;
- Service on the moving party by any other party of written notice of entry of judgment; or
- The filing of the first notice of intention to move for new trial, if no notice was given by the clerk or other party.

Crucial that court has enough time to make ruling. Counsel for the moving party should be certain that the hearing date is sufficiently early to enable the court to make a ruling. If the trial court does not rule within 60 days, the motion is deemed denied by operation of law. CCP §660. If the hearing occurs too late, the trial court will lack the jurisdiction to grant the motion even if it is inclined to do so. Any new trial order made after the jurisdictional time to rule has expired is void. *Siegal v Superior Court* (1968) 68 C2d 97, 101, 65 CR 311; *Marriage of Liu* (1987) 197 CA3d 143, 150, 242 CR 649. This time cannot be extended by the parties or the court. *Meskell v Culver City Unified Sch. Dist.* (1970) 12 CA3d 815, 825, 96 CR 773. However, if the court's order contemplates the performance of certain conditions (*e.g.,* a party's acceptance of remittitur or additur) the conditions need not be performed within the 60-day limit. See discussion in §2.36.

When ruling occurs. A motion for new trial is not "determined" within the meaning of CCP §660 until an order ruling on the motion is (1) entered in the court's permanent minutes or (2) signed by the judge and filed with the clerk. A ruling entered in the minutes constitutes a "determination" even though it expressly directs that a written order be prepared, signed, and filed. Although the minute entry must show the date it was entered in the permanent minutes, failure to meet this requirement does not impair the order's validity or effectiveness. CCP §660.

On additional requirements when a court grants a new trial wholly, partially, or conditionally, see §§2.34-2.36.

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7. Order and Specification of Reasons

§2.34 a. Granting New Trial

Order granting new trial must state grounds court is relying on. Under CCP §657, the trial court's order granting a new trial must state the grounds on which the court relied (*i.e.,* the grounds permitted by §657; see §2.17). The stated grounds should parallel as closely as possible the language of §657 (*e.g.,* insufficiency of evidence, excessive damages, jury misconduct). In *Mercer v Perez* (1968) 68 C2d 104, 111, 65 CR 315, the supreme court reiterated its "advice that the statutory language, or a reasonable approximation thereof, be used in all cases." An order granting a new trial that does not effectively state the ground on which it is based may be reversed on appeal, but it can also be affirmed if any ground legally requires a new trial. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 905, 215 CR 679. See *Fergus v Songer* (2007) 150 CA4th 552, 566, 59 CR3d 273 (despite failure to state grounds for new trial, court considered appeal because motion stated ground that "the verdict is against law," *i.e.,* is unsupported by any substantial evidence).

The specification of reasons requirement. In addition to an order, the trial court must prepare a "specification of reasons," which may be in the order itself or issued as a separate document. CCP §657. The requirements of specification of reasons are exacting and must be carefully followed. *Oakland Raiders v National Football League* (2007) 41 C4th 624, 634, 61 CR3d 634 (courts require strict compliance with §657). The purpose of such rigid requirements is to discourage ill-considered new trial orders by promoting judicial deliberation before action. *Oakland Raiders v National Football League, supra* (citing *Mercer,* 68 C2d at 113).

NOTE: If the order fails to state the reason(s) for granting a new trial, it is subject to independent review instead of the abuse of discretion standard of review. 41 C4th at 628 (trial court adequately specified juror misconduct as ground for new trial but did not provide statement of reasons; in light of conflicting evidence on juror misconduct, appellate court appropriately used independent judgment in reviewing order).

Specification is a clear and concise statement of reasons. To satisfy the specification of reasons requirement, "it will be sufficient if the judge … furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him." *Mercer,* 68 C2d at 115.

Specification must be framed in terms of case's facts. In addition to specifying the statutory grounds, the specification must be framed in terms of the facts of the case. Generalities, conclusions, or references to ultimate facts are insufficient. If the ground for new trial is insufficiency of the evidence to justify the verdict or inadequate or excessive damages, the specification "must briefly identify the portion of the record which convinces the judge that the court or jury clearly should have reached a different verdict or decision." *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 60, 107 CR 45. For a detailed discussion of sufficiency of specifications of reasons in particular contexts, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§77-123 (5th ed 2008).

Trial court must prepare specification, a nondelegable task. The specification must be the product of the trial court's mental processes. See *Mercer v Perez* (1968) 68 C2d 104, 113, 65 CR 315; *Oberstein v Bisset* (1976) 55 CA3d 184, 188, 127 CR 413. The court cannot delegate this duty to the prevailing party. CCP §657. The specification must be in writing; the judge cannot merely incorporate the transcript by reference (see *Steinhart v South Coast Area Transit* (1986) 183 CA3d 770, 774, 228 CR 283), nor will a reference to the judge's oral statements in open court suffice (*La Manna v Stewart* (1975) 13 C3d 413, 419, 1076, 118 CR 761; *Steinhart v South Coast Area Transit* (1986) 183 CA3d 770, 773, 228 CR 283).

The court may not adopt by reference the moving party's arguments in its supporting memorandum. *Devine v Murrieta* (1975) 49 CA3d 855, 860, 122 CR 847; California Judges Benchbook: Civil Proceedings After Trial §2.47 (Cal CJER 1988). This rule, however, does not preclude the court from borrowing from the memorandum by quoting, paraphrasing, or summarizing the position asserted in the memorandum. "[T]he critical factor involved is whose mental processes are being used, not whose language is being employed. '… [T]he specification of reasons must be the product of the judge's mental processes and not that of the attorney for the moving party.'" *Eltolad Music, Inc. v April*

Music, Inc. (1983) 139 CA3d 697, 707, 188 CR 858 (statement of reasons included verification that "every position and statement herein is of and by this court"). See *Lane v Hughes Aircraft Co.* (2000) 22 C4th 405, 415, 93 CR2d 60.

Many trial judges, mindful of these complex requirements, will invite counsel to comment on a "draft" specification of reasons, or even hold a hearing to discuss the draft document. This appears to be permissible as long as the court satisfies the requirements.

When specification is not included in order for new trial. If the specification is a separate statement from the order granting new trial, the court must prepare, sign, and file the separate statement within 10 days after the new trial order is filed. CCP §657. The separate statement may be filed beyond the 60-day jurisdictional period; that is, the 10-day period may extend past the 60-day cutoff to rule on the motion. However, this 10-day period is itself *mandatory* and *jurisdictional*; if the specification is filed after this period has expired, the new trial order is void. *Mercer v Perez* (1968) 68 C2d 104, 121, 65 CR 315. See *Fergus v Songer* (2007) 150 CA4th 552, 566, 59 CR3d 273 (specification of reasons was nullity because it was filed more than 10 days after entry of order granting new trial). As a result, the original judgment can be reinstated.

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§2.35 b. Granting Partial New Trial

The court may set aside the judgment in whole or in part, or may grant a new trial on selected issues. CCP §§657, 662. A partial new trial is proper only when the issues are severable rather than interwoven, no party will be prejudiced by a partial new trial, and a partial new trial will not cause such uncertainty or confusion as to deny a fair trial. *Bullock v Phillip Morris USA, Inc.* (2008) 159 CA4th 655, 696, 71 CR3d 775 (new trial limited to determining amount of punitive damages). Any doubt on this issue should be resolved in favor of granting a complete new trial. *Liodas v Sahadi* (1977) 19 C3d 278, 285, 137 CR 635; *Bullock,* 159 CA4th at 696.

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§2.36 c. Conditionally Granting New Trial

Inadequate or excessive compensatory damages. The usual scenario for a conditional new trial occurs when a party requests a remittitur or additur on the grounds that the jury's compensatory damage award is excessive or inadequate. Courts cannot outright reduce an excessive compensatory award or increase an inadequate one, because to do so would implicate the opponent's right to a jury trial. See, *e.g., Gober v Ralph's Grocery Co.* (2006) 137 CA4th 204, 212, 40 CR3d 92. Therefore, the court can only grant a new trial conditionally (*i.e.,* contingent on the opposing party's consent to the increased or reduced amount). CCP §662.5. The court should specify a reasonable time for the opposing party to accept or reject the remittitur or additur. *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 454 n6, 198 CR 155. If the party accepts, the condition is satisfied and the new trial motion is denied. If the party rejects, the grant of a new trial on damages becomes effective.

Excessive punitive damages. If the defendant files a new trial motion arguing that the punitive damages award exceeds the amount permitted by due process, a conditional new trial of the amount may not be required. The court may itself set the maximum amount and obviate the need for a damages retrial. See *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 1187, 29 CR3d 379. In contrast to an excessive award of compensatory damages, a verdict reduced on constitutional excessiveness grounds is not a remittitur; it is a determination that the law does not permit the award, and the trial court is not substituting its judgment for that of the jury concerning the factual propriety of the amount. *Gober,* 137 CA4th at 214. Thus, because the propriety of the amount is a pure issue of law, courts may outright reduce punitive awards to the maximum permitted by due process. *Roby v McKesson Corp.* (2009) 47 C4th 686, 719, 101 CR3d 773; *Simon,* 35 C4th at 1187.

Because courts have a mandatory duty to reduce a punitive award that exceeds the amount permitted by due process, a partial judgment notwithstanding the verdict may be a proper procedure, at least in some circumstances, to reduce the punitive damages verdict. *Gober,* 137 CA4th at 215. On motions for judgment notwithstanding the verdict, see §§2.39-2.51.

NOTE: A retrial of all issues relating to the amount of punitive damages may be required if other error so infected the jury's amount determination that the reviewing court cannot itself fairly determine the maximum sum permitted by due process. *Bullock v Phillip Morris USA, Inc.* (2008) 159 CA4th 655, 696, 71 CR3d 775. In *Bullock*, the trial court refused the defendant's instruction to limit the permissible uses of evidence that the jury could consider in determining the degree of reprehensibility of the defendant's conduct. Because reprehensibility is a key factor in setting the proper amount, and because the court could not determine the extent to which the error affected the jury's setting of the original number, the reviewing court could not simply reduce the jury's punitive damages award.

Specification of reasons must be prepared even on conditional new trials. It is a common misconception that on conditional new trial orders the court need not prepare the required specification of reasons until the party accepts or rejects the condition. This is incorrect. The 10-day period to prepare, sign, and file the specification of reasons runs from the time the order conditionally granting new trial is made. *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 931, 148 CR 389; *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 71, 234 CR 264. Because this 10-day period is jurisdictional, a later-filed specification of reasons will void the conditional new trial order.

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8. Appeal of New Trial Orders

§2.37 a. Appealability

Denial of motion for new trial is not directly appealable. An order denying a new trial motion is not directly appealable. Rather, it is reviewed on appeal from the judgment itself. *Walker v Los Angeles County Metro. Transp. Auth.* (2005) 35 C4th 15, 18, 23 CR3d 490. See §3.33.

Order granting new trial is appealable. In contrast, an order granting a new trial is directly appealable. CCP §904.1(a)(4).

When new trial order is appealed, respondent should file protective cross-appeal. When the trial judge grants a new trial motion, the party who had prevailed at trial (whose favorable judgment is now vacated) may appeal the order granting new trial. In this situation, the party who lost at trial (but prevailed on the new trial motion) should file a cross-appeal from the original, now vacated judgment. If the court of appeal should reverse the order granting new trial, that will automatically reinstate the original judgment unless there is a protective cross-appeal from the original judgment. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 699, 106 CR 1; *Mason v Lake Dolores Group* (2004) 117 CA4th 822, 831, 11 CR3d 914. Thus, a cross-appeal should always be filed by the prevailing party at trial in this situation. Cross-appeal permits review of the original judgment by the appellate court. The danger of failing to file a protective cross-appeal is illustrated by *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 215 CR 679: A judgment was entered against the defendant bank and a new trial subsequently granted in the bank's favor. The opposing party appealed from the new trial order, but the bank failed to file a protective cross-appeal from the original judgment. When the court of appeal reversed the grant of a new trial, the judgment against the bank was automatically reinstated. For further discussion of cross-appeals, see chap 8.

If both new trial and judgment notwithstanding verdict have been ordered. When the trial court grants both a new trial and judgment notwithstanding the verdict, "the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting new trial is not appealed from or, if appealed from, is affirmed." CCP §629.

Appeal from partial new trial order. If the moving party sought a new trial on all issues but was granted only a partial new trial, the party may appeal from the partial new trial order. *Liodas v Sahadi* (1977) 19 C3d 278, 285, 137 CR 635. Failure to appeal in partial new trial situations can be dangerous. See *Ferraro v Pacific Fin. Corp.* (1970) 8 CA3d 339, 355, 87 CR 226 (failure to appeal can result in loss of right to later claim that limited new trial order was erroneous). Note that at least one court has held that orders granting partial new trial are still appealable despite the state supreme court's ruling in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804. See *Cobb v University of S. Cal.* (1995) 32 CA4th 798, 803, 38 CR2d 543.

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§2.38 b. Deadline for Notice of Appeal

Effect of denial on time to appeal judgment. When a valid notice of intention to move for a new trial is served and filed and the motion is denied, the time for filing a notice of appeal is extended for all parties until 30 days after (1) the court clerk mails, or a party serves, the order denying the motion or notice of entry of that order or (2) the order is denied by operation of law, whichever is earlier. Cal Rules of Ct 8.108(b)(1)(A)-(B). In no event may a notice of appeal be filed later than 180 days after entry of judgment. Cal Rules of Ct 8.108(b)(1)(C). On time to appeal, see §7.32.

NOTE: If the notice of intent is untimely, the time to appeal is not extended.

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III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

A. Nature and Purpose

§2.39 1. Authorization for Motion

Code of Civil Procedure §629 is the principal authority permitting a motion for judgment notwithstanding the verdict (JNOV). The court, either on its own motion or on motion of a party, "shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." CCP §629.

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§2.40 2. Purpose of Motion

Like a directed verdict or nonsuit, the JNOV motion challenges the legal sufficiency of the evidence. The court presumes that all evidence supporting the verdict is true. See *Fountain Valley Chateau Blanc Homeowner's Ass'n v Department of Veterans Affairs* (1998) 67 CA4th 743, 750, 79 CR2d 248. In contrast with a new trial motion, on JNOV, the court does not reweigh evidence or evaluate credibility, and it disregards conflicting evidence in favor of the party who prevailed at trial. *Sole Energy Co. v Petrominerals Corp.* (2005) 128 CA4th 212, 227, 26 CR3d 798.

In California state court, a motion for directed verdict is not a prerequisite to filing for JNOV. CCP §629. Under CCP §629, the court must grant a motion for JNOV when a motion for directed would have been granted *if* that motion had been made.

JUDICIAL PERSPECTIVE: Generally, a reversal on appeal on the ground of insufficiency of the evidence results in a new trial. A new trial may be avoided, however, if appellant moved for JNOV in the trial court. In this event, the appellate court will enter judgment for appellant. *Bank of America v Superior Court* (1990) 220 CA3d 613, 625, 269 CR 596. Thus, when a party anticipates appealing on the ground of insufficiency of the evidence, a JNOV motion should always be made.

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§2.41 3. Motion May Be Made by Party, Nonparty, or Court

Not only may a party seek JNOV but, unlike motions for new trial, the court is empowered to grant JNOV on its own motion after giving 5 days' notice. CCP §629.

In addition, a motion for JNOV may be brought by a nonparty who is aggrieved by the judgment and thereby obtains standing to appeal. *Stonegate Homeowners Ass'n v Staben* (2006) 144 CA4th 740, 745 n1, 50 CR3d 709; *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1342, 100 CR2d 446.

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B. Concurrently Filed JNOV and New Trial Motions

§2.42 1. Motion for JNOV May Be Filed and Heard With Motion for New Trial

A motion for JNOV may be made alone or together with a motion for new trial. If both JNOV and a new trial are sought, CCP §629 contemplates that they be heard at the same time. The court's power to grant JNOV expires at the same time as its power to grant a new trial. CCP §629.

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§2.43 2. New Trial Is Usually Alternative to JNOV

When there is a basis for filing both JNOV and new trial motions, the new trial is usually an alternative to the JNOV. This is because a JNOV challenges the legal sufficiency of the evidence and if successful will result in a new and different judgment in favor of the party seeking JNOV. In contrast, the new trial motion cannot result in a judgment in favor of the losing party at trial, but only a new trial.

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§2.44 3. When Both Motions Are Granted

When both JNOV and new trial motions are granted, the order granting new trial is effective only if the JNOV is reversed on appeal and the order granting new trial is not appealed or is affirmed on appeal. CCP §629. If the trial court concludes, however, that grounds exist to grant both motions, the court should not condition its order for new trial on reversal of the JNOV.

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C. Procedure

§2.45 1. Deadlines

Deadlines for filing. Code of Civil Procedure §629 expressly provides that the deadlines for filing a JNOV motion are the same as the deadlines under CCP §659 for filing and serving a notice of intention to move for new trial. Thus, the JNOV motion must be filed and served either before the entry of judgment or the earliest of the following times:

- Within 15 days after the clerk mails notice of entry of judgment,
- Within 15 days after service by a party of written notice of entry of judgment, or
- Within 180 days after entry of judgment.

Deadlines for new trial and JNOV. When a party moves for new trial, CCP §659 contemplates a "splitting" of the new trial papers into two components (a notice of intention to move for new trial and a supporting memorandum), and different deadlines apply for each. The situation is different in a JNOV motion; the entire motion (*i.e.,* notice of motion and supporting memorandum) is due at the same time. The party moving for JNOV is not entitled to the 10-day extension under CCP §659 to file supporting papers, because that extension applies only to memorandums in support of new trial motions.

Consider requesting modification of deadlines. As a result, new trial and JNOV motions are often filed separately, resulting in a variety of due dates for papers and oppositions. Thus, many practitioners request the court issue an order that the JNOV supporting memorandum may be filed at the same time as the memorandum in support of the motion for new trial. Because the statute does not set any deadlines for filing opposition to the JNOV, and it is unclear whether standard law and motion deadlines apply, counsel may wish to have the court set a briefing schedule or establish one themselves. This step is advisable because JNOV and new trial motions, if filed together, must be heard and decided at the same time. CCP §629. See §2.47.

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§2.46 2. Components of Motion

A written motion for JNOV is required. See CCP §§629, 659; *Younesi v Lane* (1991) 228 CA3d 967, 279 CR 89, disapproved on other grounds in *Van Beurden Ins. Servs., Inc. v Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 63, 61 CR2d 166 (oral motion invalid). A supporting memorandum should be attached. Cal Rules of Ct 3.1113(a). It is also good practice to submit a proposed order with the moving papers. For forms of the motion and order, see §§2.68-2.69.

The motion must establish that there is no substantial evidence to support the verdict, presuming that all evidence supporting the verdict is true and disregarding all conflicting evidence. *Palm Med. Group, Inc. v State Comp. Ins. Fund* (2008) 161 CA4th 206, 218, 74 CR3d 266. For further discussion of grounds in support of a motion for JNOV, see California Trial Practice: Civil Procedure During Trial §§25.5-25.9 (3d ed Cal CEB 1995).

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§2.47 3. Hearing on Motion

Although CCP §629 does not specify which judge must hear the JNOV motion, CCP §661 provides that the same judge who presided at trial must hear the *new trial* motion unless absent or unavailable. In that event, another judge of the same court will hear the motion. Because JNOV motions are usually filed and heard together with motions for new trial, arguably the JNOV should be heard and decided by the same judge who presided at trial. If motions for both JNOV and for new trial are made, §629 requires the court to rule on them at the same time. However, one case has held that this requirement is not mandatory and that substantial compliance is sufficient. *Espinoza v Rossini* (1966) 247 CA2d 40, 45, 55 CR 205.

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§2.48 4. Window of Time in Which to Rule

What constitutes a ruling. A decision entered in the permanent minutes or an order signed by the judge and filed with the clerk constitutes the ruling on the JNOV motion. *Davcon, Inc. v Roberts & Morgan* (2003) 110 CA4th 1355, 1358 n4, 2 CR3d 782; *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 351, 118 CR 513. For a form of the court's order, see §2.69.

Limited time in which court may rule. The trial court has only a limited time in which to rule on the JNOV motion. It cannot rule too early, nor can it rule too late. The trial court cannot rule on a JNOV motion until the time for filing a "motion for new trial" has expired. CCP §629. Under CCP §660, the court's power to rule on a motion for new trial expires 60 days after the one of the three following times, whichever is earliest:

- The clerk's mailing of notice of entry of judgment under CCP §664.5;
- Service on the moving party by any party of written notice of entry of judgment; or
- The filing of the first notice of intention to file for new trial, when no such notice has been given by the clerk or other parties.

The court's power to grant JNOV expires at the same time as its power to grant a new trial. CCP §629. If both JNOV and new trial are sought, the court must rule on both at the same time (see §2.47) and also before its jurisdictional time to grant new trial expires.

When motion is granted, new judgment should be signed and filed within 60 days. In ruling on JNOV motions, the trial court need not submit the "specification of reasons" required to grant a new trial. If the court grants JNOV, however, a different judgment will be needed. Counsel should submit a proposed judgment along with the motion, or at the latest, at the hearing or immediately thereafter. The new judgment should be signed and filed before the 60-day window closes. However, the fact that the new judgment is not signed and filed until later will not invalidate the judgment if there is substantial compliance. *Espinoza v Rossini* (1966) 247 CA2d 40, 46, 55 CR 205.

Serving notice of entry of judgment. A moving party that prevails on the JNOV motion should serve notice of entry of judgment on the other parties.

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§2.49 5. Loss of Jurisdiction to Rule on Motion

Court may lose jurisdiction to rule on JNOV motion if notice of appeal involves money judgment. It remains an open question whether the trial court loses its jurisdiction to rule on a motion for JNOV in some circumstances. For example, when a money judgment has been entered against defendant, it typically is enforceable immediately. See §2.62. The trial court may, in its discretion, grant a temporary stay of enforcement. CCP §918. If the court refuses (or plaintiff will not stipulate to a stay, or a writ of supersedeas cannot be obtained), defendant can only ensure that execution on the judgment will be stayed by filing an appeal bond. See §§6.28-6.29. However, an appeal bond alone is arguably not sufficient to stay the judgment; to be effective, the bond must be accompanied by a notice of appeal. See §6.3. Because the notice of appeal generally vests jurisdiction in the appellate court except on matters collateral to the judgment, the question arises whether the filing of the notice of appeal deprives the trial court of jurisdiction to hear the pending JNOV motion.

Split of authority. There is a split of authority on this question. According to the fourth appellate district, in *Weisenburg v Molina* (1976) 58 CA3d 478, 486, 129 CR 813, once a notice of appeal is filed, the trial court is divested of jurisdiction to rule on a JNOV motion. The court reasoned that once the appeal is filed jurisdiction vests in the appellate court; the trial court retains jurisdiction to rule on collateral matters only, and JNOV (which contemplates entry of a new and different judgment if the motion is successful) cannot be considered merely collateral. See *Laidlaw Waste Sys., Inc. v Bay Cities Servs., Inc.* (1996) 43 CA4th 630, 50 CR2d 824 (trial court loses jurisdiction to materially modify or vacate judgment after notice of appeal is filed); in contrast, the first appellate district in *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204, 1212, 238 CR 130, explained that, because the trial court retains jurisdiction to hear a new trial motion after the filing of a notice of appeal, it should retain jurisdiction to rule on JNOV motions as well.

PRACTICE TIP: Attorneys should carefully research the law of the appellate district in which they are litigating.

Dangerous situation for defendant. This case law conflict can create a dangerous situation for a defendant against whom a money judgment has been entered. If the trial judge refuses to grant a temporary stay of enforcement, defendant may have no choice but to file a notice of appeal and appeal bond, thereby potentially depriving the trial court of jurisdiction to rule on defendant's pending JNOV motion.

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D. Appeal of JNOV

§2.50 1. Appealable Orders

Order denying motion is appealable. Unlike orders denying new trial (see §2.37), an order denying a motion for JNOV is directly appealable. CCP §§904.1(a)(4), 629. But see *City of Los Angeles v Glair* (2007) 153 CA4th 813, 819, 63 CR3d 280 (JNOV motion based on court trial is not valid and its denial is not appealable).

Order granting JNOV motion is not appealable; new judgment is appealable. In contrast, when the court grants JNOV, the order is not appealable. In that event, the trial court enters a new and different judgment. It is the judgment on JNOV that is appealable, not the order granting JNOV. See *Jordan v Talbot* (1961) 55 C2d 597, 602 12 CR 488; *Trujillo v North County Transit Dist.* (1998) 63 CA4th 280, 285 n2, 73 CR2d 596. See §3.34.

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§2.51 2. Notice of Appeal

The notice of appeal should specify that the appeal is taken from the order denying JNOV as well as from the judgment. Although a party may apparently file separate notices of appeal from the judgment and from the order denying JNOV, the safer practice is to file a single document. Otherwise, there will be two separate appeals (with separate filing fees and record designation requirements) and counsel eventually may have to move to consolidate the two appeals.

Judgments ordered after the grant of JNOV are treated as any other judgment for purposes of appeal. See §2.50. On filing the notice of appeal from the judgment, see chap 7.

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IV. MOTIONS TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT

A. Nature and Purpose

§2.52 1. Availability of Motion

Motion to vacate can be relatively easy method of correcting obvious error. Once judgment has been entered in a case, the trial court's power to modify it is narrowly circumscribed. The statutory motion to vacate under CCP §663 permits the trial court to correct a judgment that is improper because it is inconsistent with the facts found by the trial court or the jury on special verdict. It can thus provide a quicker and less expensive remedy for correcting obvious errors, potentially avoiding the need to appeal.

Motion to vacate can be used by a nonparty to intervene and gain standing to appeal. On a nonparty's use of the motion to intervene and to help establish standing to appeal, see §2.60.

Criteria of availability. Under CCP §663, the motion is available in the following situations:

- The judgment was based on either a court decision or a special verdict of the jury.
- The judgment sought to be vacated has materially affected the party's rights (motion must be made by aggrieved party).
- In a court trial, there was an "incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts" (when judgment is set aside, trial court's statement of decision must be amended and corrected).
- In a special verdict of the jury, the judgment or decree was inconsistent with or not supported by the special verdict.

New and different judgment must be entered. Moreover, CCP §663 mandates not only that the original judgment be set aside but also that a new and different judgment be entered. *Forman v Knapp Press* (1985) 173 CA3d 200, 203, 218 CR 815. Thus, a motion under CCP §663 cannot be used merely to restore the action to the trial calendar. *Forman v Knapp Press, supra*. Consequently, an order of vacation that does not direct entry of a different judgment is void. *20th Century Ins. Co. v Superior Court* (2001) 90 CA4th 1247, 1260, 109 CR2d 611; *Ramirez v Moran* (1988) 201 CA3d 431, 435, 247 CR 117.

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§2.53 2. Distinguished From Motion for New Trial

Motion to vacate does not ask court to reweigh evidence. A motion to vacate under CCP §663 will not permit the trial court to reweigh facts. Vacation is available only when the evidence is uncontroverted. *Plaza Hollister Ltd. Partnership v County of San Benito* (1999) 72 CA4th 1, 14, 84 CR2d 715; *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 153, 154 CR 676.

Courts often look beyond form of improperly denominated motion. That the motion is incorrectly named a motion to "vacate" the judgment rather than one for new trial is not necessarily fatal. Many cases have looked beyond the form of the motion to consider the merits of the trial court's ruling. See *Finnie v District No. 1 Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n* (1992) 9 CA4th 1311, 1316, 12 CR2d 348 ("styling of [plaintiff's] request as a motion to vacate, rather than a motion for new trial, is of no consequence"); *Ramirez v Moran* (1988) 201 CA3d 431, 435, 247 CR 117 (motion to vacate treated as motion for new trial for purposes of appeal).

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B. Procedure

§2.54 1. Contents of Motion

The moving party must file with the clerk and serve on the adverse party a notice of motion designating the grounds for the motion. The notice must "specify the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict." CCP §663a. In other words, it must identify the particular respects in which the judgment is incorrect. The notice of motion and motion should include a supporting memorandum. Cal Rules of Ct 3.1113. Consult local rules and practices to learn whether a proposed new judgment should accompany the motion.

On deadlines for filing the motion, see §2.55. For a form of the motion, see §2.70.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.55 2. Deadlines

§2.55 2. Deadlines

Under CCP §663a, the notice of motion and accompanying papers must be served and filed either:
(1) Before entry of judgment; or
(2) The earliest of the following times:

- Within 15 days after the clerk's mailing notice of entry of judgment under CCP §664.5;
- Within 15 days after any party's serving notice of entry of judgment; or
- Within 180 days after entry of judgment.

These times are not extended for service by mail. CCP §663a.

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§2.56 3. Hearing

Generally, motion is heard by trial judge. The motion must be heard and ruled on by the trial judge unless he or she is unavailable or absent from the county at the time of hearing. Cal Rules of Ct 3.1602. Note that the governing statutes do not prescribe a time in which the hearing must occur. See CCP §§663-663a.

When motion is granted. When the motion is granted and the judgment is set aside after a bench trial, the trial court must amend and correct its statement of decision. CCP §663. Also, on granting the motion, the court must direct entry of a different judgment. An order of vacation that does not direct entry of a different judgment is void. *20th Century Ins. Co. v Superior Court* (2001) 90 CA4th 1247, 1260, 109 CR2d 611; *Ramirez v Moran* (1988) 201 CA3d 431, 435, 247 CR 117.

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C. Appealing Court's Order

§2.57 1. Effect of Notice of Appeal on Trial Court Jurisdiction

Unlike a motion for new trial, a motion to vacate the judgment is considered a direct attack on the judgment. As a result, once the notice of appeal is filed, the trial court *loses jurisdiction to hear a motion to vacate*. *Mallick v Superior Court* (1979) 89 CA3d 434, 438, 152 CR 503.

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§2.58 2. Appealability of Order

Vacation order is directly appealable. If the court grants the motion to vacate, a new judgment is entered. The effect is to nullify the original judgment. Thus, the only way to obtain appellate review of the vacation order is by direct appeal. It is therefore treated as an order after final judgment and directly appealable. In addition, CCP §663a expressly states that the order granting a motion to vacate "may be reviewed on appeal in the same manner as a special order made after final judgment." Thus, a party may appeal from *both* the new judgment and the order vacating the old judgment.

Generally, denial of motion to vacate is nonappealable. Although CCP §663a is silent on the appealability of an order denying a motion to vacate, case law has generally held that such orders are nonappealable. See *City of Los Angeles v Glair* (2007) 153 CA4th 813, 822, 63 CR3d 280; 9 Witkin, California Procedure, *Appeal* §197 (5th ed 2008). But there are certain exceptions. See §3.29; 9 Witkin, Procedure, *Appeal* §§198-201.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.59 3. Timing

§2.59 3. Timing

Under Cal Rules of Ct 8.108(c), a valid notice of intention to move to vacate the judgment will extend the time to file the notice of appeal until the earliest of:

- 30 days after entry of the order denying the motion to vacate;
- 90 days after filing the first notice of intention to move to vacate the judgment; or
- 180 days after entry of the judgment.

To be valid, the notice must be timely filed and must be served on the adverse parties. CCP §663a.

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§2.60 D. Motion by Nonparties to Intervene and Acquire Standing to Appeal

By making the statutory motion to vacate, a nonparty may intervene, become a party to the record, and acquire standing to appeal. *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406. A nonparty that is "aggrieved" by a judgment or order may become a party of record and obtain a right to appeal by moving to vacate the judgment under CCP §663. *County of Alameda v Carleson* (1971) 5 C3d 730, 736, 97 CR 385 (welfare rights organization permitted to become party after judgment declared certain state agency regulations invalid); *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 295, 50 CR2d 493 (expert witness had standing to appeal order setting deposition testimony fee payable by opposing party). A nonparty is "aggrieved" if the judgment injuriously affects his or her rights or interests, which must be "immediate, pecuniary, and substantial." *County of Alameda,* 5 C3d at 737.

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V. MOTIONS TO STAY ENFORCEMENT OF JUDGMENT IN TRIAL COURT

§2.61 A. Availability of Temporary Stay

Authorization. Under CCP §918, the trial court has unlimited authority to stay enforcement of a judgment except when enforcement could only be stayed by the giving of an undertaking. When an undertaking is required, the court cannot stay enforcement for more than 10 days beyond the last date on which a notice of appeal could be filed, unless the adverse party consents. CCP §918(b). Granting or refusing a temporary stay is discretionary with the trial court. (The statute says the court "may" stay enforcement.) Likewise, the court may grant a stay for less than the maximum time allowed. CCP §918(a). For detailed discussion of stays, see chap 6.

Stay available when deciding whether to appeal. Under CCP §918 defendant may request a stay while deciding whether to appeal at all. That defendant later decides not to appeal apparently does not affect the trial court's power to grant the temporary stay. The maximum time for the temporary stay is "ten days beyond the last date on which a notice of appeal *could be* filed" (emphasis added). CCP §918(b).

Consider stay even before judgment. Because some courts require that a motion for temporary stay be made on noticed motion, rather than ex parte, a defendant might need to consider stay options even before the judgment is entered—another reason quick action is often required.

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§2.62 B. Stay of Enforcement of Money Judgments

As a general rule, any judgment that requires a bond to stay enforcement is enforceable immediately. See §§6.18-6.20. Thus, even if defendant plans to appeal in due course (within the time prescribed by the California Rules of Court), a quick-acting plaintiff can attempt to collect on a money judgment immediately. Therefore, as a practical matter, staying enforcement of the judgment is critical to preserve the right to meaningful appellate review.

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§2.63 C. Consider Stipulating to Stay

Before moving for a temporary stay, counsel may wish to contact the opponent to see whether the parties can stipulate to a temporary stay. Also, some courts request that the parties sign a form stipulation at the outset of trial, which provides for a temporary stay until any posttrial motions are heard.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/ VI. FORMS/§2.64 A. Form: Notice of Intention to Move for New Trial (Jury Trial)

VI. FORMS

§2.64 A. Form: Notice of Intention to Move for New Trial (Jury Trial)

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2.64-1 Notice of intention to move for new trial (jury trial)

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION TO MOVE FOR NEW TRIAL (JURY TRIAL)**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _
		Action filed: _ _[*date*]_ _
		Trial date: _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that in Department _ _[*number*]_ _**, at a time that shall be set by the court under Code of Civil Procedure section 661 so that the motion will be heard and determined on or before** _ _[*last date ruling can be made before court loses jurisdiction; see §2.33*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court to set aside the jury's verdict rendered on** _ _[*date*]_ _**,**

[*Add if appropriate*]

to vacate the judgment entered on _ _[*date*]_ _**, in** _ _[*plaintiff's/defendant's*]_ _ **favor,**

[*Continue*]

and to grant _ _[*plaintiff/defendant*]_ _ **a new trial on the following issues:** _ _[*List issues to be relitigated*]_ _**.**

This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant*]_ _**, who was thereby prevented from receiving a fair trial:**

1. Irregularity in the proceedings of the court;

2. Irregularity in the proceedings of the jury;

3. Irregularity on the part of the _ _[*plaintiff/defendant*]_ _**;**

4. Improper orders of the court;

5. Abuse of discretion by the court;

6. Misconduct of the jury;

7. Accident or surprise, or other acts that ordinary prudence could not have guarded against;

8. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;

9. _ _[*Excessive/Inadequate*]**_ _ damages;**

10. Insufficiency of the evidence to justify the verdict;

11. The verdict is against law;

12. Error in law occurring at the trial and excepted to by the moving party; and

13. Inability to obtain the trial transcript because of _ _[*state reason, e.g., destruction by fire of the court reporter's notes*]**_ _.**

The _ _[*e.g., 1st, 2d, 3d, 4th, 5th, 6th, and 7th grounds specified above*]**_ _ will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.**

The motion is also based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: State all grounds that might apply, because any grounds not stated in the notice may not be asserted at the hearing. See §2.17. Code of Civil Procedure §1013, extending time when service is by mail, is inapplicable. CCP §659. Any declarations or affidavits should be served on all other parties and filed with the court within 10 days after serving the notice of intention. CCP §659a. See §2.23. Counsel who does not attach a supporting memorandum to the notice must do so within 10 days after filing the notice; otherwise, the motion may be denied without a hearing on the merits. Cal Rules of Ct 3.1600.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

For a sample form of a notice of intention to move for new trial, complete with a supporting memorandum, see App I.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.65 B. Form: Notice of Intention to Move for New Trial (Bench Trial)

§2.65 B. Form: Notice of Intention to Move for New Trial (Bench Trial)

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2.65-1 Notice of intention to move for new trial (bench trial)

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION TO MOVE FOR NEW TRIAL (BENCH TRIAL)**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _
		Action filed: _ _[*date*]_ _
		Trial date: _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that in Department _ _[*number*]_ _**, at a time that shall be set by the court under Code of Civil Procedure sections 661 and 662 so that the motion will be heard and determined on or before** _ _[*last date ruling can be made before court loses jurisdiction; see §2.33*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court to set aside the judgment entered in** _ _[*plaintiff's/defendant's*]_ _ **favor and to grant** _ _[*plaintiff/defendant*]_ _ **a new trial on all issues.**

As an alternative, _ _[*plaintiff/defendant*]_ _ **will move the court to modify and change its statement of decision, to vacate the judgment, and to enter a new judgment in favor of** _ _[*plaintiff/defendant*]_ _ **and against** _ _[*plaintiff/defendant*]_ _**.**

As another alternative, _ _[*plaintiff/defendant*]_ _ **will move to set aside the statement of decision and judgment and reopen the case for further proceedings, including introduction of additional evidence with the same effect as if the case had been reopened after submission and before a decision had been filed or judgment rendered.**

This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant*]_ _**, who was thereby prevented from receiving a fair trial:**

1. Irregularity in the proceedings of the court;

2. Irregularity by the _ _[*plaintiff/defendant*]_ _**;**

3. Improper orders of the court;

4. Abuse of discretion by the court;

5. Accident, surprise, or other acts that ordinary prudence could not have guarded against;

6. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;

7. _ _[*Excessive/Inadequate*]**_ _ damages;**

8. Insufficiency of the evidence to justify the decision;

9. The decision is against law;

10. Error in law occurring at the trial and excepted to by the moving party; and

11. Inability to obtain the trial transcript because of _ _[*state reason, e.g., destruction by fire of the court reporter's notes*]**_ _.**

The _ _[*e.g., 1st, 2d, 3d, 4th, 5th, and 6th grounds specified above*]**_ _ will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.**

The motion is also based on this notice; all pleadings, papers, and records in this action; _ _[*plaintiff's/defendant's*]**_ _ specification of controverted issues, proposal of content of statement of decision, request for statement of decision, proposed statement of decision; the evidence presented at trial; and the attached supporting memorandum.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Counsel should attach the documents indicated in the final paragraph of this motion. If a supporting memorandum is not attached to the notice, then counsel must file it within 10 days after filing the notice; otherwise, the motion may be denied without a hearing on the merits. Cal Rules of Ct 3.1600.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.66 C. Form: Order Granting Motion for New Trial [Deleted]

§2.66 C. Form: Order Granting Motion for New Trial [Deleted]

This section has been deleted.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.67 D. Form: Order Denying Motion for New Trial [Deleted]

§2.67 D. Form: Order Denying Motion for New Trial [Deleted]

This section has been deleted.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.68 E. Form: Notice of Motion for JNOV

§2.68 E. Form: Notice of Motion for JNOV

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2.68-1 Notice of motion for JNOV

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION FOR**
vs	)	**JUDGMENT**
	)	**NOTWITHSTANDING**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**VERDICT; SUPPORTING**
	)	**MEMORANDUM**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court for judgment in** _ _[*plaintiff's/defendant's*]_ _ **favor, notwithstanding the verdict rendered by the jury on** _ _[*date*]_ _**.**

This motion is made on the grounds that the evidence is not sufficient to support the jury's verdict, the verdict is erroneous as a matter of law, and, if a motion for directed verdict had been made during trial, it should have been granted.

This motion is based on this notice; all pleadings, papers, and records in this action; evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Supporting memorandums and declarations should be attached to the notice of motion. Cal Rules of Ct 3.1113. If the motion is made by the court, it is good practice for counsel to file memorandums supporting their respective positions. A declaration is often unnecessary when the motion is based on matters in the trial record and the judge's own knowledge, rather than on extraneous facts brought in by declaration.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.69 F. Form: Order Granting or Denying JNOV

§2.69 F. Form: Order Granting or Denying JNOV

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2.69-1 Order granting or denying JNOV

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER _ _[*GRANTING/DENYING*]_ _
JUDGMENT NOTWITHSTANDING THE VERDICT

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, for judgment notwithstanding the verdict came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that

[*Either*]

judgment be entered in favor of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, notwithstanding the jury's verdict entered on** _ _[*date*]_ _**, as follows:** _ _[*State language of judgment*]_ _**.**

[*or*]

the motion is denied.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: As with other motions, it is good practice to submit a proposed order to the court with the motion for JNOV.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.70 G. Form: Notice of Motion to Vacate Judgment and Enter Different Judgment

§2.70 G. Form: Notice of Motion to Vacate Judgment and Enter Different Judgment

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2.70-1 Notice of motion to vacate judgment and enter different judgment

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION TO**
vs	)	**VACATE JUDGMENT AND**
	)	**ENTER DIFFERENT**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**JUDGMENT; SUPPORTING**
	)	**MEMORANDUM;**
	)	**DECLARATION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _
		Action filed: _ _[*date*]_ _
		Trial date: _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of the above-titled court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court for an order setting aside and vacating its judgment entered in this case on** _ _[*date of entry of judgment*]_ _**, and entering another, different judgment.**

[*Either*]

This motion is made on the ground that _ _[*e.g., the legal basis for the decision is not consistent with or supported by the facts/the judgment is not consistent with the special verdict*]_ _**, because** _ _[*specify particulars*]_ _**.**

[*or*]

This motion is based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; the attached supporting memorandum and the declaration of _ _[*name*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The notice of motion should specify the particulars in which the decision or judgment is inconsistent with the facts or special verdict. CCP §663a. Supporting memorandums and declarations should be attached to the notice of

motion. Cal Rules of Ct 3.1113.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.71 H. Form: Order Granting Motion to Vacate Judgment and Enter Different Judgment (Jury's Special Verdict)

§2.71 H. Form: Order Granting Motion to Vacate Judgment and Enter Different Judgment (Jury's Special Verdict)

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2.71-1 Order granting motion to vacate judgment and enter different judgment (jury's special verdict)

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER GRANTING MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (JURY'S SPECIAL VERDICT)

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that judgment rendered on _ _[*date*]_ _**, be vacated and that judgment consistent with and supported by the jury's special verdict be entered as follows:** _ _[*State language of new judgment*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is appropriate when there is (1) an incorrect or erroneous legal basis for decision that is not consistent with or not supported by the facts or (2) a judgment that is not consistent with or not supported by the special verdict.

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Source: Civil Litigation/California Civil Appellate Practice/2 Trial Court Remedies/§2.72 I. Form: Order Granting Motion to Vacate Judgment and Enter Different Judgment (Court's Statement of Decision)

§2.72 I. Form: Order Granting Motion to Vacate Judgment and Enter Different Judgment (Court's Statement of Decision)

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2.72-1 Order granting motion to vacate judgment and enter different judgment (court's statement of decision)

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER GRANTING MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (COURT'S STATEMENT OF DECISION)

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that judgment rendered on _ _[*date*]_ _**, be vacated, and that different judgment be entered as follows:** _ _[*State language of new judgment*]_ _**.**

IT IS FURTHER ORDERED that the statement of decision be amended to conform to the facts as follows: _ _[*State corrections in the statement of decision*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is appropriate when the original judgment is incorrect because the legal basis for the decision is not consistent with or supported by the facts in a court trial.

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2A

Preserving the Record for Appeal

Christina J. Imre
The Honorable George P. Schiavelli

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- A. Functions of Trial and Appellate Courts Compared §2A.2
- B. General Appellate Principles Pertaining to Preserving the Record
  - 1. The Appellate Court Will Consider Only Matters Reflected in the Record §2A.3
  - 2. Appellate Waiver/Invited Error Doctrines §2A.4

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§2A.1 I. THE ROLE OF THE APPELLATE LAWYER AS TRIAL CONSULTANT

Much has been written about the need to retain an appellate lawyer to handle the appeal of a case or, at least, to consult with trial counsel about appellate proceedings. This is sound advice, but often waiting until the conclusion of trial to seek appellate assistance can be too late. Important issues for appeal may have already been lost because they were not properly preserved. As a result, an otherwise viable appeal may be doomed from the start.

This problem arises out of a tendency to "compartmentalize" litigation. Too often, counsel think of a lawsuit as a series of independent stages, including (1) pretrial motions and discovery, (2) trial and posttrial proceedings, and (3) appeal, meaning everything after the filing of a notice of appeal. But these phases are interrelated and should not be considered separate and distinct. Motions and rulings made during the pretrial phase may affect not only the trial, but also the appeal. Acts done, or not done, during trial can make or break the eventual appeal.

Thus, it is wise to initiate the first appellate consultation as early as possible in the life of a lawsuit. The appellate perspective may help shape the scope and nature of discovery proceedings, determine the type and sufficiency of pretrial motions, help focus the trial, and assess the viability of seeking interlocutory appellate relief. Thus, for example, if a motion for summary judgment is contemplated, the appellate practitioner's input may help to ensure that the supporting evidence is sufficient; the motion papers properly raise and discuss the issues; the oral argument is properly focused; and orders are proper in form and substance. If the motion prevails, early involvement by the appellate lawyer may help preserve the ruling; if it fails, an appellate consultation increases the chances that the issues have been preserved for appeal. The appellate perspective is also invaluable in realistically assessing the chances of prevailing on a writ petition.

Similarly, appellate input into the drafting of jury instructions may be critical to success on appeal. While jury instructions are one of the most fruitful sources of reversible error, the drafting of instructions is often left to the last minute. Involving an appellate practitioner in the early preparation of instructions can help focus the issues and avoid mistakes that might result in the loss of a significant issue on appeal. Likewise, the appellate lawyer can be of great assistance during trial when it comes to focusing the legal theories, developing the themes of a case, and preserving issues, such as preparing an adequate offer of proof when key evidence has been excluded.

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II. THE NECESSITY OF THE RECORD FOR APPELLATE REVIEW

§2A.2 A. Functions of Trial and Appellate Courts Compared

The trial court's primary role is to resolve the dispute before it by applying the law to a particular set of facts. Whether judge or jury, the fact finder hears and evaluates evidence, and makes credibility and other ultimately factual determinations, largely through oral proceedings. In contrast, the court of appeal's function is *correction of error*. It reviews the lower court proceeding to decide if prejudicial error has been committed in connection with a trial or other proceeding. See *Ballard v Uribe* (1986) 41 C3d 564, 574, 224 CR 664. The appellate court takes no testimony nor will it reweigh evidence or redetermine credibility findings or other disputed factual questions. See §1.4.

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B. General Appellate Principles Pertaining to Preserving the Record

§2A.3 1. The Appellate Court Will Consider Only Matters Reflected in the Record

The court of appeal determines whether the trial court has committed error by reviewing the record of proceedings below, including the reporter's transcript and the relevant motions, briefs, exhibits, or other written materials before the lower court (*e.g.,* the clerk's transcript or attorney-prepared appendix under Cal Rules of Ct 8.124). The party challenging a judgment bears the burden of showing reversible error; the reviewing court cannot evaluate claims of error without an adequate record of what occurred below. *Ballard v Uribe* (1986) 41 C3d 564, 574, 224 CR 664; *Fox v Federated Dep't Stores* (1979) 94 CA3d 867, 872 n3, 156 CR 893. In other words, if the error is not reflected in the record, it does not count. For example, at an unreported sidebar the trial court makes a ruling excluding appellant's evidence. Appellant must take steps to ensure that the record reflects the trial court's ruling, either by requesting a reporter or by summarizing the court's ruling once back on the record. Otherwise, the court of appeal will have no way of knowing that the trial court *excluded* anything, *i.e.,* committed any error.

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§2A.4 2. Appellate Waiver/Invited Error Doctrines

As a general rule, the reviewing court will not consider issues, evidence, arguments, or objections that could have been raised but were not or were expressly or impliedly waived. See *Pellegrini v Weiss* (2008) 165 CA4th 515, 528, 81 CR3d 387; 9 Witkin, California Procedure, *Appeal* §394 (5th ed 2008) and authorities collected.

Theory of trial. Ordinarily, a party is not permitted to change its position and adopt a new and different legal theory on appeal. *Strasberg v Odyssey Group* (1996) 51 CA4th 906, 920, 59 CR2d 474; *Jones v Dutra Constr. Co.* (1997) 57 CA4th 871, 876, 67 CR2d 411; see 9 Witkin, California Procedure, *Appeal* §407 (5th ed 2008) and authorities collected. The theory of trial doctrine is generally justified based on principles of waiver and estoppel. 9 Witkin, California Procedure, *Appeal* §400.

Raising new legal issues on appeal. Parties are also expected to promptly raise all legal issues. The appellate court generally will not consider new issues raised for the first time on appeal. See, *e.g., Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 998, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109; 9 Witkin, California Procedure, *Appeal* §400 (5th ed 2008) and authorities collected. To do so would prejudice the opposing party.

Thus, for example, a party who fails to question the *amount* of a child support award granted in the lower court, contending only that no support at all was warranted, has waived the right to challenge computation of the amount on appeal. See *In re Marriage of Hinman* (1997) 55 CA4th 988, 1002, 64 CR2d 383. However, an appellant may raise a legal issue for the first time on appeal (or in a posttrial motion) if it is a pure issue of law on undisputed facts. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15, 1 CR2d 805; *Shaw v Regents of Univ. of Cal.* (1997) 58 CA4th 44, 51, 67 CR2d 850. The absence of disputed facts means the opposing party is not prejudiced. See *Strasberg v Odyssey Group* (1996) 51 CA4th 906, 920, 59 CR2d 474 (if new theory contemplates *controverted* facts not in issue, exception does not apply).

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§2A.5 III. PRACTICAL CONSIDERATIONS IN PROCURING AN ADEQUATE RECORD OF TRIAL AND PRETRIAL PROCEEDINGS

The procedures for designating the record on appeal are dealt with in detail elsewhere. See chap 9. However, the process of insuring that the record will be adequate to preserve issues must begin long before the time comes to designate the record on appeal.

For example, because of the general rule that only the final judgment in a case is appealable, interlocutory rulings must generally await entry of a judgment before they are subject to appellate review. This does not mean that counsel may await entry of a judgment before thinking about preserving the appellate record. Moreover, there are situations in which an interlocutory order is subject to immediate appellate review. See chap 9. In either case, the ability of the appellate court to review the ruling depends on the existence of a sufficient record, both oral and written.

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A. Reporter's Transcript

§2A.6 1. Practical Concerns in Procuring a Transcript

An appellate court cannot review the trial proceedings without a record, *i.e.,* a reporter's transcript or settled statement of all relevant oral proceedings. See Cal Rules of Ct 8.120-8.140; §2A.3. Obviously, this principle applies to everything from the final judgment to any interlocutory rulings on which the appeal is based. The appellate court generally cannot review interlocutory rulings in the absence of a record of the oral proceedings relating to the rulings.

This can create two serious problems for counsel. First, in some courts a reporter is not automatically provided for motion or other pretrial proceedings, or, indeed, for trial. This is especially true in limited jurisdiction cases. Counsel should check with the court in advance to find out if a reporter will be present as a matter of course, and, if not, make certain to order one. Wherever possible, a reporter should be present. If it is not feasible to procure a reporter, counsel should arrange for the preparation of a settled statement promptly after the proceeding is concluded, while memories are fresh.

Second, even if a reporter is available, by the time the appeal is filed the transcript may not be ready or may have been lost. Pretrial proceedings may occur many months before a judgment is ultimately entered. By the end of the trial, the reporter may no longer be available or the notes of the particular proceeding may have been mislaid. To the extent it is anticipated that an interlocutory ruling may be the subject of appellate proceedings after trial, counsel should arrange for the transcript to be prepared and certified promptly, as soon as the proceeding is completed.

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2. Insuring the Record Reflects the Issues for Appeal

§2A.7 a. Clarifying When Proceedings Are On or Off the Record

Because the record is critical to a meaningful appeal, counsel must at all times be aware of what is going into the record and how that record will appear to the appellate court. For example, counsel should *know at all times* whether proceedings are on or off the record. The mere fact that either lawyer says "off the record" does not mean that the reporter has stopped reporting. Typically, the reporter will only cease reporting when the court so indicates. However, having said the proceedings are off the record, the court may not make it clear when matters are back on the record. Anytime counsel has any doubt about the status of the record, he or she should inquire of the court.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.8 b. Chambers and Sidebar Conferences

§2A.8 b. Chambers and Sidebar Conferences

When it comes to preserving the record, sidebar and chambers conferences present special problems. It is not uncommon for a court to indicate it wants to discuss a matter at sidebar or in chambers without the reporter present. The court may wish to informally explore resolution of an issue without the "posturing" that occurs on the record or to save the reporter the onerous task of recording extraneous discussions. For example, the settling of jury instructions normally requires a good deal of time and is often done initially in chambers without the reporter present.

The informality of such situations is often an invitation to problems with record preservation. Anything of significance said in an off-the-record conference should be placed on the record as soon as possible. Counsel should advise the court in chambers or at sidebar that he or she would like to put certain matters on the record, and then be sure to give a complete and adequate summary of the off-the-record discussions. Failure to make an adequate record of sidebar or chambers conferences may waive the potential issue for appeal.

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B. The Written Record

§2A.9 1. The Court File

In addition to ensuring an adequate appellate record of the oral proceedings, counsel must provide an adequate record of the written submissions as well. This, too, creates practical problems. Especially in large counties with many filings, court personnel may inadvertently neglect to place a document in the file. Key documents may become lost. For example, substantive motions often involve many declarations, exhibits, supporting memorandums, and written objections to evidence. In the hectic pace of a trial court, especially an Independent Calendaring Court, some of those documents may be lost or misplaced, thereby jeopardizing an appeal arising from rulings on those motions. The problem is magnified because the loss of documents from the trial court record may go undetected until much later, when counsel designates the clerk's transcript on appeal and learns for the first time that the key designated documents cannot be found.

Consequently, it is important that, at the conclusion of any proceeding of significance, counsel check the court file to make certain it contains file-stamped copies of all documents filed or lodged during the proceeding. To protect against later loss of documents from the court file, counsel should maintain conformed copies. That way, if the court loses important documents, the copies may be utilized by stipulation or court order.

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§2A.10 2. Exhibits

The appellate record must contain the trial exhibits. However, before an exhibit may be considered on appeal, it must have been admitted into evidence at trial. To ensure that all necessary exhibits are introduced, counsel must pay close attention to the status of the exhibits.

Generally, before it will be admitted, an exhibit must be marked for identification and a foundation laid for its admission. In a trial involving a large number of documents, this can present logistical problems. Frequently, the party offering the document will mark it, establish foundation, question witnesses about the document, and then neglect to offer it into evidence.

To add to the problem, judges differ on how they handle exhibits. Some want exhibits admitted during the course of the trial. Others prefer that the parties wait until the end of their case and offer the exhibits all at once. Too often counsel for a party will rest, only to later realize that he or she has not offered the exhibits into evidence. Usually the court will either prompt counsel about the exhibits or allow the case to be reopened to offer the exhibits. To avoid this problem, counsel must be aware at all times which documents have been marked for identification only and which have been admitted.

Sometimes, even though counsel has offered the exhibit into evidence and believes it has been admitted, the transcript will not clearly reflect that fact, thereby potentially jeopardizing the record on appeal. Whenever an exhibit is offered into evidence, counsel should ensure the court's ruling is clear and on the record.

It is also imperative that exhibits are properly maintained. Problems can arise in two respects. First, during trial, exhibits are usually maintained by the court clerk. Often, exhibits are removed as witnesses are examined, creating a risk they will be misplaced. Sometimes witnesses are shown many exhibits at a time or may have brought their own files for use in testifying. As they leave the stand, they sometimes inadvertently take the exhibits with them. As a result, exhibits may be lost during trial and this problem may not be discovered until the matter is on appeal. It is wise for counsel to make sure witnesses leave any exhibits behind and to check the exhibit box at the end of each day to ensure all exhibits are there.

Second, exhibits are often unavailable on appeal because of the now common practice of returning the exhibits to counsel at the end of the case. Counsel should meet after the trial to make arrangements for the proper maintenance of exhibits pending appeal. The parties may agree to share the cost of storing the exhibits or agree to properly maintain the exhibits and that, if exhibits are lost, copies may be used on appeal. However it is done, counsel should take appropriate steps to ensure the integrity of the trial exhibits in order to preserve the record for appeal.

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C. Preserving the Record: Selected Pretrial Proceedings

§2A.11 1. Motions to Disqualify the Judge

The procedural requirements for motions to disqualify the judge under CCP §170.3 are intricate and strict adherence to them is required. From an appellate standpoint, it is important to remember that any grounds for disqualification of the judge not raised in the trial court are waived. See *San Joaquin Drainage Dist. v Jarvis* (1959) 51 C2d 799, 336 P2d 530 (discussing former CCP §170(6)). A request to challenge the judge under CCP §170.3 must be made at the earliest practical opportunity after facts supporting the ground for disqualification are discovered. CCP §170.3(c)(1); *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 27, 236 CR 193. More importantly, rulings on motions to disqualify are not appealable. *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717. Appellate review may be sought *only* by means of a petition for writ of mandate filed within 10 days of written notice of entry of the court's order determining the question of disqualification. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 276, 2 CR2d 526. See California Civil Procedure Before Trial §6.51 (4th ed Cal CEB 2004).

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§2A.12 2. Demurrers; Motions to Dismiss

Generally, the court's order sustaining a demurrer without leave to amend or granting a motion to dismiss is not appealable. The appeal lies from the subsequent order dismissing the action. See, *e.g., Sheehan v San Francisco 49ers Ltd.* (2009) 45 C4th 992, 89 CR3d 594 (appeal after trial court sustained demurrer without leave to amend and dismissed action with prejudice). Therefore, the plaintiff's counsel must be certain to appeal from the correct order. If the appellant appeals prematurely from the order sustaining the demurrer or granting a motion to dismiss and neglects to appeal from the ensuing order of dismissal, the appellate court may have no jurisdiction to proceed with the appeal. See *Shpiller v Harry C's Redlands* (1993) 13 CA4th 1177, 16 CR2d 814. See also §3.8. Similarly, counsel for the party that prevailed on the motion, having received an order sustaining the demurrer or granting the dismissal, may be assuming the time for appeal is running when it is not because no signed dismissal order has been filed. Therefore, counsel should be certain that the requisite order of dismissal is promptly prepared, signed, and filed. For discussion of demurrers and motions to dismiss, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

A demurrer focuses on the complaint and matters of which judicial notice may be taken. When judicial notice is sought, counsel should be sure the record reflects compliance with Evid C §§450-460. This is especially important with respect to permissive notice under Evid C §453.

Finally, a common mistake is for counsel to assume that when the court takes judicial notice of a document, that makes the *content* of the document admissible. Thus, for example, if the court is asked to take judicial notice of a declaration filed in another case, it may do so under Evid C §452(d). However, this does not mean that the court may judicially notice the truth of statements contained in the declaration. If the declaration contains inadmissible hearsay, that defect is not overcome merely because judicial notice has been taken of the document's existence.

Thus, a party seeking judicial notice should determine not only whether the court may take judicial notice of the document but should also make certain that the content of the document, if needed, is shown to be admissible as well. Otherwise, an order sustaining a demurrer based on improper judicial notice may be subject to reversal. Conversely, the party against whom the judicial notice is invoked should be sure to object when judicial notice is improperly sought.

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3. Motions for Summary Judgment

§2A.13 a. Documenting the Record

Motions for summary judgment and summary adjudication are the most difficult motions for counsel and the court to handle. Because they are intended to be dispositive of the case or, at least, of causes of action, they tend to result in a huge volume of material filed and lodged with the court. Generally, numerous declarations are submitted, along with other documentary evidence, extensive separate statements, supporting memorandums, and objections to evidence. Counsel must ensure that all this material finds its way to the court file and that he or she has conformed copies of everything. Often, materials such as deposition transcripts are merely lodged with the court. Because they bear no file stamp, the court may sometimes be less diligent with them. Counsel must make a special effort to assure that the lodged materials become part of the record. For discussion of motions for summary judgment, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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§2A.14 b. Separate Statements

The key documents in a summary judgment motion are the moving party's separate statement of undisputed material fact and the opposing party's responsive statement of disputed fact. Frequently, these are the first documents the judge considers in working up the motion, and the failure by either side to include the separate statement is, itself, a ground for the court to grant or deny the motion. CCP §437c(b); *Wilson v Blue Cross* (1990) 222 CA3d 660, 671, 271 CR 876.

All facts necessary to grant or deny the motion must be contained in the separate statement. As one court described it, if a fact is not contained in the separate statement, "it does not exist." *United Community Church v Garcin* (1991) 231 CA3d 327, 337, 282 CR 368. If, on review of the separate statements, the court notes a fact that is disputed, the inquiry may end there, and summary judgment will be denied. Note, however, that this "golden rule" of not considering evidence unless it was specifically delineated in the separate statement has been rejected by some courts on the ground that it ignores the summary judgment statute's reliance on the court's discretion. In *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 125 CR2d 499, the court held that the decision to consider evidence not referenced in the separate statement rests with the sound discretion of the trial court. Applying this holding, the court in *King v United Parcel Serv., Inc.* (2007) 152 CA4th 426, 437, 60 CR3d 359, found no abuse of discretion in the trial court's consideration of evidence in declarations, exhibits, and extracts from depositions that were not specifically identified in the separate statement.

What happens if a fact necessary to support or defeat the motion is not contained in the separate statement but may be found in the evidentiary materials filed with the separate statement? This can be important when the trial judge has relied solely on the separate statements to rule on the motion. There is a split of authority on the issue. One theory is that as long as the evidentiary showing is present somewhere, it is irrelevant where in the documents it may be located. *Kulesa v Castleberry* (1996) 47 CA4th 103, 112, 54 CR2d 669. The competing theory is that reliance on facts not contained in the separate statement would render the statutory requirement of a separate statement a nullity. *Fleet v CBS, Inc.* (1996) 50 CA4th 1911, 1916 n3, 58 CR2d 645; *North Coast Bus. Park v Nielsen Const Co.* (1993) 17 CA4th 22, 31, 21 CR2d 104. See *San Diego Watercrafts, Inc. v Wells Fargo Bank, supra.*

From the standpoint of preserving the appellate record, it is imperative that counsel carefully prepare the separate statement to ensure that all material facts are set forth and contain clear references to all evidentiary support. Similarly, opposing counsel should be certain the responsive separate statement sets forth sufficient facts and evidence to demonstrate a triable issue of material fact. Failure to do so creates the risk that the record on appeal will be insufficient to support or attack the trial court's decision.

The separate statement filed in opposition to the motion must indicate whether each fact in the moving party's separate statement is disputed. It is not uncommon for counsel responding to the separate statement to state an objection to the opponent's evidentiary showing but fail to indicate if the fact itself is disputed. This is a decidedly risky practice. If the objection is overruled, the fact will be deemed undisputed. Thus, counsel should make clear whether each fact set forth in the moving party's separate statement is disputed or undisputed *regardless* of whether an objection is made.

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§2A.15 c. Objections

If objections to the other side's evidence are not made at or before the hearing, they are waived. CCP §437c(b). To best preserve objections for the appellate record, they should be made in writing in advance of the hearing. This gives the court the opportunity to consider the objections at the time it is reviewing the evidence and to make a more considered ruling.

An evidentiary objection is preserved only if the trial court rules on it. If there is no ruling, the objection is waived and may not be asserted on appeal. *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137. When the trial court fails to rule on a written objection in the face of a specific request to do so, the objection is not considered to have been waived. *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 784, 97 CR2d 140.

PRACTICE TIP: It is not uncommon for both sides to object to virtually everything said in the opposing declarations, and there may be hundreds of objections filed in connection with a single motion. As a practical matter, this evidentiary "overkill" can be counterproductive. Often, the trial court, having waded through massive amounts of substantive material, has little time or patience to then plow through pages of objections or to issue a ruling on each one.

When asked to rule on myriad objections, the judge may rely on *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 267 CR 819. In *Biljac,* a trial court was asked to rule on many objections, and after it determined that the exercise would serve little purpose, it announced that it would consider only admissible evidence. The court of appeal affirmed on the basis of its ability to review summary judgment rulings de novo. 218 CA3d at 1419. In *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 57 CR3d 204, the First District Court of Appeal expressly overruled its earlier holding in *Biljac Assocs. v First Interstate Bank, supra*.

In *Sambrano v City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151, the Fourth District Court of Appeal also criticized *Biljac* for making it too easy for trial judges to avoid making necessary rulings on evidentiary issues in summary judgment motions, although the court in *Sambrano* did agree with *Biljac*'s holding that the trial judge will be presumed not to have relied on irrelevant or incompetent evidence.

NOTE: The California Supreme Court has granted review in *Reid v Google, Inc.* (review granted Jan. 30, 2008, S158965; superseded opinion at 155 CA4th 1342, 66 CR3d 744). In *Reid*, the Sixth District Court of Appeal had followed *Biljac* when considering the admissibility of statistical evidence of age discrimination. The court of appeal noted that the *Biljac* decision was "substantially correct" and that CCP §437c(c) does not mandate express rulings. 155 CA4th at 1356.

With a wealth of authority supporting the position adopted by the supreme court in *Ann M.,* there has been concern about continued validity of the *Biljac* opinion. Thus, counsel should be cautious whenever a court indicates it is relying on *Biljac*.

There are several steps counsel may take to avoid the problem and ensure the record is preserved for appeal. First, in making objections, counsel should remember that summary judgment tests only whether there are triable issues of *material* fact. Not every fact alleged in a declaration is material. Counsel should tailor objections to narrowly attack evidence relating to material facts. In this way, the trial court will have a more manageable set of objections on which to rule.

Finally, if the court relies on *Biljac* and declines to make specific evidentiary rulings, counsel may respectfully suggest that such a ruling may be insufficient to preserve the court's ruling on appeal. In addition, counsel can winnow down a long list of objections to those that really are central to the summary judgment motion and, if the court relies on the *Biljac* approach, at least suggest that the court rule on the critical objections. However, counsel should make clear that, in making this request, he or she is not withdrawing the request for a ruling on all objections.

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D. Trial

§2A.16 1. Strategic Considerations: Prevailing at Trial While Protecting the Record

During trial, the lawyer has two goals. The first, of course, is to prevail on the merits. Second, but equally important, is to make certain that issues have been preserved for appeal. Both sides must be meticulous about preserving the record. The losing party will be concerned that the record is preserved so that it may raise all potentially reversible errors on appeal. The prevailing party, on the other hand, will want to ensure that all findings and evidence to support the ruling are reflected in the record.

Sometimes, the goals of winning the trial and preserving the appellate record may conflict. For example, counsel may be reluctant to interpose frequent objections for fear of alienating the court or jury, or both. However, if objections are not made during trial, they are waived.

The best way to avoid this conflict is to prepare the case carefully in advance and anticipate potential problems. If the trial lawyer has properly prepared her case and anticipates evidentiary objections, she might raise them before trial via a motion in limine so the court and jury are not burdened during trial, or she might raise an objection in advance to a line of questioning or get the court's permission to make objections at the next break in the trial.

Counsel must also be attuned to circumstances that arise at trial that may tip the balance between these competing interests. For example, if the trial court has erred in admitting or excluding critical evidence and it is clear that the case may be lost as a result, counsel may want to change the focus to an all-out effort to preserve the record for appeal and make the prejudicial impact of the erroneous rulings clear for the appellate court.

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2. Preserving Evidentiary Issues

§2A.17 a. Objections at Trial

The most common method of challenging evidence at trial is, of course, by making an objection. However, unless the objection is properly made, it will not be preserved for appeal. The appellate court will not consider an appeal based on the improper admission of evidence unless an objection was made on a proper ground. Evid C §353. In other words, even if the judgment is based on legally inadmissible evidence, if a proper objection was not interposed at trial, the judgment may be allowed to stand. *Leonardini v Shell Oil Co.* (1989) 216 CA3d 547, 584, 264 CR 883. Moreover, an objection made on one ground will not preserve other grounds for appeal. See *People v Boyd* (1990) 222 CA3d 541, 571, 271 CR 738.

To be effective, the objection must be made promptly. Generally, this means before an answer is given. If the witness has answered, the objecting party must make a motion to strike the answer. Such a motion may be denied if it appears counsel sought to hear the answer before deciding whether to challenge the question. For example, if the question would clearly call for inadmissible evidence, a motion to strike may be denied.

Finally, the objection must appear on the face of the record. Evid C §353. Thus, if an objection is made and argued in an unreported sidebar conference, it cannot form the basis for an issue on appeal. As discussed in §2A.8, counsel should at all times be aware of whether proceedings are on or off the record.

To preserve the record on appeal, counsel must object to inadmissible evidence in a timely fashion, on the proper grounds and on the record. The only way to meet this burden effectively, especially in a long trial, is by thorough preparation before trial and a solid working knowledge of the Evidence Code. Practitioners who do not try cases often should attempt to anticipate the key items of evidence to be offered by both sides and think through all possible objections that might be made. This will help to quickly formulate proper objections to the opponent's evidence and to anticipate and effectively deal with objections.

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§2A.18 b. Conditional Rulings and Continuing Objections

An appellate trap for the unwary can occur when the court makes a conditional ruling on evidence. For example, the court may overrule an objection to evidence subject to a motion to strike if later events satisfy the court that the evidence was inadmissible. However, if the motion to strike is not subsequently made, the objection may be waived. *Ault v International Harvester Co.* (1974) 13 C3d 113, 123, 117 CR 812.

Similarly, some courts will permit a party to make a continuing objection to a line of questioning. While this practice can enhance the flow of the trial, it can also create problems for the appellate record, including the potential loss of the right to raise the objection as a basis for reversal on appeal. A continuing objection requires that a ground be stated for it. However, questions covered by the continuing objection may be objectionable on additional grounds, and the continuing objection on one ground will not preserve these additional grounds. *Smith v County of Los Angeles* (1989) 214 CA3d 266, 285, 262 CR 754. Thus, for example, objecting to a line of questioning as inadmissible opinion did not preserve a second objection based on relevance. *W.C. Cook & Co. v White Truck & Transfer Co.* (1932) 124 CA 721, 729, 13 P2d 549.

Another problem is that it may not always be clear on the record when or to what the continuing objection applies. Often counsel and the court are imprecise in indicating what evidence is and is not covered by the continuing objection. For example, counsel may rise and say simply, "This evidence is subject to my continuing objection." The court may agree in vague terms. As a result, it may not be clear exactly which questions and answers are covered by the continuing objection. Under such conditions, objecting counsel runs the risk of waiving objections on appeal. Consequently, it is up to counsel to make certain the record is clear as to when the continuing objection is operating and when it is not. See California Trial Practice: Civil Procedure During Trial §§15.43-15.44 (3d ed Cal CEB 1995).

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§2A.19 c. Motions in Limine

Motions in limine, used correctly, are a valuable tool, both for educating the court and making a record for appeal. Courts look with great disfavor at being forced to decide complex issues in the midst of trial, especially issues that could have been raised earlier when the court had more time to consider them. When difficult evidentiary issues are raised for the first time during trial, the court is faced with two equally distasteful choices: either rule quickly and run a greater risk of error, or delay the trial and send the jury out while the judge considers the matter more fully. A properly prepared motion in limine avoids these problems and is more likely to result in a ruling that will withstand appellate scrutiny. Moreover, an early ruling on an important matter may point out a defect in the trial strategy that may be corrected, thereby saving the record on appeal.

Even if, as is common with respect to evidentiary matters, the court does not rule on the in limine motion before trial, the motion is still beneficial because it has given the court a "heads up" on the issue. As the trial progresses and evidence is introduced, the judge will be attuned to the issue. When the ruling is finally made, it will be predicated on a more thorough consideration of the evidence and applicable law, again resulting in a better record on appeal. However, if the court reserves a ruling on the in limine motion, the moving party should be sure to raise the objection again at the appropriate point in trial or risk waiving the objection. For discussion of motions in limine, see California Trial Practice: Civil Procedure During Trial, chap 7 (3d ed Cal CEB 1995).

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§2A.20 d. Pocket Briefs

The pocket brief is another method for raising issues without delaying the trial, appearing "obstructionist," or forcing the court to rule without benefit of adequate briefing. A pocket brief is simply a short brief, usually prepared and filed during the trial, to advise the court on a discreet point of law. It is generally a good idea to first advise the court of the issue and of counsel's desire to file a pocket brief.

The advantage of the pocket brief in preserving the record for appeal is basically the same as that of the motion in limine. By preparing a brief rather than relying on an oral objection at trial, counsel ensures that the arguments are clearly stated in the record, both to assist the trial judge and to make the issue clear for purposes of appellate review. The pocket brief also helps avoid the problem of interfering with the orderly progress of the trial.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.21 e. Arguing Objections During Breaks in the Trial

§2A.21 e. Arguing Objections During Breaks in the Trial

Another method of making certain objections are on the record without unduly interfering with the course of trial is to wait until breaks in the trial to make a record on objections. Many courts, rather than hear argument on evidentiary objections at sidebar while the jury is present, routinely order objections be argued at the next break.

The key for purposes of the appellate record is to be sure the objection is, in fact, raised. It is not uncommon that counsel, having been told to wait for the next break to deal with an objection, neglects to raise the issue thereafter. As a result, there is no error and no record for the appellate court to review.

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§2A.22 f. Offers of Proof

Regardless of whether evidence is excluded after a motion in limine or a trial objection, the proponent of the evidence should make an offer of proof to preserve the record for appeal. The offer of proof must reflect the substance, purpose, and relevance of the evidence. Evid C §354. If the offer of proof is in the form of a document that the trial court has excluded, it must be marked for identification or be otherwise included in the record.

There are exceptions to the offer-of-proof requirement. If the excluded evidence was sought to be elicited on cross- or recross-examination, no offer of proof is necessary. Evid C §354(c). *Julrik Prods. v Chester* (1974) 38 CA3d 807, 811, 113 CR 527. Likewise, when the trial court's rulings make compliance with the offer-of-proof requirement futile, an offer is not required. Evid C §354(b); see *Pacific Gas & Elec. Co. v G.W. Thomas Drayage Co.* (1968) 69 C2d 33, 69 CR 561; *People v Adams* (1988) 198 CA3d 10, 18, 243 CR 580. Finally, when the substance of the proposed evidence is otherwise clear from the record, for example, via a motion in limine, it may not be necessary to make an offer of proof. Evid C §354(a).

Despite these exceptions, the safest practice is to *always* make an offer of proof. It is dangerous to assume that your situation falls into one of the exceptions to the offer-of-proof requirement. The appellate court may not agree. For discussion of offers of proof during trial, see California Trial Practice: Civil Procedure During Trial §§15.50-15.60 (3d ed Cal CEB 1995).

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3. Preserving Appellate Review of Trial Motions

§2A.23 a. Motion for Continuance

A motion for continuance during trial is disfavored. See Cal Rules of Ct 3.1332(c). When a request for continuance is appropriate, the motion should be made promptly, as soon as the ground is known. Cal Rules of Ct 3.1332(b); *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783, 140 CR 383. A showing of good cause is also required. California Rules of Court 3.1332(c) lists circumstances that may constitute good cause for a continuance. See, *e.g., Jurado v Toys 'R' Us, Inc.* (1993) 12 CA4th 1615, 1617, 16 CR2d 158. The moving party should demonstrate on the record that it could not have reasonably foreseen the need for a continuance. *Hays v Viscone* (1953) 122 CA2d 135, 140, 264 P2d 173. For discussion of motions for continuance during trial, see California Trial Practice: Civil Procedure During Trial, chap 6, §§18.57-18.54 (3d ed Cal CEB 1995).

PRACTICE TIP: When the ground for the continuance is not already reflected in the record, the better practice, if time permits, is to submit a written declaration in support of the oral motion. For example, when the continuance is sought due to medical emergency, present a declaration from a treating physician, so there is evidence in the record showing compelling need for a continuance.

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§2A.24 b. Nonsuit/Directed Verdict Motions

Stating the grounds with particularity. In order to give plaintiff an opportunity to cure any defects, the defendant must specifically state the grounds for a nonsuit motion. *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272, 219 CR 836; *John Norton Farms v Todagco* (1981) 124 CA3d 149, 161, 177 CR 215. Failure to do so may constitute reversible error on appeal. *Timmsen v Forest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359. For example, the defendant's motion for nonsuit on the ground that plaintiff's evidence was "insufficient" is not a specific statement of grounds. It affords plaintiff no opportunity to cure the defect.

Only grounds raised in the trial court will be considered on appeal. Courts of appeal generally will not consider new grounds for nonsuit or directed verdict that were not raised below. *Timmsen v Forrest E. Olson, Inc., supra*; *Loral Corp. v Moyes* (1985) 174 CA3d 268, 273, 219 CR 836. Thus, the moving party should state all potentially applicable grounds. However, there is an exception to this rule; new grounds may be considered on appeal if the evidentiary defect in the opponent's case is *not curable, i.e.,* the moving party's failure to raise the ground below would have made no difference because the opponent could not have cured the defect in any event. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 839, 206 CR 136.

Requesting leave to reopen. A party who is the subject of a nonsuit motion may request leave to expand its opening statement or reopen its case in an attempt to cure the defects. If the party is denied this opportunity, the nonsuit may be reversed on appeal. *Rodin v American Can Co.* (1955) 133 CA2d 524, 534, 284 P2d 530. However, the party should *affirmatively* request leave. In addition, that request must be reflected in the record, because the court of appeal will otherwise presume the motion was properly granted. *Hodges v Mark* (1996) 49 CA4th 651, 657, 56 CR2d 700. If the party does not request the opportunity to reopen or expand with additional facts, there is no error on the part of the trial judge in granting nonsuit. In other words, the right to raise the issue has been waived. *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162, 177 CR 215.

PRACTICE TIP: If the trial court denies leave to reopen, the party should, at minimum, make an offer of proof on what other evidence it could offer and how that would cure the perceived defects. *Consolidated World Inv. v Lido Preferred Ltd.* (1992) 9 CA4th 373, 381, 11 CR2d 524.

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§2A.25 c. Bifurcation Motions

When a party seeks to bifurcate a trial, the motion should be made promptly and in any event before commencement of trial. For example, when the plaintiff seeks punitive damages, the defendant has a right to a bifurcated trial, with liability and punitive damages to be determined in separate phases. CC §3295(d). This right can be waived if the defendant fails to timely assert it before trial. *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1240, 1 CR2d 301. Under this reasoning, *any* bifurcation motion seeking to control the order of proof might be waived if not timely made. For discussion of bifurcation motions before trial, see California Trial Practice: Civil Procedure During Trial §§6.99-6.104 (3d ed Cal CEB 1995).

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§2A.26 d. Motion for Mistrial

Overview. A motion for mistrial asks the court to end the trial prematurely when an error or irregularity is so potentially prejudicial that an admonition to the jury would not cure it. See *Clemente v State* (1985) 40 C3d 202, 217, 219 CR 445. Because mistrials are disfavored, the party should always consider whether other, less drastic alternatives may be available. For example, if the trial court wrongly admits certain evidence, a motion to strike, coupled with a request to admonish the jury to disregard the evidence, may be sufficient or even required. *Mosesian v Pennwalt* (1987) 191 CA3d 851, 865, 236 CR 778, disapproved on another ground in *People v Ault* (2004) 33 C4th 1250, 1272 n15, 17 CR3d 302.

Requirements. The party should promptly object to the error or irregularity, assign it as misconduct or error, and request that a curative admonition be given to the jury. The failure to make a timely objection and request an admonition waives a claim of attorney misconduct on appeal. *Jensen v BMW* (1995) 35 CA4th 112, 129, 41 CR2d 295; *Benson v Honda Motor Co.* (1994) 26 CA4th 1337, 1350, 32 CR2d 322; *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 318, 74 CR 534.

Cumulative errors. When the error consists of cumulative acts, *e.g.,* repeated misconduct of opposing counsel, the opponent should object to each act of misconduct, request an admonition, ask that the jury be instructed accordingly, and, if the conduct persists, move for a mistrial. See *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 985, 229 CR 513 (opposing counsel objected to one act of misconduct but not to several other similar acts; court held that failure to object to *each* act of misconduct waived right to mistrial).

Exception. Certain acts of misconduct, even single ones, can be so prejudicial that an admonition would be ineffective. In such cases, the admonition requirement may be excused. *Lewis v Bill-Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654, 208 CR 699 (highly prejudicial comment by trial court about one party's evidence held to be incurable error).

Waiver. Generally, a party may waive grounds for a mistrial by failing to make a timely or proper objection or request an admonition. Failure to object will be deemed a waiver. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516; *Love v Wolf* (1964) 226 CA2d 378, 392, 38 CR 183. A claim of misconduct cannot be first raised on appeal if the prejudice resulting from the misconduct could have been cured by a prompt objection. *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 798, 174 CR 348. Delay in objecting, or a failure to object, may waive the right to *later* move for a mistrial. *Horn v Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 C2d 602, 610, 39 CR 721; *Neumann v Bishop* (1976) 59 CA3d 451, 468, 130 CR 786.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.27 4. Jury Instructions

§2A.27 4. Jury Instructions

One of the most common sources of reversible error on appeal is jury instructions. Nevertheless, trial counsel frequently leave the preparation and settling of jury instructions to the last possible moment. This is a mistake. Ideally, counsel should be thinking about the jury instructions during all phases of the case. Jury instructions can be a significant aid in preparing a focused presentation at trial. Beyond that, if thought has been given to the instructions in advance, counsel will be prepared with a thorough and defensible set of instructions at trial.

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§2A.28 a. Time for Submission

Under CCP §607a, instructions are due before the first witness is sworn; thereafter, additional instructions may be submitted on issues not disclosed by the pleadings. However, many local rules contemplate an earlier deadline. For example, in Los Angeles, jury instructions must be exchanged at least 5 days before the final status conference. Los Angeles Ct R 7.9(h). Although the court may accept late jury instructions, its decision will be reviewed under an abuse of discretion standard, a difficult standard to overcome. See *Wilson v Gilbert* (1972) 25 CA3d 607, 613, 102 CR 31. Late instructions are usually the product of lack of preparation. When instructions are hastily put together at the last moment, the potential for error increases dramatically.

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§2A.29 b. Drafting Instructions

Most instructions are taken from BAJI and are given in the form they appear. The biggest problems come in proposing special instructions based on statutory and/or case authority. When proposing a jury instruction based on the language of a statute, the instruction, if possible, should quote the statutory language *verbatim*. Paraphrasing a statute that declares a rule of law may constitute reversible error on appeal. However, surplus language may be omitted when the statutory meaning is unchanged. See 7 Witkin, California Procedure, *Trial* §268 (5th ed 2008).

In contrast, jury instructions that quote an *appellate opinion* may constitute reversible error. *Drake v Dean* (1993) 15 CA4th 915, 924, 19 CR2d 325. In fact, at least one court has noted that direct quotations from a case rarely result in acceptable jury instructions. *Ernest W. Hahn, Inc. v Sunshield Insulation Co.* (1977) 68 CA3d 1018, 1023, 137 CR 732. However, courts will evaluate the propriety of quotations on a case-by-case basis. See *Kline v J.C. Penney Co.* (1957) 153 CA2d 717, 720, 314 P2d 989 (quoting opinion permissible when facts are substantially similar); see also *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1049, 213 CR 69.

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§2A.30 c. Objections and Settling Instructions

The record must reflect who requested each instruction. This is because, on appeal, the court will presume an instruction was requested by the appellant unless the record demonstrates otherwise. *Morehouse v Taubman Co.* (1970) 5 CA3d 548, 559, 85 CR 308. If a party withdraws or proposes modifications to an instruction, that should be reflected as well. If the court refuses your proper instruction, the record *must* show the court *actually denied it*.

Code of Civil Procedure §647 provides that giving or refusing an instruction, or modifying an instruction requested, are "deemed excepted to." Thus a specific exception or objection to an instruction may not be necessary to preserve the issue of instructional error for appeal, even if appellant failed to propose a correct instruction. *Mock v Michigan Millers Mut. Ins. Co.* (1992) 4 CA4th 306, 334, 5 CR2d 594.

Although the language of CCP §647 is quite broad, it is dangerous to rely on it too literally. Courts have carved out many exceptions, holding that it *is* possible to waive an instructional error. A party must propose additional or qualifying language when the instruction proposed is misleading or incomplete, or, while substantively correct, is overly general or unclear. See *Metcalf v County of San Joaquin* (2008) 42 C4th 1121, 1131, 72 CR3d 382 (plaintiff's failure to request different instruction precluded plaintiff from arguing on appeal that court should have instructed differently); *People ex rel Dep't of Transp. v Salami* (1991) 2 CA4th 37, 42 n2, 2 CR2d 833 ("party is only precluded from complaining on appeal that an instruction correct in law is too general or incomplete unless he has requested an additional or qualifying instruction").

Often, issues involving objections to the instructions and their final wording are resolved initially in chambers without a reporter present. When participating in these chambers conferences, counsel must bear in mind that any lack of diligence could result in an objection to an instruction being lost for appeal.

The doctrine of invited error applies to jury instructions. Submitting an erroneous instruction or inviting instructional error precludes that party from raising the instructional error on appeal. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 225, 285 CR 99. Likewise, if the appellant offered a substantially similar instruction to the one given, the doctrine of invited error applies. *Mary M., supra*. Appellant cannot raise the issue of instructional error if it has proposed a substantially similar instruction.

However, when the appellant has requested the instruction only after the trial court has refused its proper instruction on the issue, the doctrine of invited error does not apply. *Winkler v Southern Cal. Permanente Med. Group* (1956) 141 CA2d 738, 746, 297 P2d 728. Similarly, it is not invited error to simultaneously submit two instructions on an issue, conditionally requesting that one be given only if the other, proper instruction is refused. *Christensen v Bocian* (1959) 169 CA2d 223, 228, 336 P2d 1018. For example, a trial court, bound by a published opinion, advised the parties it would instruct on a particular theory. Defendant contended that the case was wrongly decided, but proposed an alternate instruction with different wording. Because the defendant merely acquiesced, after objecting, its proposal of an instruction on that theory did not bar defendant from arguing that the case was wrongly decided. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 212, 285 CR 99.

The key is to make clear at all times what counsel's position is on the various instructions and to make certain that, when the conference is over, any objections or issues are clearly put on the record. In this context, counsel should *always* look at the instructions in their final form. In the give and take of discussion over numerous jury instructions, the court may erroneously attribute an instruction to the wrong party. For example, if a party objects to an instruction and, after the objection is rejected, requests a wording modification that the court accepts, the court may incorrectly indicate on the instruction form that it was requested by the objecting party or both parties. This may result in the objection being deemed waived on appeal.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.31 5. Reading Instructions

§2A.31 5. Reading Instructions

After extensive revision of the proposed jury instructions, the court may have to use a marked up and interlineated copy of the instructions to read to the jury. In such a case, it is easy for the court to misread the instructions or forget to read portions. Counsel should have a copy of the jury instructions in their final form and carefully follow the court's reading. If the court errs and no objection is made by counsel, the error may be waived. See *Cruz* v *Homebase* (2000) 83 CA4th 160, 164, 99 CR2d 435.

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§2A.32 6. Verdict Forms

Requesting special findings. With a general verdict form, any theory free of error and supported by the evidence will be sufficient to support the judgment. A special verdict allows the party to point to specific aspects of the verdict that are inconsistent or are otherwise in error.

A party who desires special findings must, before argument, present in writing the issues or factual questions on which findings are requested and serve a copy of the request on all parties. Cal Rules of Ct 3.1580. Thus, for example, a defendant was held to have waived the right to periodic payments in a medical malpractice case by failing to ask for allocation on the verdict form between future lost years damages and future earnings disability damages. *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 406, 254 CR 840.

Objecting to the verdict form. A party must object to a defect in a verdict form that is apparent on its face, or risk waiving the right to complain about the defect on appeal. *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 521, 143 CR 247 (defendant's objection to verdict was waived when defendant failed to object, following poll of jury, that proper verdict had not been reached); *Greer v Buzgheia* (2006) 141 CA4th 1150, 46 CR3d 780 (defendant forfeited right to assert verdict error on appeal by failing to object to verdict form); *Jensen v BMW* (1995) 35 CA4th 112, 131, 41 CR2d 295 (defendant waived objection to special verdict form by failing to object before court discharged jury).

This rule is limited: Failure to object to an ambiguous verdict form will be deemed a waiver only when the party's silence was the result of a desire to reap a technical advantage or engage in a litigious strategy. *Woodcock v Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 456 n2, 72 CR 217 (no waiver found; verdict was not ambiguous, but even if it were ambiguous, there is no hint of purpose to achieve technical advantage or to fulfill litigious strategy); *Schiernbeck v Haight* (1992) 7 CA4th 869, 879, 9 CR2d 716 (no waiver found; verdict was ambiguous and there is no evidence that defendant's failure to object resulted from "secret agenda" or desire to trap plaintiff); see also *Greer v Buzgheia* (2006) 141 CA4th 1150, 1159, 46 CR3d 780 (declining to apply rule stated in *Woodcock,* because verdict at issue does not involve ambiguity or inconsistency). Moreover, the rule does not require the party to clarify a truly inconsistent verdict—one which would entitle a party to a new trial because the inconsistency cannot be reconciled. *Godfrey v Steinpress* (1982) 128 CA3d 154, 187, 180 CR 95 (no inconsistency in verdict found); *Morris v McCauley's Quality Transmission Serv.* (1976) 60 CA3d 964, 972, 132 CR 37 (court found verdict inconsistency). See also *Keener v Jeld-Wen, Inc.* (2009) 46 C4th 247, 92 CR3d 862 (defendant's objection to verdict was waived when defendant failed to object to jury polling defect that was apparent when verdict was rendered).

PRACTICE TIP: If the jury has rendered verdicts that are or may be inconsistent, the losing party should ask the trial court to send the jury back to resolve the inconsistency, or raise the issue in a posttrial motion. If the error is not discovered until after the jury is discharged and has not been waived, the court will attempt to resolve the issue based on the record in the trial court. If the verdict cannot be clarified, the proper remedy is a new trial. *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1344, 100 CR2d 446.

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E. Posttrial

1. New Trial Motions

§2A.33 a. New Trial Motion to Preserve or Create a Record

Even after the trial is over, a new trial motion may be necessary to make the appropriate record so that certain issues may be raised on appeal. For a detailed discussion of new trial motions, see chap 2.

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§2A.34 b. New Trial Motion as Prerequisite to Raising Excessive or Inadequate Damages Arguments on Appeal

A motion for new trial is not a prerequisite to raising issues on appeal except for certain claims that the damages awarded are excessive or inadequate. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 918, 114 CR 622. When the party plans to argue that the court made a *factual* error in calculating damages, a new trial motion is required. When determining the damages requires "resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for the first time on appeal." *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 122, 135 CR 802; see also *Baker v Pratt* (1986) 176 CA3d 370, 382, 222 CR 253. However, a new trial motion is not necessary to preserve the issue when the party claims there was *a legal* error in calculating the damages. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co., supra*. Because the distinction between factual and legal error is an illusive one, a new trial motion should always be made if the party plans to raise the issue of excessive or inadequate damages on appeal.

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§2A.35 c. Nonparties' Use of Posttrial Motion to Obtain Standing to Appeal

A timely filed posttrial motion may give a nonparty standing to appeal from the judgment that it otherwise would not have. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15, 1 CR2d 805; *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 100 CR2d 446; *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406. However, only nonparties who are "aggrieved" by the judgment may invoke this procedure. A nonparty is aggrieved if the judgment injuriously affects his or her rights or interests; those interests must be "immediate, pecuniary and substantial." *County of Alameda v Carleson* (1971) 5 C3d 730, 737, 97 CR 385.

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§2A.36 d. New Trial Motion to Preserve Factual Matters Not Otherwise in the Record

If there is a potential claim of error that is not reflected by the record, a new trial motion may be the vehicle to preserve the record for appeal. The most common example is juror misconduct. Improper deliberations in the jury room or juror bias are seldom reflected in the record. It is the party's responsibility to make that record through declarations submitted in support of a new trial motion. See CCP §657(2). Such declarations are the only recognized way of getting the matter into the record.

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§2A.37 e. No Knowledge Affidavits

When the claim is that a juror committed misconduct before deliberations, the moving party and its attorney must each file a no knowledge affidavit in support of the new trial motion. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516. The affidavit requirement ensures that a party aware of misconduct during trial does not hold the misconduct claim in reserve in order to gamble on the outcome of the trial. *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 186, 269 CR 240. The opposing party must object in the trial court if the moving party and its lawyer fail to file such affidavits. Failure to object means that the opposing party has waived the defect for appeal. 220 CA3d at 188.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.38 f. Juror Declarations and Counterdeclarations

§2A.38 f. Juror Declarations and Counterdeclarations

If the moving party submits juror declarations or affidavits demonstrating jury misconduct that contain proper and admissible matter, they may be deemed admitted unless the opposing party submits counterdeclarations. *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 681, 18 CR2d 923; *Chronakis v Windsor* (1993) 14 CA4th 1058, 1066, 18 CR2d 106. For a discussion of what constitutes admissible material in a juror declaration and how declarations may be used to impeach a jury verdict, see Evid C §1150; *Krouse v Graham* (1977) 19 C3d 59, 137 CR 863. See also §2.25.

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g. Jurisdictional Requirements for New Trial Motion

§2A.39 (1) Filing Deadline for Notice of Intent to Move for New Trial

The trial court is vested with jurisdiction to rule on a new trial motion by a timely filed notice of intent to move for new trial. The court lacks the power to grant new trial sua sponte. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 919, 114 CR 622. When the notice of intent is filed late, the court lacks jurisdiction to hear the motion, and any order granting new trial is void. *Douglas v Janis* (1974) 43 CA3d 931, 935, 118 CR 280. For a detailed discussion of deadlines for a notice of intent to move for new trial, see §2.25.

PRACTICE TIP: Be absolutely certain that the notice of intent to move for new trial is timely filed. A late notice will deprive the trial court of the power to rule on the motion, even if it is inclined to rule favorably. This could also mean that the court of appeal will not consider certain issues, *e.g.,* juror bias arguments or factual errors in calculating damages, that must be raised by a new trial motion.

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§2A.40 (2) Jurisdictional Time to Rule on the Motion

The trial court also has a short window of time in which to rule on a new trial motion, generally 60 days after service of written notice of entry of judgment or the filing of the first notice of intent to move for new trial. CCP §660; see §2.33. If the trial court does not rule within this period, it loses jurisdiction to do so, and the motion will be deemed denied by operation of law. CCP §660. Any order made by the court after the time to rule has expired is void, and the time cannot be extended by the court or parties. *Marriage of Liu* (1987) 197 CA3d 143, 150, 242 CR 649; *Meskell v Culver City Unified Sch. Dist.* (1970) 12 CA3d 815, 825, 96 CR 773. For a discussion of when a ruling occurs, see §2.33.

PRACTICE TIP: On a new trial motion, the court, rather than the party, sets the hearing date. Counsel for the moving party should make certain that the hearing is set in plenty of time for the court to make a ruling within the jurisdictional period. The hearing should not be continued if that will jeopardize the trial court's window of time in which to rule.

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§2A.41 (3) Requirements for an Order Granting New Trial

Should the court agree to grant the new trial motion, it must issue an order and specification of reasons. CCP §657; *Oakland Raiders v National Football League* (2007) 41 C4th 624, 634, 61 CR3d 634 (courts require strict compliance with §657). Counsel *cannot* prepare the specification of reasons *for* the court. See §2.34. The specification must contain a clear and concise statement of reasons supporting the grant of new trial, framed in terms of the facts of the case rather than in generalities. See §2.34. While the specification of reasons may be contained in a separate statement from the order granting new trial, that separate statement must be signed and filed within 10 days after the new trial order is filed. CCP §657. The separate statement may be filed after the 60-day jurisdictional period to rule on a new trial motion has expired, but this 10-day period is itself jurisdictional and cannot be extended. If the specification of reasons is filed after the 10-day period has expired, the order granting new trial is void. *Mercer v Perez* (1968) 68 C2d 104, 121, 65 CR 315; *Fergus v Songer* (2007) 150 CA4th 552, 566, 59 CR3d 273 (specification of reasons was nullity because it was filed more than 10 days after entry of minute order granting new trial).

PRACTICE TIP: Counsel for the moving party must be intimately familiar with the jurisdictional provisions for the granting of a new trial motion. Failure to adhere to these complex requirements can snatch defeat from the jaws of victory.

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§2A.42 2. Motions for Judgment Notwithstanding Verdict

A motion for judgment notwithstanding the verdict (JNOV) is a posttrial challenge to the sufficiency of the evidence. The court will presume that all evidence supporting the verdict is true. See *Moore v City & County of San Francisco* (1970) 5 CA3d 728, 733, 85 CR 281. In California state court, a directed verdict or nonsuit motion is not a prerequisite to moving for JNOV posttrial. (This is to be contrasted with federal practice.) The JNOV statute, CCP §629, provides that the court must grant a motion for JNOV when a motion for directed verdict would have been granted had it been made. For a discussion of jurisdictional and other deadlines applicable to JNOV motions, see §§2.45-2.49. A JNOV motion should be considered whenever the evidence is insufficient as a matter of law on all or part of a claim or defense.

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§2A.43 3. Statement of Decision

In a court trial, the court's rationale is normally expressed through a statement of decision. The court is not required to render a statement of decision unless a proper request for it is made. Absent a statement of decision, the reviewing court will assume that the trial court made whatever findings were necessary to support the judgment. *Whittington v McKinney* (1991) 234 CA3d 123, 129, 285 CR 586.

The advantage of a statement of decision is that it pins down findings as the basis of the judgment. If the appellant can successfully attack those findings, the judgment may be reversed. On the other hand, well-developed, detailed findings may discourage an appeal by the losing party.

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§2A.44 a. Timing of the Request

For trials lasting more than 8 hours or more than 1 calendar day, a request for statement of decision must be made within 10 days after announcement or service of the tentative decision, whichever is later. CCP §632; Cal Rules of Ct 3.1590(d). The tentative decision may be written or oral. If it is oral it must be on the record. Thus, if the court announces a decision after the trial, counsel should assume that is the tentative opinion and use that as the basis for requesting a statement of decision.

For trials lasting less than 1 calendar day or less than 8 hours over more than 1 day, a request for statement of decision must be made before submission of the matter for decision. CCP §632; Cal Rules of Ct 3.1590(n). If the trial is short, it is a good idea to request the statement of decision during the trial. Sometimes it may not be clear how much trial time has been occupied over several days. If the trial is under the time limit and, at the close of trial, the court announces the matter submitted and leaves the bench, it may be too late to request the statement of decision.

A late request for statement of decision deprives the requesting party of a right to the statement. However, the court is free to grant the request. The reality is that the preparation of statements is something many judges want to avoid, so the likelihood of relief if the statutory requirements are not followed is small.

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§2A.45 b. Form of the Request

Although CCP §632 does not set forth a requirement for the form of the request, clarity of the record militates in favor of a written request, especially if there are many issues to be decided. The request must specify the controverted issues the requesting party wants included in the statement. CCP §632.

It is important to carefully draft the request because the court need only deal with the controverted issues specified. If the request is vague, the court may not have to prepare a statement. On the other hand, a request that is too specific may also be improper. The request must specify controverted issues. It is not a set of interrogatories to the court requiring it to respond to myriad minutiae regarding the trial. *People v Casa Blanca Convalescent Homes, Inc.* (1984) 159 CA3d 509, 525, 206 CR 164 (request contained 75 questions and asked for rulings on uncontradicted issues); *Kroupa v Sunrise Ford* (1999) 77 CA4th 835, 842, 92 CR2d 42.

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Source: Civil Litigation/California Civil Appellate Practice/2A Preserving the Record for Appeal/§2A.46 c. Preparation of the Statement of Decision

§2A.46 c. Preparation of the Statement of Decision

The statement may be prepared by the court, or, as is often the case, the court may order that it be prepared by counsel. The proposed statement must be served within 30 days of announcement or service of the tentative decision. Cal Rules of Ct 3.1590(f).

Counsel should carefully review a proposed statement prepared by another party. The proposed statement might contain findings on matters not resolved by the court or might misstate what the court indicated in its tentative decision. When a proposed statement of decision is incomplete or ambiguous, the other parties have 15 days after service of the proposed decision to object. Cal Rules of Ct 3.1590(g). The failure to object may constitute a waiver of those deficiencies. *Pellegrini v Weiss* (2008) 165 CA4th 515, 528, 81 CR3d 387.

The statement must be in writing unless the parties agree to the contrary or the trial lasted less than 1 day or 8 hours over more than 1 day (in which case it can be announced orally on the record in the presence of the parties). CCP §632; Cal Rules of Ct 3.1590(n). The statement need not address every issue specified in the request nor does it have to deal with underlying evidentiary issues as long as it addresses the principal controverted issues, *i.e.,* those that are relevant and essential to the judgment. *Kuffel v Seaside Oil Co.* (1977) 69 CA3d 555, 138 CR 575.

NOTE: If the statement fails to resolve a controverted issue or if the statement is ambiguous, a party who wishes to raise omissions or ambiguities on appeal must bring those omissions or ambiguities to the attention of the trial court, or the appellate court will presume the court found against the party on those issues. CCP §634.

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3

Is the Order or Judgment Appealable?

Elliot L. Bien
E. Elizabeth Summers

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I. INTRODUCTION

§3.1 A. Scope of Chapter

Review by appeal of rulings in superior court civil actions. The superior courts make a variety of procedural and substantive rulings, from the setting of status conferences to the ultimate disposition of the case. Although many rulings have considerable practical significance for the parties, only certain kinds of rulings can be reviewed by a higher court. This chapter discusses which rulings in superior court civil actions qualify for appellate review by appeal. Although this chapter occasionally refers to extraordinary writ procedure, which is the alternative method of appellate review, a more detailed examination of that subject is in California Civil Writ Practice (4th ed Cal CEB 2008). Appellate review of rulings in limited civil cases is discussed in chap 10 of this book. Criminal appellate practice is covered in Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007).

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§3.2 B. Basic Rules and Concepts

What does "appealable" mean? A ruling is "appealable" when the aggrieved party has a right to an appellate review of that ruling by means of an appeal, as opposed to an extraordinary writ.

When rulings are appealable, the aggrieved party must seek appellate review by appeal or forfeit the right to appellate review. If a ruling is appealable, the aggrieved party must pursue an appeal within the prescribed time limit or forfeit any appellate review of that ruling. An extraordinary writ will not be entertained if a party has failed to appeal and the ruling was appealable. *Mauro B. v Superior Court* (1993) 19 CA4th 187, 23 CR2d 482. Nor can an appealable ruling be reviewed on a subsequent appeal from the final judgment. CCP §906. For further discussion, see §3.4.

Some nonappealable rulings can still be reviewed on appeal. Although nonappealable rulings may not be appealed at the time they are entered, such rulings, if they are significant to the outcome of the case, can be reviewed on an appeal from the final judgment. CCP §906. For example, an order denying a demurrer or summary judgment motion is nonappealable, but if the motion was based on a complete statute of limitations defense, that issue can be raised on a timely appeal from the final judgment. Note, however, that §906 specifically provides that *appealable* rulings prior to the final judgment, such as the entry of a complete summary judgment in favor of a particular defendant, may not be reviewed on a subsequent appeal from a final judgment as to other parties.

Nonappealable rulings are still subject to review by extraordinary writ. If a ruling is not appealable, the aggrieved party may still *request* an appellate review at that time by filing a petition for the appropriate extraordinary writ. As the word "petition" implies, it is entirely within the discretion of the appellate court whether to grant such an extraordinary review of the challenged order. The great majority of such petitions are summarily denied.

In general, the requirement for a writ is that the ordinary remedy, an appeal from the final judgment, is inadequate for one or more practical reasons. For example, if one of several causes of action is dismissed incorrectly, to wait for an appeal means that the parties and the superior court must go through one trial on the remaining causes of action, and then another trial if the appellate court reinstates the cause of action on appeal. A review by extraordinary writ, with a stay of trial on the remaining causes of action, may greatly increase the efficiency of the litigation. See generally California Civil Writ Practice (4th ed Cal CEB 2008).

Available options when rulings are nonappealable. In summary, when rulings are nonappealable, the aggrieved party generally has the option to do nothing, to petition for an extraordinary writ, or to raise the point on a subsequent appeal from the final judgment. Note, however, that in some cases only one method of review is available. For example, a motion to disqualify a judge under CCP §170.1 or §170.6 is only reviewable by writ petition. CCP §170.3(d); *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717. See California Trial Practice: Civil Procedure During Trial §6.78 (3d ed Cal CEB 1995).

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§3.3 C. Statutory Basis of Appealability

Appealability is determined by statute. Even though appellate jurisdiction in California derives from the constitution (Cal Const art VI, §11), it is controlled by statute. *Southern Pac. Co. v Oppenheimer* (1960) 54 C2d 784, 785, 8 CR 657. In general, a judgment or an order is appealable only if the right to appeal is expressly granted by statute. *Skaff v Small Claims Court* (1968) 68 C2d 76, 78, 65 CR 65; *Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 198, 40 CR3d 108.

Generally, appealability is governed by CCP §904.1. Code of Civil Procedure §904.1 is the principal authority on appealability in civil actions. It is the first and often the only authority that need be consulted.

Section 904.1 establishes two major classes of appealable rulings: (1) the "judgment" in an action or proceeding and (2) a variety of other orders listed in that statute. The statute also recognizes that appeals may be taken from orders and decrees made appealable by the Probate Code or the Family Code.

However, other statutes confer appealability on specified orders. For example, the Arbitration Act makes a variety of orders appealable (see CCP §§1294-1294.2; §3.42); CC §1714.10 makes appealable civil conspiracy claims against attorneys (see §3.45).

Past exception to basic rule. Despite the statutory control of appealability, several appellate decisions have suggested that judicial policy considerations can expand or contract appealability. One court, for example, stated that "the decisions temper the rule [limiting appeals to a final judgment] to the point of justifying an exception in unusual cases when its enforcement would result in injustice or more waste than saving of the time and energies of court and counsel." *Guntert v City of Stockton* (1974) 43 CA3d 203, 209, 117 CR 601. However, the supreme court's decision in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804, may have ended this point of view by disapproving a long line of decisions that permitted appeals from nonfinal rulings if they could be deemed "separate and independent." Notably, the "unusual" case described in the quote above from *Guntert* is the kind of case that might be considered appropriate for discretionary writ review. 7 C4th at 743. For further discussion of *Morehart,* see §3.21.

Appealability cannot be determined by consent, stipulation, or trial court order. The statutory basis of appealability precludes appellate jurisdiction by consent or stipulation. *Phillips v Phillips* (1953) 41 C2d 869, 874, 264 P2d 926; *Hoveida v Scripps Health* (2005) 125 CA4th 1466, 1468, 23 CR3d 667. Nor can a trial court confer or withhold appealability except by entering or failing to enter an appealable judgment or order. The trial court has no power to declare the appealability or nonappealability of its rulings. Compare *Armstrong Petroleum Corp. v Superior Court* (1981) 114 CA3d 732, 736, 170 CR 767 (cannot sever counts or issues for purpose of permitting several appeals), with *Marriage of Schultz* (1980) 105 CA3d 846, 852, 164 CR 653 (cannot preclude review by "reservation of jurisdiction" over final order).

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II. IMPORTANCE OF APPEALABILITY

§3.4 A. Failure to Appeal an Appealable Ruling Is Fatal

Failure to file timely appeal from appealable ruling bars later appeal. Failure to file a timely appeal from an appealable ruling is a far more serious mistake than attempting to appeal from a nonappealable ruling. In general, a nonappealable ruling may be reviewed on appeal from a subsequent final judgment. CCP §906. However, the same statute provides that, if the earlier ruling was appealable it may *not* be reviewed on the subsequent appeal. See *Marriage of Curtis* (1992) 7 CA4th 1, 6, 9 CR2d 145; *United Pac. Ins. Co. v Hanover Ins. Co.* (1990) 217 CA3d 925, 266 CR 231; *Guenter v Lomas & Nettleton Co.* (1983) 140 CA3d 460, 465, 189 CR 470.

In addition, even if review of an appealable order has already commenced via a writ petition, the writ proceeding must be dismissed if the aggrieved party failed to file a timely notice of appeal. Absent "special circumstances," such as an order in excess of jurisdiction, the lack of a timely appeal will bar writ review. *Mauro B. v Superior Court* (1993) 19 CA4th 187, 23 CR2d 482.

Examples. The fatal consequences of failing to appeal an appealable order are well illustrated by *Marriage of Curtis, supra* (failure to appeal from order determining community property interest in present and future military retirement benefit; later collateral attack held unavailable); *United Pac. Ins. Co. v Hanover Ins. Co., supra* (failure to appeal order enforcing arbitration award foreclosed challenge by insurer of its allocation of liability); *Chong v Fremont Indem. Co.* (1988) 202 CA3d 1097, 249 CR 264 (after determination of main issues in action, respondent cross-appealed from order awarding attorney fees as CCP §128.5 sanction against respondent's attorney; cross-appeal dismissed because respondent had not filed separate notice of appeal within 60 days after entry of sanctions order that was immediately appealable as final order on collateral matter directing payment of money).

Use caution when there are two or more versions of same judgment or order. An extremely dangerous situation arises when two or more versions of the same judgment or order are entered. The most common example is the following situation: A party timely appeals the first document titled "judgment," such as the clerk's judgment following a jury verdict. CCP §664. But the judge ultimately signs a new judgment, often prepared by the prevailing party's counsel. Lulled by the original appeal, the aggrieved party forgets to appeal from the new judgment. But the first judgment has been superseded and is no longer appealable. See §3.19. Once the appeal deadline expires as to the new judgment, the aggrieved party loses all appellate rights. In this situation, the wisest practice is to appeal both judgments. The court of appeal will later dismiss the improper appeal, and appellant's counsel will not be forced to guess or face a malpractice claim.

JUDICIAL PERSPECTIVE: There may be another result when two or more versions of the same judgment are entered. If the appealable judgment is the second judgment, the notice of appeal might be deemed to be premature but effective if it can be construed to refer to the second judgment. Cal Rules of Ct 8.104(e). (But see §3.6. See also §7.8 on liberal construction of sufficiency of notice.)

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§3.5 B. Appealing Nonappealable Ruling Is Seldom Fatal

General rule: appeal from nonappealable ruling must be dismissed. It is well settled that appellate courts lack jurisdiction to entertain appeals from nonappealable rulings and judgments. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 696, 107 CR2d 149. The general rule is that such an appeal must be dismissed even on the court's own motion. *Jennings v Marralle* (1994) 8 C4th 121, 126, 32 CR2d 275; *Olson v Cory* (1983) 35 C3d 390, 398, 197 CR 843; *Chavez v Carpenter* (2001) 91 CA4th 1433, 1437, 111 CR2d 534.

Mistaken appeal of nonappealable ruling is sometimes curable. Although failing to appeal an appealable ruling is fatal (as shown in §3.4), mistakenly appealing a nonappealable ruling sometimes has little practical consequence. (But see §3.2 on failure to properly challenge denial of a motion to disqualify a judge.) The party and counsel might suffer no more than the expense and embarrassment of initiating an appeal and then having it dismissed. However, this does not mean the appellate courts are powerless to decide the issues raised in such a case. There are a surprising number of ways in which a dismissal of the appeal can be avoided and the review can proceed on the merits. See §§3.6-3.9.

JUDICIAL PERSPECTIVE: Do not underestimate the expense of appealing a nonappealable ruling; it can be considerable and sanctions may be imposed. (See chap 20.)

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§3.6 1. Appealability Cures Available in Trial Court

Seek to remedy mistake while trial court has jurisdiction. If the problem of a mistaken appeal is discovered while the trial court retains jurisdiction, the prospective appellant may and should ask the trial court for the appropriate solution. A missing judgment can be supplied. An incomplete judgment or order can be completed by amendment or the entry of a new version. For example, if a demurrer is sustained without leave to amend, an erroneous appeal from this order may be corrected by obtaining an order of dismissal.

Appealable trial court ruling after defective appeal. When a trial court enters an appealable ruling after the defective appeal has been commenced, the reviewing court can save the appeal by deeming it taken from the appealable ruling. See, *e.g., Marriage of Wood* (1983) 141 CA3d 671, 677, 190 CR 469; *American Motorists Ins. Co. v Cowan* (1982) 127 CA3d 875, 882, 179 CR 747; *Mason v Mercury Cas. Co.* (1976) 64 CA3d 471, 473 n2, 134 CR 545.

JUDICIAL PERSPECTIVE: This rarely occurs today. Often, courts decline to "save" such appeals.

With two or more versions of same judgment or order, appeal from latest or both. Make sure to appeal from the appealable judgment or order, which is usually the latest version. If the appealability of the earlier version is in question, file a notice of appeal that specifies it and is also timely as to that version. The latter alternative is the wisest approach. Never appeal from the earliest ruling alone.

Action of trial court after appeal has been filed. At the appellate court's direction, the parties can return to the trial court to try and remedy a mistake even after an appeal has been filed. The leading case of *Gombos v Ashe* (1958) 158 CA2d 517, 322 P2d 933, disapproved on other grounds in *Taylor v Superior Court* (1979) 24 C3d 890, 900, 157 CR 693, observed in dictum that appellate courts can remand cases to the trial court to take appropriate action even after an appeal has been filed and briefed. The appeal can then be deemed to have been taken from the corrected ruling. This situation occurred in *Gutierrez v Petoseed Co.* (1980) 103 CA3d 766, 768 n1, 163 CR 313 (trial court entered summary judgment nunc pro tunc at appellate court's suggestion after appeal was taken from order granting the motion for summary judgment); *Carroll v Hanover Ins. Co.* (1968) 266 CA2d 47, 48, 71 CR 868 (same procedure as to order sustaining demurrer). But see *Rios v Klaveness* (1969) 2 CA3d 1077, 1079, 83 CR 150 (appellants did not follow appellate court's suggestion to obtain appealable judgment or order; appeal from defective order dismissed).

JUDICIAL PERSPECTIVE: Typically, the court of appeal directs the *parties* to obtain from the trial court an appealable order or judgment. The appellate court rarely, if ever, directs the trial court. Sometimes, the court of appeal enters the appealable order or judgment itself.

After returning to trial court, follow court of appeal's instructions. In returning to the trial court to correct a mistake, it is crucial to follow the appellate court's instructions. Otherwise, the trip to the trial court for a cure can be more fatal than the disease. In *Yancey v Fink* (1991) 226 CA3d 1334, 277 CR 415, plaintiff appealed from a nonappealable order sustaining a demurrer without leave to amend. The appellate court directed plaintiff to file a proper order or judgment of dismissal before it would consider his appeal. Instead, he filed a voluntary request for dismissal of the entire action, which was duly entered by the superior court clerk, and then attempted to appeal. But a voluntary dismissal is not appealable, and the appellate court was forced to dismiss his second appeal, the only one he had left.

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§3.7 2. Appealability Cures Available in Appellate Court

If an order appealed from cannot be treated as an appealable ruling under any of the theories described above, the appellate court still has two ways in which to proceed to a decision on the merits:

- The appellate court itself can cure the appealability defects; or
- The appellate court can treat an invalid notice of appeal as a writ petition.

These methods are discussed in §§3.8-3.9.

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§3.8 a. Curing Appealability Defect

Treating preliminary ruling as appealable. When an appeal is taken from a preliminary ruling and no formal order followed, the reviewing court may simply treat the preliminary ruling as appealable. See, *e.g., Conservatorship of Starr* (1989) 215 CA3d 1390, 264 CR 80 (appeal from minute order instructing counsel to prepare formal order treated as appeal from later formal order); *Jones v Los Angeles Community College Dist.* (1988) 198 CA3d 794, 244 CR 37 (appeal from order granting summary adjudication of issues treated as appeal from final judgment); *In re Jennifer V.* (1988) 197 CA3d 1206, 243 CR 441 (appeal from jurisdictional order in child dependency proceeding treated as appeal from later dispositional order); *Hummel v First Nat'l Bank* (1987) 191 CA3d 489, 236 CR 449 (appeal from order confirming sale of property treated as appeal from final judgment confirming legal description and transfer of property); *People ex rel Rominger v County of Trinity* (1983) 147 CA3d 655, 658, 195 CR 186 (order sustaining demurrer without leave to amend treated as appeal from order of dismissal); *Lieding v Commercial Diving Ctr.* (1983) 143 CA3d 72, 73, 191 CR 559 (minute order granting summary judgment treated as appeal from summary judgment); *Safeway Stores v Brotherhood of Teamsters* (1978) 83 CA3d 430, 434 n1, 147 CR 835 (memorandum of decision treated as appeal from final judgment vacating an arbitration award).

Amending record to make correct basis for appeal. The reviewing court may also amend the record to include a formally correct basis for appeal. The classic amendment case is *Gombos v Ashe* (1958) 158 CA2d 517, 322 P2d 933, disapproved on other grounds in *Taylor v Superior Court* (1979) 24 C3d 890, 900, 157 CR 693. The trial court sustained a demurrer to one of several causes of action and entered a judgment of dismissal. Plaintiffs appealed, but proceeded with the remaining causes of action. The court of appeal nonetheless retained and decided the appeal from the dismissal of the single cause of action. Although acknowledging that it was not a final judgment, the court stated that, "in the interests of justice and to prevent unnecessary delay," it would amend the judgment and treat the appeal as taken from the judgment as amended, applying former Cal Rules of Ct 2(d) (now Cal Rules of Ct 8.104(e)) to solve the prematurity problem. 158 CA2d at 524. *Gombos* has been followed in many cases. See, *e.g., Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 921, 167 CR 831; *Tenhet v Boswell* (1976) 18 C3d 150, 153, 133 CR 10; *Shepardson v McLellan* (1963) 59 C2d 83, 88, 27 CR 884.

See also *Hilliard v A.H. Robins Co.* (1983) 148 CA3d 374, 384, 196 CR 117 (judgment amended to take account of order granting directed verdict); *Munoz v Davis* (1983) 141 CA3d 420, 431, 190 CR 400 (order sustaining demurrer modified to add order of dismissal); *National Indem. Co. v Demanes* (1978) 86 CA3d 155, 150 CR 117 (judgment "deemed to have incorporated" ruling reflected in prejudgment decision); *Nystrom v First Nat'l Bank* (1978) 81 CA3d 759, 762, 146 CR 711 (order granting motion for summary judgment deemed to include entry of summary judgment); *Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 208, 137 CR 118 ("final judgment" that did not dispose of complaint in intervention amended to include order that intervenor was entitled to no relief on complaint in intervention).

Appellate court might be reluctant to save defective appeal. Not all courts, however, are interested in saving defective appeals by resort to the foregoing devices. And crowded appellate dockets may deepen that resistance.

For example, in *Jordon v Malone* (1992) 5 CA4th 18, 6 CR2d 454, the plaintiff attempted to appeal the trial court's tentative decision that judgment for defendant should be entered. Although former Cal Rules of Ct 2(d) (now Cal Rules of Ct 8.104(e)) provided that a notice of appeal filed before entry of judgment, but after its rendition, shall be valid and considered to be filed immediately after judgment is entered, the court of appeal noted that no judgment had been rendered. Thus, plaintiff was attempting to appeal from a nonappealable order, and the court dismissed the appeal. The plaintiff in *Jordon* argued that, because the tentative decision called for the defendant to prepare the judgment, the plaintiff was powerless to prepare a judgment that would enable him to appeal. The court of appeal disagreed, finding that plaintiff could have requested the trial court to compel defendant to prepare a judgment or could have requested permission to prepare the judgment himself.

Similarly, the court of appeal in *Shpiller v Harry C's Redlands* (1993) 13 CA4th 1177, 16 CR2d 814, rejected an attempt to appeal from a notice of ruling of a dismissal when the record contained no order of dismissal as required by CCP §904.1. The court criticized the parties' persistence in appealing from nonappealable orders and stated that it was no longer the Fourth District's policy to save erroneous appeals. See also *Cohen v Equitable Life Assur. Soc'y* (1987) 196 CA3d 669, 671, 242 CR 84 ("notice to the bar that henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders").

Cases like *Shpiller, Jordon,* and *Cohen* illustrate that the practice of saving appeals by curing jurisdictional defects is

on the wane. Lacking an appealable judgment or order below, appeals may increasingly be summarily dismissed.

JUDICIAL PERSPECTIVE: The resistance of appellate courts to save defective appeals is due to frustration at the appellate bar's continued failure to appeal from appealable orders or judgments. This is a jurisdictional defect and should not be treated lightly.

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§3.9 b. Incurably Defective Appeals May Be Treated as Writ Petitions

Invalid appeal might be treated as extraordinary writ when no other device available to save appeal. Even if appealability can not be accomplished by one of the devices discussed in §3.8, the appellate court may nonetheless proceed to a decision on the merits by treating the invalid appeal as a petition for an extraordinary writ. See, *e.g., Mounger v Gates* (1987) 193 CA3d 1248, 239 CR 18; *People v Cimarusti* (1978) 81 CA3d 314, 319, 146 CR 421; *United States Fin. v Sullivan* (1974) 37 CA3d 5, 11, 112 CR 18. Indeed, in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804, in which the California Supreme Court significantly tightened the final judgment rule (see §3.21), the court treated the defective appeal as a writ petition and decided the issues on the merits.

Criteria for treating defective appeals as writ petitions. There are principled criteria for treating defective appeals as writ petitions. In the following cases, defective appeals were treated as writ petitions for the indicated reasons:

- The appealability of sanctions orders was uncertain, and the court disagreed with the only published court of appeal decision on the issue. See *Drum v Superior Court* (2006) 139 CA4th 845, 853, 43 CR3d 279.
- Case presented matters of statewide concern affecting the public interest. See *Morehart,* 7 C4th at 747; *Mounger,* 193 CA3d at 1254.
- Appeal was an inadequate remedy, and the record and briefs included the elements necessary for review as a petition for a writ of mandate. See *Olson v Cory* (1983) 35 C3d 390, 400, 197 CR 843.
- The right to appeal had been taken away retroactively by legislation, and the parties had fully briefed the issues. See *In re Albert B.* (1989) 215 CA3d 361, 373, 263 CR 694.
- The time to appeal the final judgment had not yet expired, issues of continuing interest had been fully briefed, and proceeding with writ review would resolve the litigation. See *Marriage of Vryonis* (1988) 202 CA3d 712, 714 n1, 248 CR 807.
- The issues had already been fully briefed, and respondent did not question the propriety of appellate court review. See *Marriage of Hattis* (1987) 196 CA3d 1162, 1165 n2, 242 CR 410.

As these broad criteria suggest, the decision to treat a defective appeal as a writ petition is a highly discretionary one. In fact, it is closely akin to deciding whether to accept an original writ petition for a hearing on the merits. Note that this device is never available to salvage a tardy appeal. See §7.31.

Do not rely on writ device to salvage appeal. Prudent counsel will not rely on the availability of the writ device any more than the other curative measures discussed earlier. Appellate dockets are extremely crowded, and the courts may be just as happy to dismiss a defective appeal altogether. As a matter of principle, too, they may prefer to enforce the appealability rules rather than invoke a curative device unless the case is truly compelling. See, *e.g., Ballard v Taylor* (1993) 20 CA4th 1736, 25 CR2d 384 (no exigent reason shown why improper appeal of discovery sanction award should be treated as writ); *Wells Props. v Popkin* (1992) 9 CA4th 1053, 11 CR2d 845 (writ treatment denied as to denial of sanctions); *Lemaire v All City Employees Ass'n* (1973) 35 CA3d 106, 110, 110 CR 507 (writ treatment denied despite parties' request). See §3.8.

JUDICIAL PERSPECTIVE: If a court allows an improper appeal to be treated as a writ, it rewards sloppy legal work and permits the case to be decided out of turn, to the detriment of properly appealed cases.

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§3.10 3. When to Commence Both Appeal and Writ Petition in Doubtful Cases

At a minimum, file notice of appeal. When the appealability of a ruling is unclear and the notice of appeal deadline will expire before the entry of a ruling that may be appealable, counsel should, at the very least, file a notice of appeal. As noted in §3.4, the consequences of not doing so are fatal. At worst, the appeal will be dismissed, and a ruling that is held nonappealable can be raised on a later appeal from the final judgment. CCP §906.

Contemplate filing simultaneous writ petition. A writ petition can be filed simultaneously. For example, in *California Trial Lawyers Ass'n v Superior Court* (1986) 187 CA3d 575, 231 CR 725, the CTLA filed a writ petition and a notice of appeal challenging the superior court's decision of a contested election for the office of president-elect. The appellate court entertained the writ because of the prejudicial delay and doubt as to the leadership of the organization. See also *Resnik v Superior Court* (1986) 185 CA3d 634, 230 CR 1 (granting writ review in interests of affording complete relief).

Considerations in filing simultaneous writ petition. However, is it wise to file a simultaneous writ petition as a hedge against the possibility that the court of appeal will deem the ruling nonappealable? As explained in §3.9, the court may elect to treat a defective appeal as a fictional writ petition and decide the case on that basis. Is there any point, therefore, in filing an *actual* writ petition on the premise that it might increase the likelihood of an appellate review?

Cost. Economics is one factor. A separate writ petition requires an independent filing fee, an immediate transcript of the dispositive hearing, the duplication of a complete record, and counsel's time and expense to research and draft the necessary factual and legal sections of a writ petition. Of course, many aspects of the appellate brief and writ petition would be substantially similar. See California Civil Writ Practice (4th ed Cal CEB 2008).

Advocacy advantages. The advocacy advantages to a separate writ petition are that it can more effectively make the case for granting writ review. The normal appeal process has no place for verified factual showings or the special legal arguments that must be included in a writ petition. Counsel must rely instead on a letter, a motion, or a request to file a supplemental brief. Also, a separate writ petition might favorably impress the court with the seriousness of the aggrieved party's interest in writ review if the appeal is incurably defective.

Legal risks. There is a legal risk, however, in filing a separate writ petition along with an appeal. Even without one, the appellate court can decide the case by treating the defective notice of appeal as a fictional writ petition. But if the court finds that it can quickly reject the aggrieved party's position, it can deny the writ petition *on the merits* with res judicata effect on the pending appeal and law of the case effects on any issues pending in the trial court. Although a summary denial is not binding (*Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728), an expedited decision on the merits is still possible in limited circumstances (*Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623).

Balance benefits against risks. The benefits of a separate writ petition must be carefully weighed against the extra cost as well as the risk of an abbreviated adverse outcome. Either approach may be appropriate, depending on the circumstances.

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III. APPEALABLE JUDGMENTS

§3.11 A. Appealable Judgment Defined

Code of Civil Procedure §904.1(a) provides that the "judgment" in every action or special proceeding is appealable. Although this rule seems straightforward enough, the opposite can be true. The rule that judgments are appealable is fraught with complexity and danger for litigants and their attorneys.

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§3.12 1. General Rule

The general rule derived from CCP §904.1(a) is that all "judgments" are appealable. By statutory definition (CCP §577), a judgment is the "final determination of the rights of the parties." In other words, "judgments" are only those determinations that finally adjudicate one group of parties' rights. See *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (judgment is final determination of rights of parties).

This general rule also applies to special proceedings, in which any judgment is appealable even without specific statutory authorization. *In re Bank of San Marino* (1985) 167 CA3d 247, 250 n1, 213 CR 602. Nonetheless, some statutes provide that particular judgments are appealable. See, *e.g.,* Pen C §1507 (final order granting habeas relief to other than criminal defendants); CCP §1294(d) (judgment in general arbitration proceeding); Fam C §3554; CC §249 (judgment in Uniform Civil Liability for Support Act proceeding).

See §§3.15-3.21 for discussion of the rules for determining whether a judgment is appealable. See §§3.23-3.25 for exceptions to the general rule. See §3.22 for a checklist that will assist you in making this determination. See §3.41 for a chart listing opportunities and procedures for prejudgment review of superior court orders.

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§3.13 2. Problems of Terminology

The "final judgment" conundrum. The type of appealable ruling discussed in §§3.11-3.22 is commonly called a "final judgment." However, it would be more useful and less misleading to refer to this type of ruling as an "appealable judgment" or simply "judgment." Other appealable rulings are covered in §§3.26-3.47.

Term "final judgment" is redundant. The problems begin with terminology. The familiar expression "final judgment" is redundant. The governing statute, CCP §904.1(a), provides that an appeal may be taken from "a judgment." By statutory definition, however, a judgment is the "*final* determination of the rights of the parties in an action or proceeding." CCP §577 (emphasis added). Thus, a ruling must be "final" to qualify as a judgment in the first place. On the other hand, CCP §904.1(a) itself refers to an "interlocutory judgment," which seems to be a contradiction in terms.

Illustrative is *Walton v Magno* (1994) 25 CA4th 1237, 30 CR2d 815. Following a defense verdict, the trial court granted plaintiff's motion for entry of a judgment in his favor notwithstanding a verdict on the issue of liability. But because this judgment was followed by a trial on damages, defendant's appeal from the liability judgment was correctly dismissed as premature. The *Walton* opinion held that the order was "interlocutory" and therefore nonappealable. It would be clearer to say that such an order was not a *judgment*, because it was not a final determination of the dispute. The term "final judgment" is also notoriously ambiguous. It sometimes refers to appealability, sometimes to res judicata as law of the case, and sometimes to the effectiveness or enforceability of the judgment itself. See generally 7 Witkin, California Procedure, *Judgment* §7 (5th ed 2008).

Usefulness of term "final judgment." Nevertheless, "final judgment" has gained wide acceptance in the bench and bar as the subject of CCP §904.1(a). And, despite its redundancy, the term has some countervailing benefit for practitioners. It is a reminder that in the real world of civil practice sometimes two or more documents designated "judgment" are entered in the same case. The practitioner must carefully analyze whether any of them are *final* judgments for appealability purposes.

Most helpful term is "appealable judgment." Over all, the best term for a judgment that is appealable is simply "appealable judgment." It is neither redundant nor misleading and provides the same warning to counsel as "final judgment." In addition, it focuses that warning on the real issue, "appealability," rather than the amorphous concept of finality. For example, a judgment that is final for purposes of appealability is not final for purposes of res judicata until the case has been decided on appeal. *Taylor v State Farm Fire & Cas. Co.* (1985) 172 CA3d 557, 218 CR 403.

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§3.14 3. "Single Final Judgment" or "One Final Judgment" Rule

Statement of rule. An even more misleading expression than "final judgment" (see §3.13) is the "single final judgment rule" or "one final judgment rule." A typical statement is that there can be "but one final judgment in an action, and that is one which in effect ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy" (*Bank of America v Superior Court* (1942) 20 C2d 697, 701, 128 P2d 357) or, "[o]rdinarily … appeal would be barred by the 'one final judgment' rule" (*Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 921, 167 CR 831).

"Single" or "one final" language is misleading. The "single final judgment rule" or "one final judgment rule" is redundant, false, and dangerous. First, it is redundant because by definition there can be only one final version or manifestation of the same thing. There is simply no need to add the modifier "single" or "one" to the term "final."

Second, the "single" or "one" modifier is not only false but dangerous by implying that a case can have only one appealable judgment. Often that is not true, as when a judgment fully and finally adjudicates all claims between one set of adverse parties but not others or all claims by or against a party in one capacity but not others. See §3.20. A practitioner misled by the "single final judgment rule" may fail to appeal appealable judgments and forfeit the client's appellate rights.

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B. Criteria for Appealable Judgment

§3.15 1. Rule of Effect Over Form

Effect of ruling prevails over form. If the effect of a ruling is a final determination of all pending issues between adverse parties, the ruling is an appealable judgment. See, *e.g., Shepardson v McLellan* (1963) 59 C2d 83, 86, 27 CR 884 (order granting nonsuit); *Estate of Miramontes-Najera* (2004) 118 CA4th 750, 755, 13 CR3d 240 (order denying petition to set aside nonconsensual nonprobate transfers of community property); *Warford v Medeiros* (1984) 160 CA3d 1035, 207 CR 94 (order denying application for order compelling depositions in out-of-state case); *Estate of Lock* (1981) 122 CA3d 892, 896, 176 CR 358 (signed and filed memorandum of decision); *Bellah v Greenson* (1978) 81 CA3d 614, 618 n1, 146 CR 535 (order sustaining demurrer without leave to amend); *Eldridge v Burns* (1978) 76 CA3d 396, 403, 142 CR 845 ("interlocutory judgment"); *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 432, 55 CR 529 (order excluding essential evidence on only cause of action).

Unusual cases. Nevertheless, some courts seem to have based their determinations of appealability on form rather than effect. In *Contreras v Blue Cross* (1988) 199 CA3d 945, 245 CR 258, the court accepted an appeal on the authority of CCP §901.1(b) (making orders setting aside dismissals appealable), although the effect of the order was simply to allow plaintiffs to file a first amended complaint, which is not an appealable ruling.

Another unusual case is *Adoption of Michael H.* (1995) 10 C4th 1043, 43 CR2d 445, in which the court accepted an appeal from what the majority acknowledged was not an appealable order, but simply a "determination that an unwed father has a constitutional right to veto adoption absent a showing of unfitness." 10 C4th at 1050 n2. Over the objection of Justice Kennard, the majority reasoned that the adoptive parents "waived the contention that [the unwed father] is unfit by noticing an appeal rather than raising that issue in the trial court. Because of this waiver, the order appealed from was in effect a 'final determination of the rights of the parties' from which an appeal may be taken.'" 10 C4th at 1050 n2.

The *Michael H.* reasoning could logically be extended to other situations. However, it would not be surprising if the supreme court eventually limited its use to such cases as adoptions, in which delayed adjudication would be extremely harmful to the parties.

Court's characterization does not control appealability. Suppose that a nonfinal determination is designated a "judgment"; or, conversely, that a mere "order" is actually dispositive of all issues between a set of adverse parties. The legal effect controls, not the title or the form of the document. The lower court's own characterization of its ruling does not control appealability. *Daar v Yellow Cab Co.* (1967) 67 C2d 695, 698, 63 CR 724; *County of Tulare v Ybarra* (1983) 143 CA3d 580, 583, 192 CR 49.

A good example of the application of this principle is in *California Ass'n of Psychology Providers v Rank* (1990) 51 C3d 1, 9, 270 CR 796, in which the California Supreme Court upheld the appealability of an order granting summary judgment on one of seven causes of action. Because the cause of action in question (declaratory relief sought) incorporated the allegations of the other six causes of action, the summary judgment "effectively disposed of the case." See also *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 107 CR2d 149 (follows *California Ass'n of Psychology Providers v Rank, supra*); *Jones v Los Angeles Community College Dist.* (1988) 198 CA3d 794, 244 CR 37 (order summarily adjudicating issues that had effect of barring plaintiff's entire civil action was therefore treated as appealable judgment); *Keenan v Dean* (1955) 134 CA2d 189, 285 P2d 300 (upheld appeal from superior court's order striking cross-complaint that had raised amount in suit above municipal court's jurisdiction; effect of order was final determination of case in superior court and its retransfer to municipal court). Thus, when a series of orders is entered, with each disposing of part of the case, the last order may constitute an appealable judgment no matter how it is entitled. Better practice is to have a separate judgment entered at the conclusion of the case.

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§3.16 2. Judgment Must Be Judicial Determination of Contested Issues

No appeal of judgment by stipulation or consent. The next important principle of law is that the judgment must be a judicial "determination" (CCP §577) of contested issues in the sense of an actual adjudication. Although termed a "judgment" and entered by a court, it will not be appealable if its entry was by consent or stipulation. See *Reed v Murphy* (1925) 196 C 395, 399, 238 P 78; *Hoveida v Scripps Health* (2005) 125 CA4th 1466, 1468, 23 CR3d 667. In *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 121, 94 CR3d 109, the court explained that "the issue is not whether parties may stipulate to a judgment in order to secure appellate review. … [T]here must be a properly filed motion for the appellate court to review." In that case, the stipulated judgment, providing that the trial court would have granted summary judgment if a summary judgment motion had been made, was reversed.

The same is true when a dismissal or settlement is tantamount to a consent judgment. See *Don Jose's Restaurant, Inc. v Truck Ins. Exch.* (1997) 53 CA4th 115, 61 CR2d 370 (no appealable judgment when trial court dismissed two causes of action following summary adjudication and parties stipulated to dismissal of remaining causes of action without prejudice and with waiver of statutes of limitations, effectively permitting parties to litigate remaining causes of action in event trial court's dismissal was affirmed). See also *Four Point Entertainment, Inc. v New World Entertainment, Ltd.* (1997) 60 CA4th 79, 70 CR2d 82, and *Jackson v Wells Fargo Bank* (1997) 54 CA4th 240, 62 CR2d 679 (drawing same conclusion on substantially similar facts).

Although consent judgments are not normally appealable, there is an exception when "consent was merely given to facilitate an appeal following adverse determination of a critical issue." *Norgart v Upjohn Co.* (1999) 21 C4th 383, 400, 87 CR2d 453 (citing *Building Indus. Ass'n v City of Camarillo* (1986) 41 C3d 810, 817, 226 CR 81). See also *McMahon v Craig* (2009) 176 CA4th 1502, 1508 n1, ___ CR3d ___ (to be appealable, stipulated judgment must fully resolve all claims in underlying litigation). *Norgart* clarifies the distinction between the rule and the exception (21 C4th at 401):

> The rationale turns on the intent of the parties *either* to settle their dispute fully and finally *or* merely to hasten its transfer from the trial court to the appellate court. The rule covers cases in which the parties intended a full and final settlement of their dispute, and the exception covers those in which they intended merely a hastening of its trial-court to appellate-court transfer.

Parties may stipulate to *facts,* and a judgment resolving a dispute about their legal effect meets the test for appealability. CCP §1140.

No appeal of voluntary dismissal. Similarly, a voluntary dismissal of a lawsuit is not appealable. See *Cook v Stewart McKee & Co.* (1945) 68 CA2d 758, 761, 157 P2d 868. An involuntary dismissal, however, if ordered by the court without the consent of the party whose claim was dismissed, necessarily involves adjudication. Such orders of dismissal, when properly written, signed, and filed, "shall constitute judgments and be effective for all purposes" (CCP §581d) and will be appealable as such. *Herrscher v Herrscher* (1953) 41 C2d 300, 303, 259 P2d 901; *Kellis v Ring* (1979) 92 CA3d 854, 857 n2, 155 CR 297; *Vedder v County of Imperial* (1974) 36 CA3d 654, 658, 111 CR 728.

The court in *In re Tomi C.* (1990) 218 CA3d 694, 267 CR 210, stated this rule somewhat differently: A voluntary dismissal of a dependency petition is not appealable by the father unless he requested affirmative relief. In *Tomi C.,* the dismissal was held nonappealable, not only because it was voluntary, but also because it was without prejudice and was therefore not a final determination. But see *In re Lauren P.* (1996) 44 CA4th 763, 52 CR2d 170 (limiting *Tomi C.* to its facts, court held that any parent aggrieved by dismissal of dependency petition is entitled to appeal of dismissal).

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§3.17 3. Judgment May Not Be Preliminary

Preliminary rulings. Only the final determination of the parties' rights qualifies as an appealable judgment. CCP §§577, 904.1(a). Seldom, however, do judicial rulings emerge for the first time in final form. They typically begin with an oral ruling, minute order, or memorandum of decision. In many cases, the court requests the prevailing party to prepare a more formal order. In other cases, the court must still rule on some additional issue. Even if the type of ruling in question involves a final determination of the rights of adverse parties, only the ultimate contemplated form of that ruling can be appealable.

Examples. In *Marriage of Griffin* (1993) 15 CA4th 685, 19 CR2d 94, a party appealed a minute order that purported to value certain property but did not represent a final disposition of all marital property issues. Because further judicial action was necessary for a final resolution of property and other issues, the court of appeal held that the minute order was not appealable. It could also be said more simply that the minute order was not an appealable judgment. See also *In re Alma B.* (1994) 21 CA4th 1037, 26 CR2d 592 (order directing review of status of adoptive family in 60 days was not appealable, because further judicial review could moot appeal); *Integral Land Corp. v Anderson* (1944) 62 CA2d 770, 145 P2d 364 (order granting summary judgment not appealable). A similar problem arises when a key element of an announced decision is omitted from the formal judgment and appellant seeks review of the element by directing the appeal to the preliminary decision. See also *National Indem. Co. v Demanes* (1978) 86 CA3d 155, 160, 150 CR 117 (appellate court treated judgment as incorporating preliminary decision).

Caution: Blanks in judgment for attorney fees and costs. The general rules of appealability strongly suggest that any blanks in a judgment render it nonappealable. But when the blank is merely for the inclusion of statutory costs, a ministerial act, the order is treated as appealable. See *Grant v List & Lathrop* (1992) 2 CA4th 993, 3 CR2d 654 (judgment is appealable even if court leaves a blank for later entry of costs by the clerk under Cal Rules of Ct 3.1700(b)(4)). But see *Soldate v Fidelity Nat'l Fin., Inc.* (1998) 62 CA4th 1069, 72 CR2d 404 (when posttrial order setting attorney fees follows trial court judgment awarding attorney fees to appellant, trial court's posttrial order must be expressly specified in notice of appeal to be reviewable; holding in *Grant v List & Lathrop, supra,* applies to appeals from *unfavorable* awards of attorney fees only). The appeal of the posttrial order setting attorneys fees can also include a challenge to the entitlement to those fees as well as to the amount. *P.R. Burke Corp. v Victor Valley Wastewater Reclamation Auth.* (2002) 98 CA4th 1047, 120 CR2d 98.

In contrast, a blank reserving a substantive issue like prejudgment interest keeps the judgment in a preliminary and nonappealable status. But the pendency of attorney fees claims presents a difficult and unsettled issue. Compare *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 1035, 285 CR 856, *Eldridge v Burns* (1978) 76 CA3d 396, 405, 142 CR 845, and *Kamper v Mark Hopkins, Inc.* (1947) 78 CA2d 885, 888, 178 P2d 767 (judgment appealable even though attorney fee issues outstanding), with *Olson v Cory* (1983) 35 C3d 390, 399, 197 CR 843 (judgment not appealable, because trial court reserved jurisdiction to award, among other things, attorney fees and litigation costs); but see *Grant v List & Lathrop, supra* (amount of attorney fees and costs determined after judgment reviewable on appeal from judgment with blank for amount of attorney fees and costs), and *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 48 CR2d 301 (appellate court assumes judgment appealable prior to attorney fee determination but suggests trial court stay entry of judgment).

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§3.18 4. Judgment May Not Be Provisional

Can party appeal judgment contingent on future event? Judgments sometimes determine all disputes between the parties, but some matter might be left unresolved pending a future event. Some judgments "reserve jurisdiction," while others simply provide for more, less, or different relief if a stated condition is met. Can there be an appeal following entry of the judgment, or must the aggrieved party await the future event and the possibility of further judicial action? There is no easy answer to that question.

When jurisdiction is expressly reserved. A judgment that expressly reserves jurisdiction over specified matters requires special analysis. No clear rules have emerged, but the court in *Lyon v Goss* (1942) 19 C2d 659, 670, 123 P2d 11, stated:

> As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.

The cases applying *Lyon* are not easy to reconcile. Counsel analyzing a particular judgment that reserves jurisdiction should compare the facts of the case with those of the cases in which the courts have discussed this issue. Compare, *e.g., Eldridge v Burns* (1978) 76 CA3d 396, 404, 142 CR 845, and *Palo Alto-Menlo Park Yellow Cab Co. v Santa Clara County Transit Dist.* (1976) 65 CA3d 121, 129, 135 CR 192, in which final determinations were found, with *Olson v Cory* (1983) 35 C3d 390, 399, 197 CR 843, and *Degnan v Morrow* (1969) 2 CA3d 358, 362, 82 CR 557, in which the court concluded that the reservation of jurisdiction defeated appealability.

JUDICIAL PERSPECTIVE: A rule can be fashioned from these cases; they are not inconsistent. The test for whether a judgment that reserves jurisdiction in the trial court is appealable is whether or not the judgment is self-executing or whether it requires further judicial action. If it is self-executing, it is appealable.

When judgment contains conditional element but jurisdiction is not reserved. When the court does not reserve jurisdiction, but the judgment includes a conditional element, it will likely be considered appealable if no further judicial action is required when the condition occurs. See, *e.g., Taper v City of Long Beach* (1982) 129 CA3d 590, 606, 181 CR 169 (only ministerial action required if condition occurs); *Yarbrough v Yarbrough* (1956) 144 CA2d 610, 613, 301 P2d 426 (judgment self-executing on payment of costs and attorney fees); *Reeves v Hutson* (1956) 144 CA2d 445, 451, 301 P2d 264 (same). But see *Nimmigadda v Krishnamurthy* (1992) 3 CA4th 1505, 5 CR2d 351 (no appealable judgment until party awarded attorney fees makes election of remedies).

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§3.19 5. Judgment Must Be Final Version

Appeal from final version of judgment. A common and important sense of the word "final" is "finished," as in "final product." Because the appellate courts do not want to be troubled with a series of appeals from different versions of the same basic rulings, only the final *version* of a judgment between the same parties is appealable.

Transfer of appealability. Even if the original version of a judgment is appealable, the entry of a new version transfers appealability from the original to itself. In Witkin's phraseology, to be appealable "the judgment must be subsisting; a superseded judgment is not appealable." 9 Witkin, California Procedure, *Appeal* §98 (5th ed 2008).

The term "transfer of appealability" simply means that the earlier version of the judgment has been superseded by entry of the new version. The earlier version thereby loses its appealability, and the new version becomes the appealable judgment. All applicable procedural rules and deadlines then apply to the judgment.

Example. Transfer of appealability is illustrated in *Dickens v Lee* (1991) 230 CA3d 985, 281 CR 783, in which the county clerk entered a judgment based on a judicial arbitration award. The judgment included an award of $1000 in attorney fees and an award of statutory costs in an unstated amount. However, the arbitrator had also specified that the prevailing party was to receive no more than $1000 in costs *and* fees. Thus, following a memorandum of costs and a motion to tax, the superior court amended the clerk's judgment to provide for a total recovery of $1000 in fees and statutory costs. The appellant in *Dickens* filed a notice of appeal from the amended judgment. The court of appeal held that the original judgment had been superseded by the new version and, therefore, had no further significance in determining the 60-day appeal deadline.

Always file new and timely notice of appeal from new version of appealable ruling. A note in *Dickens* suggests that the change from the original to the new version must be "substantial" in order to transfer appealability as stated above. The opinion explained that "the amended judgment substantially modified the initial judgment as to costs and thus superseded the initial judgment for purposes of appealability." 230 CA3d at 987 n1. However, the change in that case had no apparent practical effect. The original $1000 award was intended to include both fees and costs. The final judgment accomplished exactly the same result. It simply replaced an unspecified costs award with a denial of costs.

Thus, it remains an open question how much of a change is required in order to transfer appealability from one version of a judgment or order to the next. Consequently, counsel should always file a new and timely notice of appeal from any new version of an appealable ruling.

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§3.20 6. Judgment Need Be Final Only as to One Set of Parties

Appealability of judgment as between one set of parties. In California, a judgment resolving all issues between any one set of adverse parties is immediately appealable. See, *e.g., Justus v Atchison* (1977) 19 C3d 564, 568, 139 CR 97, disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661 (demurrers sustained on all causes of action of certain plaintiffs); *Johnson v Threats* (1983) 140 CA3d 287, 289, 189 CR 447 (demurrers sustained on all counts against one defendant); *Schreiber v Ditch Road Investors* (1980) 105 CA3d 675, 677 n1, 164 CR 633 (order dismissing complaint in intervention).

Appealability of final determination as to single capacity of party. An extension of the foregoing logic is the rule that final determinations as to a single *capacity* of a party, such as a trustee, are appealable even if his or her rights in other capacities remain undecided. See *First Sec. Bank of Cal. v Paquet* (2002) 98 CA4th 468, 119 CR2d 787; *Dominguez v City of Alhambra* (1981) 118 CA3d 237, 241, 173 CR 345. It can sometimes be argued, however, that the two capacities are so closely related that an appeal should be postponed until the rights of all capacities of the party have been fully adjudicated. See *Tinsley v Palo Alto Unified Sch. Dist.* (1979) 91 CA3d 871, 880, 154 CR 591.

Class actions. The most common setting for the "separate capacity" appealability rule is class-action litigation. The case law appears settled that orders denying a plaintiff's right to proceed on class-action allegations, leaving individual claims to be litigated, are appealable. This "tightly defined and narrow concept" is sometimes referred to as the "death knell" doctrine. *Farwell Sunset Mesa Prop. Owners Ass'n* (2008) 163 CA4th 1545, 1547, 78 CR3d 666. As the leading case explained, this order is "tantamount to a dismissal of the action as to all members of the class other than plaintiff." *Daar v Yellow Cab Co.* (1967) 67 C2d 695, 699, 63 CR 724 (demurrer to class action allegations sustained). See *Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (writ issued vacating order sustaining demurrer). See also *Richmond v Dart Indus.* (1981) 29 C3d 462, 470, 174 CR 515 (certification motion denied); *Green v Obledo* (1981) 29 C3d 126, 149 n18, 172 CR 206 (concluding that an order partially decertifying a class would not be directly appealable); *Kennedy v Baxter Healthcare Corp.* (1996) 43 CA4th 799, 50 CR2d 736 (demurrer sustained as to all unnamed class plaintiffs); *Guenter v Lomas & Nettleton Co.* (1983) 140 CA3d 460, 464, 189 CR 470 (certification motion denied). But see *Rosack v Volvo of Am. Corp.* (1982) 131 CA3d 741, 747, 182 CR 800; *Petherbridge v Prudential Sav. & Loan Ass'n* (1978) 79 CA3d 509, 513, 145 CR 87 (citing *Vasquez v Superior Court* (1971) 4 C3d 800, 806, 94 CR 796, in which a demurrer was sustained to only one of two pleaded class-action counts); *Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325.

An order merely certifying a class smaller than requested, however, has been held nonappealable when it does not have the "death knell" effect of making further proceedings impracticable. *General Motors Corp. v Superior Court* (1988) 199 CA3d 247, 244 CR 776 (discussing many of the aforementioned cases).

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§3.21 7. No Claims Can Be Pending Between Parties to Judgment

Even if all other criteria for appealability are met, a judgment between any two adverse parties in the action is not appealable if any other claim between those parties in the same action remains pending. The California Supreme Court strongly endorsed this rule in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804, overruling a long line of appellate court cases beginning with *Schonfeld v City of Vallejo* (1975) 50 CA3d 401, 123 CR 669. The *Schonfeld* line of cases permitted an appeal if a ruling was considered sufficiently "separate and independent" so that a separate appeal appeared to make practical sense. Disapproving that exception, *Morehart* held squarely that "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." For applications of this rule, see *Harrington-Wisely v State* (2007) 156 CA4th 1488, 1494, 68 CR3d 209; *Hoveida v Scripps Health* (2005) 125 CA4th 1466, 23 CR3d 667; *Don Jose's Restaurant, Inc. v Truck Ins. Exch.* (1997) 53 CA4th 115, 61 CR2d 370.

Note that *Morehart* is consistent, however, with the rule that disposition of *all* claims between fewer than all parties creates an appealable order. See *Daon Corp. v Place Homeowners' Ass'n* (1989) 207 CA3d 1449, 255 CR 448, which held that a judgment dismissing a cross-complaint is appealable if it finally adjudicates all pending claims as to a particular party.

JUDICIAL PERSPECTIVE: The general rule, that to be appealable the judgment must resolve all pending claims between the parties, is often characterized as the "one final judgment rule." See §3.14.

An exception to the rule that no existing claims can be pending between the parties can be found in the law of government tort liability. A pending tort action against a public entity does not preclude an appeal from the denial of plaintiff's petition to file a late administrative claim. See *Scott v County of Los Angeles* (1977) 73 CA3d 476, 140 CR 785.

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§3.22 C. Checklist for Appealable Judgment

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The following questions will help counsel ascertain in most situations whether a document entered by the superior court, whether or not labeled as a judgment, is appealable as a judgment.

Question	Consequence of Answer
1. Does the "judgment" purport to grant or deny relief on a substantive issue?	"No" means it is not a judgment, and thus not appealable as such.
2. Conversely, does the "judgment" merely rule on a motion or a demurrer?	"Yes" defeats appealability.
3. Did a court issue the judgment as its own decision of contested issues?	"No" defeats appealability.
Or did the parties simply settle and stipulate to the entry of the judgment?	"Yes" defeats appealability.
4. Must some further ruling or document be entered in order to finalize the court's decision of a substantive issue (*i.e.,* other than on statutory costs)?	"Yes" defeats appealability.
5. Does the judgment contemplate further judicial action or some change in the relief granted on the occurrence of a condition?	"Yes" may defeat appealability, depending on the circumstances.
6. Does the judgment finally adjudicate all claims between at least one set of adverse parties?	If so, it is appealable as to those parties despite the pendency of other parties' claims.
7. Does the judgment finally adjudicate all claims by and against a party in a particular capacity?	If so, it is appealable notwithstanding the pendency of claims by or against the party's other capacities.
8. Is there any other substantive dispute still pending between the parties named in the judgment, such as another cause of action, a cross-action, or a particular remedy (other than statutory costs)?	"Yes" defeats appealability with limited exceptions.
9. Has the court entered a subsequent version of the judgment and made any substantive change in it (*e.g.,* not merely filling in a blank left for statutory costs)?	If so, only the new version is appealable.

See §3.47 for a chart showing opportunities and procedures for prejudgment review of superior court orders.

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IV. EXCEPTIONS TO APPEALABLE JUDGMENT RULE

§3.23 A. Judgments Declared Nonappealable by Statute

Contempt judgments are not appealable. By statute, a judgment of contempt is "final" in the sense that it is conclusive; but it is not appealable. CCP §§904.1(a)(1)(B), 1222. A contempt judgment must be reviewed, if at all, by a writ of certiorari, habeas corpus, or other extraordinary writ. See *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121; California Civil Writ Practice (4th ed Cal CEB 2008).

Judicial arbitration award entered in judgment book is not appealable. A judicial arbitration award that has been entered in the judgment book has "the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal." CCP §1141.23. A party that is dissatisfied with a judicial arbitration award must make a timely request for a trial de novo after the award is filed with the court. See CCP §1141.20.

Exceptions for arbitration awards. When the arbitrator's award does not specify the amount of recoverable costs, the court's later determination of that issue is appealable. *Dickens v Lee* (1991) 230 CA3d 985, 281 CR 783. Also, a judgment on an arbitration award is appealable regarding prearbitration judicial rulings on claims prior to submission to arbitration that are independent of the arbitrated claim. *Jennings v Marralle* (1994) 8 C4th 121, 32 CR2d 275.

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§3.24 B. Final Determination of "Collateral" Matter Is Appealable

Appealability of collateral rulings. A long line of cases confers appealability on so-called collateral rulings. These are decisions on matters considered "distinct from the general subject of [the] litigation, affecting only the particular parties to the controversy and finally settling the same" (*Collins v Corse* (1936) 8 C2d 123, 124, 64 P2d 137), or are "independent of the main action" (*Greene v Superior Court* (1961) 55 C2d 403, 405, 10 CR 817).

Some courts have suggested that the order must also direct payment of money or performance of an act. See, *e.g., Sjoberg v Hastorf* (1948) 33 C2d 116, 119, 199 P2d 668; *Conservatorship of Rich* (1996) 46 CA4th 1233, 54 CR2d 459 (order that merely prevents performance of act or payment of money cannot constitute appealable collateral ruling, but that requirement is not universal); *People v McKale* (1979) 25 C3d 626, 639 n5, 159 CR 811 (order denying attorney fees characterized as collateral and appealable); *Bandy v Mount Diablo Unified Sch. Dist.* (1976) 56 CA3d 230, 233 n2, 126 CR 890 (order granting lien on cause of action and prospective judgment). However, other courts have suggested that the order does not require the direct payment of money or performance of an act. See, *e.g., Meehan v Hopps* (1955) 45 C2d 213, 216, 288 P2d 267 (order disqualifying counsel); *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 903, 91 CR3d 617 (order denying motion for sanctions).

Possible effect of *Morehart* on appealability of collateral rulings. The state supreme court's decision in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804, discussed in §3.21, might presage similar holdings by the courts limiting the "collateral order" exception for appealability. *Morehart* attacks appealability based on the notion that one of several causes of action is sufficiently "separate and independent" to warrant a separate appeal. Logically, at least, that approach applies equally to so-called collateral orders. There is also great pressure on California's appellate court system to reduce its caseload; the collateral order doctrine may be a tempting target for restriction or elimination. But unless the case law starts to move in that direction, the collateral order doctrine should be considered alive and well.

Examples of collateral rulings. The following kinds of rulings have been considered "collateral" and therefore appealable:

- Order for temporary support in a dissolution action. *Marriage of Skelley* (1976) 18 C3d 365, 368, 134 CR 197; *Greene v Superior Court, supra*.
- Order allowing and settling a receiver's account, fixing compensation, and providing for sale or receivership property to pay compensation. *Fish v Fish* (1932) 216 C 14, 16, 13 P2d 375. See also *Schreiber v Ditch Road Investors* (1980) 105 CA3d 675, 677 n1, 164 CR 633.
- Order to pay an arbitration filing fee in a proceeding to compel arbitration. *Spence v Omnibus Indus.* (1975) 44 CA3d 970, 976, 119 CR 171.
- Certain orders for payment of monetary sanctions. *Bauguess v Paine* (1978) 22 C3d 626, 634 n3, 150 CR 461 (attorney's alleged misconduct at trial); *I.J. Weinrot & Son v Jackson* (1985) 40 C3d 327, 331, 220 CR 103 (sanctions ordered by trial court held appealable); *Ellis v Roshei Corp.* (1983) 143 CA3d 642, 645 n3, 192 CR 57 (CCP §128.5 sanctions); *Wisniewski v Clary* (1975) 46 CA3d 499, 502, 120 CR 176 (parties' failure to attend settlement conference). But see §3.41 on limitations on appealability of sanctions awards.
- Order denying motion for sanctions. *Muller v Fresno Community Hosp. & Med. Ctr., supra*.
- Order authorizing the sale of property and impoundment of proceeds pendente lite. *Stockton v Rattner* (1972) 22 CA3d 965, 968, 99 CR 787.
- Order granting a lien for attorney fees and costs against a prospective judgment. *Bandy v Mount Diablo Unified Sch. Dist., supra*.
- Order denying a motion to expunge a lien. *Trimble v Steinfeldt* (1986) 178 CA3d 646, 649, 224 CR 195 (lien was filed by attorney who was stranger to main action; therefore, order was final determination as to attorney of rights of parties to action, and appealable).
- Order finding that decedent's parents were not heirs or dependent parents of the decedent and therefore not entitled to a share of the settlement in a wrongful death action. *Collins v Hemet Valley Hosp. Dist.* (1986) 186 CA3d 922, 231 CR 92 (because order disposed of questions reserved by earlier order, court held that portion appealable as final judgment on collateral matter).
- Interim order enforcing arbitration award by payment of money pending final determination of validity of award. *United Pac. Ins. Co. v Hanover Ins. Co.* (1990) 217 CA3d 925, 266 CR 231.
- Order disqualifying counsel. *Meehan v Hopps, supra; Vivitar Corp. v Broidy* (1983) 143 CA3d 878, 881, 192 CR

281; *Kraus v Davis* (1970) 6 CA3d 484, 487, 85 CR 846 (rule may be based in part on determination that order is final order on collateral issue as well as on alternative ground that order is in its nature injunctive). See §3.36.

- Order setting expert witness's deposition testimony fee. *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493.

Ruling on discovery is not "collateral." Discovery cannot be regarded as collateral to the main action, and therefore discovery orders are not appealable. *Southern Pac. Co. v Oppenheimer* (1960) 54 C2d 784, 786, 8 CR 657; *Collins v Corse, supra*.

Several cases holding that orders for discovery *sanctions* are not appealable relied on the same rationale. See, *e.g.*, *Lund v Superior Court* (1964) 61 C2d 698, 709, 39 CR 891; *Kibrej v Fisher* (1983) 148 CA3d 1113, 1115, 196 CR 454. But see §3.41, reviewing cases holding that certain discovery sanctions awards are appealable under CCP §904.1(a)(11)-(12). Appealability may turn, however, on the section under which the court imposed sanctions. In *Slemaker v Woolley* (1989) 207 CA3d 1377, 1382, 255 CR 532, the court held that a sanction order for failure to make discovery was not an appealable order, because it was imposed under CCP §2025.420(d) rather than CCP §128.5 and because it was directed against a party's current attorney.

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§3.25 C. Some "Interlocutory Judgments" Are Appealable

What is an "interlocutory judgment"? An interlocutory judgment is one entered when any further judicial action "is essential to a final determination of the rights of the parties." *Knodel v Knodel* (1975) 14 C3d 752, 761 n11, 122 CR 521; *Lyon v Goss* (1942) 19 C2d 659, 670, 123 P2d 11. It would clarify this difficult area of the law to abandon the phrase, "interlocutory judgment," and use the term "order" instead. A judgment is defined by statute as a "final determination of the rights of the parties in an action or proceeding." CCP §577. "Order" is defined in CCP §1003 as "[e]very direction of a court or judge, made or entered in writing, and not included in a judgment." See §3.26. Accordingly, the term "interlocutory judgment" violates and confuses the clear statutory distinction between judgments and orders. Nonetheless, "interlocutory judgment" is used in the governing statute on appealability (CCP §904.1) and is well established in the legal lexicon. See, *e.g.,* CCP §872.720 (partition of ownership in real property).

Interlocutory judgments are usually not appealable. As a general rule, interlocutory judgments are not appealable. CCP §904.1(a). The statute provides, however, that interlocutory judgments are not appealable *except* as provided in CCP §904.1(a)(8)-(9), (11).

Exceptions to general rule: Code of Civil Procedure §904.1(a) confers appealability on three classes of "interlocutory judgments":

- An interlocutory judgment in an action to redeem real or personal property from a mortgage or lien, determining the right to redeem and directing an accounting (CCP §904.1(a)(8));
- An interlocutory judgment in an action for partition, determining the rights and interests of the parties and directing partition (CCP §904.1(a)(9); *Solis v Vallar* (1999) 76 CA4th 710, 90 CR2d 677); and
- An interlocutory judgment directing the payment of sanctions in excess of $5000 (CCP §904.1(a)(11)) (see discussion in §3.41).

Other appealable interlocutory judgments include:

- An interlocutory judgment sustaining the special defense of or a demurrer based on the ground that another action is pending in the same cause of action (CCP §597; see *San Bernardino Valley Mun. Water Dist. v Gage Canal Co.* (1964) 226 CA2d 206, 209, 37 CR 856);
- Certain interlocutory decrees in actions to test the validity of tax deeds (Rev & T C §§3609, 3631);
- Orders made appealable by the Probate Code, *e.g.*, enumerated orders involving transfers of property and fiduciaries under the Probate Code (Prob C §1300), enumerated orders in guardianship and conservatorship proceedings (Prob C §1301), enumerated orders regarding power of attorney (Prob C §1302), certain orders regarding a decedent's estate (Prob C §1303), and certain proceedings involving trusts (Prob C §1304). See also CCP §904.1(a)(10). The Probate Code does not clearly distinguish between judgments and orders.

Family law orders. In addition, a judgment of dissolution in a family law proceeding is intended to be appealable even though it often falls short of a final determination of all rights of the parties. See Fam C §§2339-2344. For example, the court may reserve jurisdiction to make a subsequent division of property (Fam C §2550), modify spousal support (Fam C §3651(a)), or determine child support (Fam C §3651(b)). Also, CCP §904.1(a)(10) provides that an appeal can be taken from an order made appealable by the Family Code. But see *Lester v Lennane* (2000) 84 CA4th 536, 101 CR2d 86 (temporary custody orders are interlocutory, nonappealable orders that can only be reviewed on petition for writ relief).

Appealability of partial adjudication in superior court and transfer of remaining causes of action to former municipal court. There is currently a conflict of authority on the appealability of a superior court's partial dismissal order when the case is transferred to municipal court because the remaining causes of action fail to satisfy superior court jurisdiction. In *Uptain v Duarte* (1988) 206 CA3d 1258, 254 CR 150, the Fifth District Court of Appeal held that a party *could* take an immediate appeal from the superior court's partial judgment because the superior court had relinquished its jurisdiction over the action. In *Eckhart v Genuine Parts Distrib.* (1997) 53 CA4th 1340, 62 CR2d 487, however, the Second District Court of Appeal held that after the superior court issues its order, the plaintiff may seek writ review of any summary adjudication and transfer orders in an attempt to retain the matter in superior court. If the writ is denied or the plaintiff elects not to seek a writ and elects to appeal from the superior court's final disposition of the matter, the plaintiff may move the superior court to enter final judgment on the summarily adjudicated causes of action, if the court has not already done so *sua sponte*. The plaintiff must then timely appeal from the superior court judgment without waiting for the municipal court's disposition of the remaining causes of action. The court in *Eckhart*

criticized the *Uptain* rule for violating the requirement of a final judgment under CCP §904.1 and for introducing unnecessary confusion for litigants. 53 CA4th at 1345.

Ascertain whether court's order is an appealable judgment. Even though a trial court's order might appear to be interlocutory and not to qualify under the exceptions listed above, consider whether the court's ruling might be appealable as a judgment in the proper sense. For example, events subsequent to the judgment could *make* it appealable at that time, by the dismissal of an outstanding issue.

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V. APPEALABLE ORDERS

§3.26 A. Statutory Basis

What is an "order"? If judgments are the first major category of appealable rulings, specifically designated orders are the second. Code of Civil Procedure §1003 defines orders: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order."

Appealability of orders is governed by statute. There is no general statutory provision that renders an "order" appealable. Accordingly, because appellate jurisdiction is controlled by statute (see §3.3), orders are *not* appealable unless they are made appealable by a specific statute. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 696, 107 CR2d 149; *Caruso v Snap-Tite, Inc.* (1969) 275 CA2d 211, 79 CR 642. There is no substitute for checking the list of appealable orders in CCP §904.1 and any specific statute on the proceeding in question. Specific appealable orders are discussed in §§3.26-3.46. See also the chart in §3.47. In addition, counsel should always consider whether the *effect* of an order renders it a judgment and thus appealable as a judgment. See §3.15.

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§3.27 B. Order Made After Appealable Judgments or Orders

Appealability of orders made after appealable judgments. The first and broadest category of specially appealable orders is an order made after an appealable judgment. CCP §904.1(a)(2). Appealability on this specific ground is necessary because CCP §906 limits appellate review from a judgment to orders entered *before* the judgment. Subsequent orders can only be reviewed, if at all, by a subsequent appeal.

Appealability of orders made after appealable orders. Although CCP §904.1(a)(2) refers to orders made after a judgment, it can also apply to orders made after appealable *orders*.

Reason that previous judgment or order must be appealable. The statute requires a prior *appealable* judgment or order for two reasons. First, a special right of appeal is unnecessary if the case has not yet produced an appealable judgment or order. Second, the special appeal right might otherwise be exploited to obtain review of a nonappealable prior judgment or order. But see *Rappenecker v Sea-Land Servs.* (1979) 93 CA3d 256, 261, 155 CR 516, which permitted an appeal from an order of costs after a compromise judgment that would probably not have been appealable.

Examples. Among the many examples of orders made appealable under CCP §904.1(a)(2) or its predecessors are:

- Orders extending judgments (*Faias v Superior Court* (1933) 133 CA 525, 24 P2d 567; *Belt Cas. Co. v Superior Court* (1933) 129 CA 642, 19 P2d 25);
- Orders denying motion to vacate renewal of judgment (*Jonathan Neil & Assocs., Inc. v Jones* (2006) 138 CA4th 1481, 1487, 42 CR3d 350);
- Orders vacating orders for execution and recalling the writ (*Demens v Huene* (1928) 89 CA 748, 265 P 389);
- Orders granting or denying motions to recall or quash the writ of execution (*Di Corpo v Di Corpo* (1948) 33 C2d 195, 200 P2d 529);
- Orders staying enforcement of judgments or vacating such stays (*Macario v Macario* (1929) 208 C 601, 283 P 291; *Gray v Bybee* (1943) 60 CA2d 564, 141 P2d 32);
- Orders granting or denying a charging order against a partnership interest (*Baum v Baum* (1959) 51 C2d 610, 615, 335 P2d 481);
- Orders granting or denying a motion for judgment on an appeal bond (*Merritt v J.A. Stafford Co.* (1968) 68 C2d 619, 622, 68 CR 447);
- Orders granting or denying motions to obtain interest on judgments (*Redevelopment Agency v Goodman* (1975) 53 CA3d 424, 430, 125 CR 818);
- Orders denying attorney fees under CCP §2033.420 entered after judgment (*Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 25 CR2d 109);
- Orders granting or denying sanctions (*Day v Collingwood* (2006) 144 CA4th 1116, 1123, 50 CR3d 903); and
- Orders denying attorney fees after entry of a stipulated judgment (*Wilson's Heating & Air Conditioning v Wells Fargo Bank* (1988) 202 CA3d 1326, 249 CR 553).

Limitations on appealability of orders after appealable judgment or order. The courts have imposed three limitations on the appealability of orders following an appealable judgment or order:

- The prior ruling must be "final" in the trial court;
- The appeal may not present the same issues as an appeal from the prior ruling; and
- The order must either "affect" or "relate to" the prior ruling.

These limitations are discussed in §§3.28-3.30.

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§3.28 1. Prior Ruling Must Be "Final"

Requirement of finality. The prior ruling must be "final" in the sense that the trial court contemplates no further action on the subject matter of the ruling. *Neilsen v Saylors* (1956) 146 CA2d 139, 303 P2d 781; *Stein v Simpson* (1950) 96 CA2d 642, 216 P2d 117. Code of Civil Procedure §904.1(a)(2), however, requires an *appealable* prior judgment and appears to encompass all pertinent requirements for the appealability of a judgment.

Examples. Cases in which the court insisted on the finality of the prior judgment include *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 700, 107 CR2d 149 (when trial court's ruling disposed of all causes of action framed by pleadings, there remained no further substantive issues for future determination); *I.J. Weinrot & Son v Jackson* (1985) 40 C3d 327, 331, 220 CR 103 (order denying reconsideration is not appealable if the underlying order, sustaining a demurrer, was not appealable); *Day v Collingwood* (2006) 144 CA4th 1116, 1123, 50 CR3d 903 (postjudgment order denying sanctions motion is appealable under §904.1(a)(2), in part because it finally determines parties' rights and liabilities arising from judgment); *Barnes v Litton Sys.* (1994) 28 CA4th 681, 33 CR2d 562 (appeal dismissed from order taxing costs entered after reversal of summary judgment; because trial was still pending on substantive issues, court concluded that order taxing costs was not sufficiently final for separate appeal); *Marriage of Levine* (1994) 28 CA4th 585, 33 CR2d 559 (postjudgment order providing mechanism for resolution of future disputes following judgment of dissolution of marriage contemplated later proceedings in trial court; order held not sufficiently final to support appeal under CCP §904.1(a)(2)).

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§3.29 2. Appeal Must Raise Distinct Issues

Issues must be distinct from those that were or could have been raised on appeal from prior ruling. The appeal from the order must raise issues distinct from those that were or *could* have been raised on appeal from the earlier ruling. Appellants should not be permitted to raise the same issue by more than one appeal. "[I]f the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion." *Litvinuk v Litvinuk* (1945) 27 C2d 38, 44, 162 P2d 8. See also *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 25 CR2d 109; *Simmons v Santa Barbara Ice & Cold Storage Co.* (1958) 162 CA2d 23, 327 P2d 141. The rationale for this rule is that a party should not be able to use a postjudgment appeal to revive issues when the time to file an appeal from the initial order has expired.

Examples. Among the numerous examples of appeals denied for this reason are *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 358, 110 CR 353 (order denying motion to vacate not appealable if all issues could have been reviewed on appeal from judgment itself), *Blue Mountain Dev. Co. v Carville* (1982) 132 CA3d 1005, 183 CR 594 (denial of motion to reconsider appealable only if motion supported by new evidence), and *McKenna v Elliott & Horne Co.* (1953) 118 CA2d 551, 258 P2d 528 (denial of motion that amounts to no more than request that trial court reconsider its original action not appealable).

Examples of cases in which an appeal was accepted because of the presence of distinct issues include *Day v Collingwood* (2006) 144 CA4th 1116, 1123, 50 CR3d 903 (postjudgment order denying sanctions motion is appealable under CCP §904.1(a)(2), in part because motion is collateral proceeding that is not directly based on merits of underlying proceeding); *Marriage of Brockman* (1987) 194 CA3d 1035, 1043, 240 CR 96 (order denying motion to vacate judgment appealable because, "if the record made at the time of judgment does not disclose the grounds for appeal, it is pointless to require the party to appeal directly from the judgment.… Such cases frequently arise when the error complained of occurs around the time the judgment is entered or afterwards. The only way to bring the issue to the attention of the trial court is by bringing a motion to vacate. In such instances, the denial of a motion to vacate is then appealable"); and *County of Los Angeles v Thompson* (1985) 172 CA3d 18, 20, 218 CR 101 (order denying motion to vacate stipulated paternity judgment ruled appealable; appellate court stated it was reasonable to preserve appellate review when postjudgment order resolves constitutional issues concerning judgment).

Motions under CCP §473.5 to vacate a default judgment typically raise issues distinct from the judgment and are appealable. *Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389. The *Tunis* court relied on *Winslow v Harold G. Ferguson Corp.* (1944) 25 C2d 274, 153 P2d 714, which held that orders denying any postjudgment motion expressly provided by statute are appealable.

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§3.30 3. Order Must Affect or Relate to Prior Ruling

The order "must affect the [preceding] judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution." *Raff v Raff* (1964) 61 C2d 514, 517, 39 CR 366. "Where an order after an appealable judgment simply leaves the judgment intact and neither adds to nor subtracts from it, the order is not appealable. But where the order relates to enforcement of a judgment, it is appealable." *City of Carmel-by-the-Sea v Board of Supervisors* (1982) 137 CA3d 964, 971, 187 CR 379. See also *Jones v World Life Research Inst.* (1976) 60 CA3d 836, 839, 131 CR 674 (order made to enforce judgment or prevent enforcement is appealable).

Lakin v Watkins Assoc. Indus. (1993) 6 C4th 644, 25 CR2d 109, contains an excellent discussion of this point and this general category of specifically appealable orders.

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§3.31 C. Order Quashing Summons

An order granting a motion to quash service of summons is appealable. CCP §904.1(a)(3). An order denying such a motion is not appealable but is subject to discretionary writ review under CCP §418.10.

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§3.32 D. Order Staying or Dismissing for Inconvenient Forum

Orders granting a motion to stay or dismiss an action on the ground of inconvenient forum are appealable. CCP §904.1(a)(3). An order denying such a motion is not appealable but is subject to discretionary writ review under CCP §418.10.

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§3.33 E. Order Granting New Trial

An order granting a motion for a new trial is appealable. CCP §904.1(a)(4). Although an order denying such a motion is *not* appealable, CCP §906 expressly provides that it can be reviewed on appeal from the judgment. This provision is an exception to the general rule that an appellate review is limited to rulings made *prior to* the judgment. See *Walker v Los Angeles County Metro. Transp. Auth.* (2005) 35 C4th 15, 23 CR3d 490 (appellate court should not have dismissed plaintiff's appeal from order denying new trial; court should have treated appeal as from judgment, not from order). But see *City of Los Angeles v Glair* (2007) 153 CA4th 813, 820, 63 CR3d 280 (court could not consider order denying new trial motion as seeking review of judgment, as was done in *Walker*, because underlying judgment was no longer appealable).

In *Marriage of Liu* (1987) 197 CA3d 143, 242 CR 649, the court held that an order denying a motion for new trial can be reviewed on appeal from the judgment even if the motion had been denied by operation of law or was based on affidavits that the court did not consider and thus were outside the appellate record. However, the *Liu* court was critical of that result. 197 CA3d at 152 n3.

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§3.34 F. Order Denying Judgment Notwithstanding Verdict

An order denying a motion for judgment notwithstanding the verdict is appealable. CCP §904.1(a)(4). However, an order merely granting such a motion is *not* appealable. *Mason v Mercury Cas. Co.* (1976) 64 CA3d 471, 473 n2, 134 CR 545. Because such an order contemplates entry of a new judgment, only the latter, *i.e.,* the new judgment, can be appealable. Of course, the order granting the motion is reviewable on such an appeal.

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§3.35 G. Order re Attachment

Orders discharging or refusing to discharge an attachment, or granting a right to attach order (see CCP §§484.010-484.110, 485.210-485.240), are all made appealable by CCP §904.1(a)(5).

Note that an order denying a right to attach order is not specified in the statute and is therefore not appealable. *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 191 CR 227.

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§3.36 H. Order re Injunction

An order granting or dissolving an injunction, or refusing to grant or dissolve an injunction is appealable. CCP §904.1(a)(6). Such orders include temporary restraining orders (*Brydon v City of Hermosa Beach* (1928) 93 CA 615, 620, 270 P 255) as well as preliminary injunctions (*Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398; *O'Connor v Superior Court* (1979) 90 CA3d 107, 110, 153 CR 306).

Some courts have rejected appeals of orders dismissing causes of actions for injunctive relief or denying motions for injunctive relief. See *Bishop Creek Lodge v Scira* (2000) 82 CA4th 631, 98 CR2d 398 (order refusing grant of permanent injunction not appealable because trial court can revisit its decision denying permanent injunction any time until final judgment); *Art Movers, Inc. v Ni West, Inc*. (1992) 3 CA4th 640, 4 CR2d 689 (CCP §904.1(a)(6) (former CCP §904.1(f)) authorizes appeals only from orders refusing to grant or deny injunctions pendente lite, such as preliminary injunctions, temporary restraining orders, and stays pending appeal but not permanent injunctions); *Melchor Inv. Co. v Rolm Sys*. (1992) 3 CA4th 587, 4 CR2d 343 (appeal dismissed from order denying motion for injunctive relief against arbitration; order treated as tantamount to order compelling arbitration, which is not appealable). Permanent injunctions are by definition, however, embodied in a *judgment*. They are therefore appealable under CCP §904.1(a)(1), not CCP §904.1(a)(6).

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§3.37 I. Order Appointing Receiver

An order appointing a receiver is appealable. CCP §904.1(a)(7).

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§3.38 J. Order Enforcing ALRB Decisions

Superior court orders enforcing decisions of the Agricultural Labor Relations Board (ALRB) are appealable under CCP §904.1(a)(6). *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 238 CR 780. The court recognized that a party has no right under Lab C §1160.8 to appeal the merits of an ALRB order but nonetheless felt compelled under current statutes to allow an appeal of right from the superior court's enforcement order, "which can only be entered after the merits of the ALRB order are beyond attack." 43 C3d at 705 n7. The court virtually invited the legislature to devise a better review system. However, the court also held that the issues on appeal of a superior court enforcement order are limited by §1160.8 to procedural irregularity and refusal to comply. 43 C3d at 706.

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§3.39 K. Specially Certified Family Law Rulings

Availability of appeal for bifurcated family law issues. Code of Civil Procedure §904.1(a)(10) and Fam C §2025 allow appeals of bifurcated family law issues certified for appeal by the trial court and accepted for review by the court of appeal.

Procedure. The procedure for appealing a bifurcated issue is set forth in Cal Rules of Ct 5.180.

When deciding the bifurcated issue, the judge may include an order certifying that there is probable cause for immediate appellate review. The aggrieved party may move for such an order if the court does not enter it sua sponte. If a certificate is granted, trial of the remaining issues may be stayed to allow a "motion to appeal" and, if the motion is granted, to allow the appeal to be decided. Cal Rules of Ct 5.180(b)-(c). A party makes a "motion to appeal," rather than file a notice of appeal, in the appellate court, accompanied by the filing fee for an appeal. The particulars of the motion procedure are specified in Cal Rules of Ct 5.180(d)-(f).

The trial court's denial of certification may be reviewed by extraordinary writ. Cal Rules of Ct 5.180(g). The appellate court's denial of the motion to appeal may be reviewed by petition to the supreme court. Both denials may also be reviewed on appeal from the final judgment. Cal Rules of Ct 5.180(h).

Effect of Cal Rules of Ct 5.180 on prior authority. The motion to appeal procedure may undermine the authority of cases such as *Knodel v Knodel* (1975) 14 C3d 752, 762, 122 CR 521, which permitted review of a series of orders in dissolution proceedings, stating that "[w]e adhere to the rule that doubtful cases should be resolved in favor of the right to appeal where a substantial interest is affected." This approach seems inconsistent with *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804, discussed in §3.21, which disapproved a long line of cases permitting interlocutory appeals for reasons of judicial policy. In addition, the procedure under Cal Rules of Ct 5.180 may be held to control the appealability of bifurcated family law issues and bar appealability as of right under previous case law.

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§3.40 L. Order re Disqualification of Counsel

General rule. "[A]n order disqualifying counsel from representing a party in litigation is directly appealable." *Vivitar Corp. v Broidy* (1983) 143 CA3d 878, 881, 192 CR 281. The appealability of such an order can rest on its injunctive nature (see, *e.g., Meehan v Hopps* (1955) 45 C2d 213, 215, 288 P2d 267; *Kraus v Davis* (1970) 6 CA3d 484, 487, 85 CR 846; *Jacuzzi v Jacuzzi Bros.* (1963) 218 CA2d 24, 32 CR 188) or, as suggested in *Meehan* and *Kraus,* on its final determination of a collateral matter.

Caution: Disqualification ruling may not be reviewable on appeal from final judgment. A disqualification order cannot be reviewed on appeal from the final judgment unless the appellant can show that the grant or denial of the disqualification motion affected the outcome of the case and prejudiced the complaining party. *In re Sophia Rachel B.* (1988) 203 CA3d 1436, 250 CR 802. Therefore, prudent counsel will initiate a timely, direct appeal from the ruling accompanied, if necessary, by a petition for a stay (by supersedeas) or a writ of mandate (or both) to avoid prejudice to the client. See *Reed v Superior Court* (2001) 92 CA4th 448, 111 CR2d 842 (appeal from denial to disqualify counsel does not automatically stay proceedings in trial court).

JUDICIAL PERSPECTIVE: Appeal is preferable to seeking a writ of mandate in this situation because the appellate court must decide the case and must hear oral argument and write an opinion.

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§3.41 M. Order Awarding Sanctions in Excess of $5000

General rule. Code of Civil Procedure §904.1(a)(11)-(12) confers appealability on orders or interlocutory judgments directing payment of sanctions in excess of $5000. In addition, sanctions awards in lesser amounts may be reviewed on appeal from the judgment in the main action or, at the discretion of the court of appeal, may be reviewed on petition for an extraordinary writ. CCP §904.1(b). These rules supersede previous case law conferring appealability on *all* sanctions awards under the collateral order doctrine. See *County of Monterey v Mahabir* (1991) 231 CA3d 1650, 282 CR 924. Clearly, appeals in this area are now governed by the statutory dollar limit, at least when sanctions are assessed against parties or attorneys who continue to be involved in the case or a discovery related sanctions award against a nonparty witness. See *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493.

NOTE: Unlike in *unlimited* civil cases, in which interlocutory appeals are permitted for monetary sanctions only if the amount exceeds $5000 (CCP §904.1), in *limited* civil cases, orders for monetary sanctions not involving discovery are immediately appealable. CCP §904.2; *Drum v Superior Court* (2006) 139 CA4th 845, 851, 43 CR3d 279. On appeals from limited civil cases, see chap 10.

Possible exception: Sanctions award against attorney or party no longer involved in case. At least one court has held that the collateral order doctrine applied to the special situation of a discovery sanction order assessed against an attorney who no longer represented a party in the case. *Barton v Ahmanson Devs.* (1993) 17 CA4th 1358, 22 CR2d 56. The court reasoned that the sanctions order was effectively a final determination as to the sanctioned attorney. The same reasoning would appear to confer appealability on a sanctions award against a party no longer involved in the case or a discovery-related sanctions award against a nonparty witness. See *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493.

Possible exception: Sanctions award based on a frivolous request for public records. Under Govt C §6259(c), rulings under the California Public Records Act (Govt C §§6250-6270) are reviewable only by petition for extraordinary writ. However, at least one court has held that sanctions, consisting of attorney fees and costs, awarded against a party for making a frivolous request under the Act are appealable on denial of the request. *Butt v City of Richmond* (1996) 44 CA4th 925, 52 CR2d 232. The court reasoned that the purpose of Govt C §6259(c) is to prevent public agencies from delaying the ordered disclosure of documents by filing an appeal, not to prevent appeals of sanction orders once the court has rendered a decision on the document request.

Appealability of discovery sanctions awards in question. Case law is divided on whether orders imposing discovery sanctions are appealable. The majority of cases interpreting CCP §904.1(a) have held that discovery sanctions in excess of the statutory threshold are *not* appealable. See, *e.g., Green v GTE Calif., Inc.* (1994) 29 CA4th 407, 409, 34 CR2d 517 (majority view is against appealability); *Ballard v Taylor* (1993) 20 CA4th 1736, 25 CR2d 384 (discovery sanctions orders not appealable); *Hanna v Bankamerica Bus. Credit, Inc.* (1993) 16 CA4th 913, 20 CR2d 430 (legislature meant to restrict appealable orders); *Ghanooni v Super Shuttle* (1992) 2 CA4th 380, 3 CR2d 43 (discovery sanctions not appealable). Another line of cases has held that discovery orders *are* appealable if they exceed the statutory threshold. See, *e.g.*, *Kohan v Cohan* (1991) 229 CA3d 967, 280 CR 474 (although observing that legislature's apparent intent was to restrict category of appealable orders, discovery sanctions orders held appealable); *Greene v Amante* (1992) 3 CA4th 684, 688, 4 CR2d 571 (discovery sanctions orders are immediately appealable).

In *Rail Transp. Employees Ass'n v Union Pac. Motor Freight* (1996) 46 CA4th 469, 54 CR2d 713, the court of appeal held that the current version of CCP §904.1(a)(11)-(12), permitting the appeal of a sanctions judgment or order in excess of $5000, permits a direct appeal of discovery sanctions over $5000. The court especially noted that the statute now expressly refers to appeal of *orders* and not simply to appeals of judgments. Other cases appear to follow this view. See, *e.g.*, *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1352, 32 CR3d 717 (discovery sanctions over $5000 are appealable under CCP §904.1(a)(11)); *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 262, 264, 26 CR3d 831 (monetary discovery sanctions over $5000 immediately appealable under CCP §904.1(a)(12)). See also *London v Dri-Honing Corp.* (2004) 117 CA4th 999, 1002, 12 CR3d 240 (court reviewed and upheld discovery sanctions in excess of $5000 by direct appeal without addressing issue of appealability).

PRACTICE TIP: If you are uncertain as to which view the court will follow in your case, consider filing an immediate appeal and a writ petition, noting that both procedures have been filed in an abundance of caution to ensure review of the sanctions orders. No matter which approach the court selects as correct, you will assure yourself and your client that the issue is reviewed.

See also Smith, *What Did the Legislature Intend Regarding Appealability of Sanctions?* 15 CEB Civ Litigation Rep 275 (Aug. 1993) (discussing *Hanna* and related cases dealing with the appealability of sanctions).

Multiple sanction award probably cannot be aggregated to meet statutory limit. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 24 CR2d 337, held that multiple sanctions orders could not be aggregated to exceed the statutory limit under former CCP §904.1(k) (predecessor to CCP §904.1(a)(11)-(12)). Presumably, that conclusion will be held to apply to the current version.

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§3.42 N. Order re Arbitration

Appealable arbitration orders. Certain orders involving arbitration are appealable, including:

- Orders dismissing or denying a petition to compel arbitration (CCP §1294(a));
- Orders dismissing a petition to confirm, correct, or vacate an arbitration award (CCP §1294(b));
- Orders vacating an arbitration award unless a rehearing in arbitration is ordered (CCP §1294(c));
- A judgment entered under the California Arbitration Act (CCP §§1280-1294.2) (CCP §1294(d); see §§3.11-3.22); and
- A special order after final judgment (CCP §1294(e); see §§3.27-3.30).

See *Otay River Constructors v San Diego Expressway* (2008) 158 CA4th 796, 805, 70 CR3d 434 (order denying motion for attorney fees and costs was appealable under CCP §1294(e) because prior order denying petition to compel arbitration was "essentially" final judgment); *Rubin v Western Mut. Ins. Co.* (1999) 71 CA4th 1539, 1547, 84 CR2d 648, which implies that a judgment imposed after confirmation of an arbitration award under CCP §1287.4 is appealable subject to the one final judgment rule. See §§3.19-3.21.

Order compelling arbitration. Orders compelling arbitration are not appealable (*Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 353, 133 CR 775) even if the order purports to deny a motion for injunctive relief against an arbitration (*Melchor Inv. Co. v Rolm Sys.* (1992) 3 CA4th 587, 4 CR2d 343) or the order incorrectly dismisses a party's action at law (*Muao v Grosvenor Props.* (2002) 99 CA4th 1085, 122 CR2d 131).

Order denying petition to vacate arbitration award. Although CCP §1294(b) permits an appeal from an order *dismissing* a petition to vacate, the section is silent on the appealability of an order *denying* such a petition. Given the rule that appealability in civil cases is conferred only by statute, the court in *Mid-Wilshire Assoc. v O'Leary* (1992) 7 CA4th 1450, 9 CR2d 862, held that the legislature's silence meant that an order denying a petition to vacate an arbitration award is not appealable. Instead, the aggrieved party must either appeal from any judgment confirming the award or seek discretionary review by writ. Notably, the court declined to adjudicate the issues under its power to treat the appeal as a writ petition (see §3.9), finding that an appeal from a final judgment confirming the arbitral award was an adequate remedy.

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§3.43 O. Order Vacating Judgment

An order vacating a judgment and entering a different judgment is appealable "in the same manner as a special order made after final judgment." CCP §663a. Similarly, an order vacating a judgment of dismissal is made appealable by CCP §§663a and 904.1(a)(1)-(2). See, *e.g., Finnie v District No. 1 Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n* (1992) 9 CA4th 1311, 12 CR2d 348.

A postjudgment order vacating a judgment and reopening the case for further proceedings under CCP §662 is *not* appealable. *Concerned Citizens Coalition of Stockton v City of Stockton* (2005) 128 CA4th 70, 80, 26 CR3d 735. A court may, however, treat the appeal as a petition for extraordinary writ. See §3.2.

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§3.44 P. Order re Claim of Exemption From Levy

An order determining a claim of exemption of property subject to levy is appealable. CCP §703.600.

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§3.45 Q. Order re Civil Conspiracy Claim Against Attorney

Civil Code §1714.10 governs certain actions in which a plaintiff alleges that an attorney conspired with his or her client to contest or compromise a claim or dispute. Civil Code §1714.10(d) provides that various orders concerning court permission to plead such an action are appealable.

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§3.45A R. Order re Special (Anti-SLAPP) Motion to Strike

An order granting or denying a special (anti-SLAPP) motion to strike is appealable. CCP §§425.16(i), 904.1(a)(13); *Russell v Foglio* (2008) 160 CA4th 653, 659, 73 CR3d 87.

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§3.46 S. Denial of Writ Petition From Former Municipal Court's Contempt Order

A superior court's denial of a petition for writ of certiorari seeking review of a former municipal court's contempt order is an appealable order. *Bermudez v Municipal Court* (1992) 1 C4th 855, 4 CR2d 609. Although CCP §1222 provides that the contempt order itself is not appealable, the court in *Bermudez* found that the content of the underlying order for which a writ of certiorari is sought does not determine the appealability of a superior court's denial of that particular writ.

There is no appeal from a judgment of contempt in a limited civil case. CCP §904.2(a).

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§3.47 T. Chart: Opportunities and Procedures for Prejudgment Review of Superior Court Orders

The following chart lists superior court orders and the proper method for obtaining review, *e.g.*:

- Wait until the end of the case and appeal judgment;
- Appeal order immediately; or
- Petition for extraordinary writ.

Issue/Procedure/ Order/Code Sections	Method of Review	Pertinent Authorities
1. Abatement		
Order of Abatement Granted	Mandate	See *Daum v Superior Court* (1964) 228 CA2d 283, 39 CR 443 (order denying amendment until future occurrence is order of abatement, which may be reviewed by mandate).
	Appeal judgment	Another action pending —CCP §597.
2. Advancement to Trial—CCP §36		
Motion to Advance—Denied	Appeal judgment	*Salas v Sears, Roebuck & Co.* (1986) 42 C3d 342, 345 n3, 228 CR 504.
	Mandate	*Rice v Superior Court (*1982) 136 CA3d 81, 185 CR 853.
Motion to Advance—Granted	Mandate	*Koch-Ash v Superior Court* (1986) 180 CA3d 689, 225 CR 657 (writ lies to challenge stay of order for advancement).
3. Amendment of Pleadings—CCP §§471.5, 473 (supplementary pleadings)		
Amended Pleading Not Timely Filed and Matter Dismissed	Appeal order of dismissal	*Leader v Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 611, 107 CR2d 489.
Motion to Amend—Granted	Appeal judgment	*Deetz v Carter* (1965) 232 CA2d 851, 43 CR 321(order granting motion to amend reviewed on appeal from judgment).
Motion to Amend—Denied	Appeal order	*Dominguez v City of Alhambra* (1981) 118 CA3d 237, 173 CR 345 (order is final judgment if it disposes of all claims by or against one party);

		American Adver. & Sales Co. v Mid-Western Transp. (1984) 152 CA3d 875, 877 n1, 199 CR 735 (same). But see *Rainer v Community Mem. Hosp. (*1971) 18 CA3d 240, 95 CR 901 (motion to amend denied, but reviewed and reversed on appeal from judgment).
	Mandate	*Daum v Superior Court* (1964) 228 CA2d 283, 39 CR 443 (order denying amendment until future occurrence is order of abatement from which mandate lies); *California Cas. Gen. Ins. Co. v Superior Court* (1985) 173 CA3d 274, 279, 218 CR 817, disapproved in part on other grounds in *Kransco v International Ins. Co.* (2000) 23 C4th 390, 97 CR2d 151.
Motion to File Supplementary Complaint—Denied	Mandate	*Louie Queriolo Trucking, Inc. v Superior Court* (1967) 252 CA2d 194, 196, 60 CR 389.
4. Anti-SLAPP—Order Granting or Denying a Special Motion to Strike Under CCP §425.16	Appeal	CCP §§425.16(i), 904.1(a)(13); *Russell v Foglio* (2008) 160 CA4th 653, 659, 73 CR3d 87.
5. Arbitration—CCP §§1294, 1294.2		
Petition to Compel—Granted	Appeal judgment of confirmation	*Villacreses v Molinari* (2005) 132 CA4th 1223, 1229, 34 CR3d 281; *Maddy v Castle* (1976) 58 CA3d 716, 130 CR 160, disapproved in part on other grounds by *Doers v Golden Gate Hwy. & Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837. See also *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 811 n1, 171 CR 604.
	Mandate or prohibition	*Bertero v Superior Court* (1963) 216 CA2d 213, 30 CR 719, disapproved on other grounds in *St. Agnes Med. Ctr. v Pacificare* (2003) 31 C4th 1187, 1199, 8 CR 3d 517 (mandate lies to attack order before arbitration takes place).

		See also *Melchor Inv. Co. v Rolm Sys.* (1992) 3 CA4th 587, 592, 4 CR2d 343 (writ of prohibition is appropriate remedy if arbitration is unjustifiably ordered); *Atlas Plastering, Inc. v Superior Court* (1977) 72 CA3d 63, 140 CR 59 (mandate or prohibition lies if matters ordered arbitrated fall outside scope of arbitration agreement or are unduly time consuming or expensive). But see *International Film Inv. v Arbitration Tribunal of Dirs. Guild* (1984) 152 CA3d 699, 704, 199 CR 690 (prohibition not proper remedy because there was no judicial act to be restrained; prohibition does not lie to restrain acts of arbitrator).
Petition to Compel—Dismissed or Denied	Appeal order	CCP §1294(a); *Porter v United Servs. Auto. Ass'n* (2001) 90 CA4th 837, 108 CR2d 860.
Petition to Enjoin Arbitration—Granted	Appeal order	*International Film Inv. v Arbitration Tribunal of Dirs. Guild* (1984) 152 CA3d 699, 704, 199 CR 690 (dicta).
Petition to Enjoin Arbitration—Denied	Appeal judgment of confirmation	*International Film Inv. v Arbitration Tribunal of Dirs. Guild, supra* (characterizing petition for writ of prohibition to prevent arbitration as petition for injunction, and analogizing denial of writ to order compelling arbitration, which in the better view is not appealable).
Petition to Confirm Award—Granted	Appeal judgment of confirmation	CCP §1294(d).
Petition to Confirm Award—Denied	Appeal order	CCP §1294(b).
Petition to Vacate Award—Granted	Appeal order	CCP §1294(c) (order vacating award is appealable unless rehearing in arbitration is ordered).
6. Attachment—CCP §§482.010, 485.240		
Application for Right to Attach Order or Writ of	Appeal order	CCP §904.1(a)(5) or §904.2(f).

Attachment—Granted		
Application for Right to Attach Order or Writ of Attachment—Denied	Mandate	*San Diego Wholesale Credit Men's Ass'n v Superior Court* (1973) 35 CA3d 458, 461, 110 CR 657. See also *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 735, 191 CR 227.
Application for Order to Set Aside Right-To-Attach Order and to Quash Writ of Attachment—Granted	Appeal judgment	*Islander Yachts, Inc. v One Freeport 36-Foot Vessel* (1985) 173 CA3d 1081, 1086 n6, 219 CR 654.
Motion to Discharge an Attachment—Granted	Appeal order	CCP §§904.1(a)(5), 904.2(f).
Motion to Discharge an Attachment—Denied	Appeal order	CCP §§904.1(a)(5), 904.2(f).
7. Attorney Fees (see also Sanctions)		
Motion for Fees—CCP §1021.5—Granted	Appeal order	CCP §904.1(a)(2); *Nestande v Watson* (2003) 111 CA4th 232, 238, 4 CR3d 18.
Motion for Fees—CCP §1021.5—Denied	Appeal order	CCP §904.1(a)(2); *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 405, 25 CR3d 514; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 335, 130 CR2d 512.
Motion for Fees—CCP §§1717, 1033.5(a)(10)—Granted or Denied	Appeal order	CCP §904.1(a)(2); *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 1797, 54 CR2d 541.
8. Attorneys (see Counsel)		
9. Capacity to Sue (see Strike, Motion to; Demurrer; Summary Judgment)		
10. Claim of Exemption After Levy—CCP §703.600		
Motion for Claim of Exemption—Granted	Appeal order	CCP §703.600.
Motion for Claim of Exemption—Denied	Appeal order	CCP §703.600.
11. Claims Statutes—Govt C §§911.2,		

911.4, 945.4, 946.6

Petition to Present Late Claim (for relief from Claim Requirements)—Granted	Mandate	*County of Alameda v Superior Court* (1987) 196 CA3d 619, 622, 242 CR 215.
Petition to Present Late Claim (for relief from Claim Requirements)—Denied	Appeal order	*Munoz v State* (1995) 33 CA4th 1767, 1772 n1, 39 CR2d 860; *Garcia v Los Angeles Unified Sch. Dist.* (1985) 173 CA3d 701, 706 n1, 219 CR 544.

12. Class Actions

Motion to Certify Class—Granted	Mandate	*Sav-On Drug Stores Inc. v Superior Court* (2004) 34 C4th 319, 17 CR3d 906; *Blue Chip Stamps v Superior Court* (1976) 18 C3d 381, 387 n4, 134 CR 393.
Motion to Certify Class—Denied	Appeal order	*Daar v Yellow Cab Co.* (1967) 67 C2d 695, 63 CR 724 (discussing "death knell" doctrine*, i.e.,* order is appealable when it has effect of making further proceedings impractical); *Stephen v Enterprise Rent-A-Car* (1991) 235 CA3d 806, 1 CR2d 130.
	Mandate	*General Motors Corp. v Superior Court* (1988) 199 CA3d 247, 250, 244 CR 776 (discussing split of authority on whether or not order denying class certification is appealable and deciding that mandate is only means of judicial review when "death knell" doctrine does not apply); *Hogya v Superior Court* (1977) 75 CA3d 122, 142 CR 325 (detailed discussion of why mandate lies in certain cases).
Motion to Dismiss Class Action—Granted	Appeal order	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
	Mandate	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court

		consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
Motion to Dismiss Class Action—Denied	Appeal order	*Reich v Club Universe* (1981) 125 CA3d 965, 969, 178 CR 473.
13. Consolidation/ Bifurcation/ Severance—CCP §§597, 1048(a)		
Motion to Consolidate/Sever—Granted	Appeal judgment	*State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 304 P2d 13 (order not appealable, reviewable on appeal from final judgment).
	Mandate	*State Farm Mut. Auto. Ins. Co. v Superior Court, supra* (when appeal inadequate).
Motion to Consolidate/Sever—Denied	Mandate	*Fisher v Superior Court* (1980) 103 CA3d 434, 163 CR 47 (issue of first impression).
14. Contempt—CCP §§904.1(a)(1)(B), 904.2(a)(2), 1222		
Judgment of Contempt (Civil)	Review (certiorari)	*John Breuner Co. v Bryant* (1951) 36 C2d 877, 229 P2d 356; *Grant v Superior Court* (1963) 214 CA2d 15, 29 CR 125.
	Prohibition	*Cohen v Superior Court* (1959) 173 CA2d 61, 343 P2d 286 (to restrain enforcement of judgment).
Judgment of Contempt (Criminal)	Review (certiorari)	CCP §1209(d).
	Habeas corpus	*In re DeSilva* (1948) 33 C2d 76, 199 P2d 6.
15. Continuance —CCP §§594-596		
Motion to Continue Trial—Granted	Appeal judgment	*Eastwood v Froehlich* (1976) 60 CA3d 523, 131 CR 577; *Haraszthy v Horton* (1873) 46 C 545 (order not directly appealable, reviewable on appeal from final judgment).
Motion to Continue Trial—Denied	Appeal judgment	*Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1393, 16

		CR3d 638.
	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 924, 6 CR3d 7.
16. Coordination —CCP §§404-404.9; Cal Rules of Ct 3.500-3.550		
Motion to Coordinate —Granted or Denied	Mandate	CCP §404.6; Cal Rules of Ct 3.505(b).
17. Counsel		
Motion to Appoint Counsel—Granted	Mandate	*Brown v Superior Court* (1981) 119 CA3d 189, 173 CR 803 (without discussion of why writ lies).
	Review (certiorari)	*Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83 (special rule for probate proceeding).
Motion to Appoint Counsel—Denied	Appeal judgment	*In re Jacqueline H.* (1979) 94 CA3d 808, 156 CR 765 (without discussion).
Motion to Disqualify Counsel—Granted	Appeal order	*Cal Pak Delivery, Inc. v United Parcel Serv., Inc.* (1997) 52 CA4th 1, 8, 60 CR2d 207.
Motion to Disqualify Counsel—Denied	Appeal order	*Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 1052, 8 CR2d 228; *Gregori v Bank of America* (1989) 207 CA3d 291, 300, 254 CR 853. See also *Kraus v Davis* (1970) 6 CA3d 484, 85 CR 846 (characterized as order to restrain counsel from proceeding (see CCP §904.1(a)(6)) and as final order on collateral matter).
Motion to Substitute (or to Withdraw as) Counsel—CCP §284(2)—Granted	Appeal judgment	*Messih v Lee Drug, Inc.* (1985) 174 CA3d 312, 220 CR 43.
Motion to Substitute (or to Withdraw as) Counsel—CCP §284—Denied	Mandate	*Ferruzzo v Superior Court* (1980) 104 CA3d 501, 163 CR 573 (corporate client); *Redevelopment Agency v Superior Court* (1961) 195 CA2d 591, 16 CR 45 (without discussion).
18. Cross-Complaints—CCP §§426.10-426.70 (see		

also Demurrer; Strike, Motion to; Settlement)		
Motion to File Cross-Complaint—Denied	Mandate	*Nelson v Superior Court* (1950) 97 CA2d 78, 217 P2d 119.
19. Default—CCP §§473, 585-587		
Request to Enter Default—Denied	Prohibition and mandate	*W.A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49 (prohibition to restrain further proceedings, mandate to compel entry of default).
Motion to Compel Entry of Default—Denied	Mandate	*California Pine Box & Lumber Co. v Superior Court* (1910) 13 CA 65, 108 P 882.
Motion to Set Aside Default—Granted	Appeal judgment	*Davis v Taliaferro* (1963) 218 CA2d 120, 32 CR 208.
Motion to Set Aside Default—Denied	Appeal judgment	*Rappleyea v Campbell* (1994) 8 C4th 975, 35 CR2d 669.
Motion to Vacate Default Judgment and Set Aside Default—Granted	Appeal order	*Baske v Burke* (1981) 125 CA3d 38, 177 CR 794; *Yarbrough v Yarbrough* (1956) 144 CA2d 610, 301 P2d 426 (order is one after judgment and immediately appealable).
Motion to Vacate Default Judgment—Denied	Appeal order	CCP §904.1(a)(1)-(2); *Huh v Wang* (2007) 158 CA4th 1406, 1413, 71 CR3d 65.
20. Demurrer		
Demurrer Sustained, *With* Leave to Amend	Mandate	Not an appealable order under CCP §904.1.
Demurrer Sustained, *Without* Leave to Amend	Appeal judgment	CCP §472c(a).
Demurrer Overruled	Mandate	*State v Superior Court (Bodde)* (2004) 32 C4th 1234,1238, 13 CR3d 534 (court overruled demurrer); *Mitsubishi Materials Corp. v Superior Court* (2003) 113 CA4th 55, 6 CR3d 159 (after remand from supreme court, writ issued commanding superior court to vacate order).
21. Discovery—CCP §§2034.010-2034.730		

Issue Presented Is of First Impression or of General Importance to the Trial Courts of the Profession	Mandate	*Britt v Superior Court* (1978) 20 C3d 844, 851, 143 CR 695; *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 245, 100 CR2d 725.
Violation of a Privilege	Prohibition or mandate	*Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 3, 123 CR 283; *Titmas v Superior Court* (2001) 87 CA4th 738, 744 n4, 104 CR2d 803.
Discovery Ruling Denies Party Fair Opportunity to Litigate the Case	Mandate	*Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45.
Motion to Compel Production/Answers—Granted	Prohibition	*Roberts v Superior Court* (1973) 9 C3d 330, 107 CR 309; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (writ lies when discovery would invade privilege).
Motion to Compel Production/Answers—Denied	Mandate	*Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643; *2,022 Ranch v Superior Court* (2003) 113 CA4th 1377, 1381, 7 CR3d 197.
Motion to Quash Subpoena or for Protective Order—Denied	Mandate	*Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 471, 200 CR 471.
Motion for Protective Order (nonparty witness)—Denied	Appeal order	*Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624 (appealable as collateral order).
	Mandate	*Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1290, 93 CR2d 619.
Nonparty Expert Witness Challenges Amount of Fee	Appeal order	*Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 298, 50 CR2d 493.
Order That Plaintiff Submit to Examination—Granted	Mandate	*Browne v Superior Court* (1979) 98 CA3d 610, 613, 159 CR 669.
22. Dismissal—CCP §§583.110-583.430		
Motion to Dismiss—Granted	Appeal judgment	*Daley v County of Butte* (1964) 227 CA2d 380, 38 CR 693 (order is final judgment and appealable).
	Mandate	*Brown v Superior Court* (1970) 7 CA3d 366, 86

		CR 670 (without discussion of why writ lies).
Motion to Dismiss—Denied	Prohibition	*J.C. Penney Co. v Superior Court* (1959) 52 C2d 666, 343 P2d 919.
	Mandate	*McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 105 CR 330 (mandate to compel dismissal or prohibition to restrain trial).
Motion to Vacate Dismissal—Denied	Appeal order	*Peltier v McCloud River R.R.* (1995) 34 CA4th 1809, 41 CR2d 182 (motion to vacate under CCP §473).
23. Dissolution of Marriage—CCP §904.1(a)(10); Fam C §2404		
Judgment—"Status Only"	Appeal judgment	Fam C §§2025, 2337.
Orders for Support	Appeal order	*Marriage of Skelley* (1976) 18 C3d 365, 134 CR 197; *Marriage of Hunt* (1985) 172 CA3d 872, 218 CR 451.
Order on Bifurcated Issue	Appeals order (with leave)	Fam C §2025; Cal Rules of Ct 5.175, 5.180.
Temporary Custody Orders	Mandate	*Lester v Lennane* (2000) 84 CA4th 536, 560 n13, 101 CR2d 86.
24. Dissolution of Partnership		
Order Granting	Appeal judgment	*Kinoshita v Horio* (1986) 186 CA3d 959, 231 CR 241 (judgment dissolving partnership and directing sale of assets interlocutory and appealable only on final judgment).
25. Good Faith Settlement (see Settlement)		
26. Government Claims Act		
Review of Agency Decision Not to Defend Public Employee Under Govt C §995.2(a)	Mandate	*Stone v Regents of Univ. of Cal.* (1999) 77 CA4th 736, 746, 92 CR2d 94.
27. Guardian ad Litem—CCP §§372-373.5		
Motion to Appoint—	Appeal order	*Estate of Hathaway*

Granted or Revoked		(1896) 111 C 270, 43 P 754; Prob C §1301(a) (granting or revoking letters of guardianship is appealable).
Motion to Remove—Granted	Review (certiorari)	*Hollaway v Scripps Mem. Hosp.* (1980) 111 CA3d 719, 168 CR 782 (temporary removal of guardian ad litem).
28. Guardianship (Conservatorship)		
The following motions are immediately appealable whether granted or denied:		
Granting or revoking letters, except temporary letters	Appeal order	CCP §904.1(a)(10); Prob C §1301(a).
Granting permission to fix ward's residence not within state	Appeal order	CCP §904.1(a)(10); Prob C §1301(b).
Directing, authorizing, approving, or modifying payments for support, maintenance, or education	Appeal order	CCP §904.1(a)(10); Prob C §1301(c).
Granting or denying petition under Prob C §2423 or Prob C §§2580-2586	Appeal order	CCP §904.1(a)(10); Prob C §1301(d).
Affecting legal capacity of conservatee under Prob C §§1870-1901	Appeal order	CCP §904.1(a)(10); Prob C §1301(e).
Adjudicating merits of claim under Prob C §§2500-2507	Appeal order	CCP §904.1(a)(10); Prob C §1301(f).
Granting or denying petition under Prob C §§3100-3154	Appeal order	CCP §904.1(a)(10); Prob C §1301(g).
29. Inconvenient Forum		
Motion to Dismiss—Granted	Appeal order	CCP §904.1(a)(3).
Motion to Dismiss or Stay—Denied	Mandate	See *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 208 CR 627; *Outboard Marine Corp. v Superior Court* (1976) 59 CA3d 434, 130 CR 642.
30. Injunctions—CCP §§525-534		
Injunction—Granted or Denied	Appeal order	CCP §§904.1(a)(6), 904.2(g).

Motion to Dissolve—Granted	Appeal order	CCP §§904.1(a)(6), 904.2(g).
Motion to Dissolve—Denied	Appeal order	CCP §904.1(a)(6); *In re Glacier Gen. Ins. Co*. (1991) 234 CA3d 1549, 286 CR 262; *Welsch v Goswick* (1982) 130 CA3d 398, 181 CR 703; CCP §904.2(g) (by analogy to *Northcutt v Superior Court* (1924) 66 CA 350, 226 P 25, prohibition should lie in certain circumstances).

31. Interpleader —CCP §§386-386.6

Application for Order Substituting Parties and Discharging Applicant—Granted	Appeal judgment	*Neilsen v Saylors* (1956) 146 CA2d 139, 303 P2d 781 (order not appealable, reviewable on appeal from subsequent judgment); *Camp v Oakland Mortgage & Fin. Co.* (1928) 205 C 380, 270 P 685 (writ of review will not issue).
Application for Order to Deliver Property—Denied	Appeal judgment	*Crocker-Anglo Nat'l Bank v American Trust Co.* (1959) 170 CA2d 289, 338 P2d 617.
Application for Order Restraining Other Proceedings—Denied	Mandate	*Department of Educ. v Superior Court* (1979) 97 CA3d 977, 159 CR 265 (without discussion of why writ lies).
Application for Order Restraining Other Proceedings—Granted	Appeal order	*Surety Co. of Pac. v Piver* (1983) 149 CA3d Supp 29, 31, 197 CR 531.
Judgment on Complaint in Interpleader—Granted	Appeal judgment	*Lincoln Nat'l Life Ins. Co. v Mitchell* (1974) 41 CA3d 16, 115 CR 723 (interlocutory judgment reviewable on appeal from final judgment on conflicting claims).

32. Intervention —CCP §387

Application to Intervene—Granted	Appeal judgment	*Taylor v Western States Land & Mortgage Co.* (1944) 63 CA2d 401, 147 P2d 36 (order not appealable, reviewable on appeal from final judgment).
Application to Intervene—Denied	Appeal order	*Braun v Brown* (1939) 13 C2d 130, 87 P2d 1009; *City & County of San Francisco v State* (2005) 128 CA4th 1030, 1036,

		27 CR3d 722; *City of Malibu v California Coastal Comm'n* (2005)128 CA4th 897, 27 CR3d 501.
33. Judge's Disqualification —CCP §§170.1, 170.3(d)		
Motion to Disqualify—Granted	Mandate	CCP §170.3(d); see *Curle v Superior Court* (2001) 24 C4th 1057, 1063, 103 CR2d 751 (CCP §170.1); *In re Sheila B.* (1993) 19 CA4th 187, 23 CR2d 482.
Motion to Disqualify—Denied (CCP §§170.1, 170.6)	Mandate	CCP §170.3(d).
34. Judgment		
Motion for Judgment —Granted	Appeal judgment	*Adohr Milk Farms, Inc. v Love* (1967) 255 CA2d 366, 63 CR 123 (nonappealable order, reviewable on appeal from final judgment).
Motion for Judgment —Denied	Mandate	CCP §904.1.
35. Jurisdiction —CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion to Quash—Granted	Appeal order	CCP §§904.1(a)(3), 904.2(d).
Motion to Quash—Denied	Mandate	CCP §418.10(c).
36. Jury Trial—CCP §§592, 1090		
Motion for Jury Trial—Granted	Prohibition	*Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 129 CR 912 (without discussion of why writ lies).
Motion for Jury Trial—Denied	Prohibition	*Mallarino v Superior Court* (1953) 115 CA2d 781, 252 P2d 993 (writ issued to restrain trial without jury).
37. Liens		
Motion to Expunge Attorney Lien—Denied	Appeal order	*Trimble v Steinfeldt* (1986) 178 CA3d 646, 224 CR 195.
38. Lis Pendens —CCP §§405-405.61		
Motion to Expunge—Granted or Denied	Mandate	CCP §405.39 (order not appealable, reviewable

		on writ of mandate only).
39. Mistrial		
Motion for Mistrial—Granted	Appeal judgment	*Bauguess v Paine* (1978) 22 C3d 626, 634 n3, 150 CR 461.
	Mandate	*Juarez v Superior Court* (1982) 31 C3d 759, 183 CR 852.
Motion for Mistrial—Denied	Appeal judgment	*Blair v Williams* (1952) 109 CA2d 516, 240 P2d 1043.
40. Nonsuit—CCP §581c		
Motion for Nonsuit—Granted	Appeal order	*Shepardson v McLellan* (1963) 59 C2d 83, 27 CR 884 (when order terminated litigation as to one party and did not indicate when it would be followed by formal written judgment).
Motion for Nonsuit—Denied	Petition for extraordinary writ	Not appealable under CCP §904.1.
41. Partition		
Interlocutory Judgments	Appeal judgment	CCP §904.1(a)(9).
42. Powers of Attorney—Prob C §1302		
The following motions are immediately appealable whether granted or denied:		
Any final order under Prob C §4541, except §4541(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(a).
Any final order under Prob C §4766(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
An order dismissing the petition or denying a motion to dismiss under Prob C §4953	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
43. Pretrial Conference Order —CCP §576	Mandate	*Universal Underwriters Ins. Co. v Superior Court* (1967) 250 CA2d 722, 58 CR 870 (without discussion of why writ lies).
44. Probate Orders —Prob C §§1300, 1303		
The following motions are immediately appealable whether granted or denied:		
Directing, authorizing,	Appeal order	CCP §904.1(a)(10); Prob

approving, or confirming sale, lease, encumbrance, grant of option, purchase, conveyance, or exchange of property		C §1300(a).
Settling account of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(b).
Authorizing, instructing, or directing fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Approving or confirming acts of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Directing or allowing payment of debt, claim, or cost	Appeal order	CCP §904.1(a)(10); Prob C §1300(d).
Fixing, authorizing, or allowing payment of compensation or expenses of attorney	Appeal order	CCP §904.1(a)(10); Prob C §1300(e).
Fixing, directing, authorizing, or allowing payment of compensation or expenses of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(f).
Surcharging, removing, or discharging fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(g).
Transferring property of estate to fiduciary in another jurisdiction	Appeal order	CCP §904.1(a)(10); Prob C §1300(h).
Allowing or denying fiduciary's petition to resign	Appeal order	CCP §904.1(a)(10); Prob C §1300(i).
Discharging surety on fiduciary's bond	Appeal order	CCP §904.1(a)(10); Prob C §1300(j).
Adjudicating the merits of a claim made under Prob C §§850-859	Appeal order	CCP §904.1(a)(10); Prob C §1300(k).
Granting or revoking letters to personal representative (except special administration)	Appeal order	CCP §904.1(a)(10); Prob C §1303(a).
Admitting a will to probate or revoking probate	Appeal order	CCP §904.1(a)(10); Prob C §1303(b).
Setting aside an estate of less than $20,000 (Prob C §6609)	Appeal order	CCP §904.1(a)(10); Prob C §1303(c).
Setting apart homestead or other exempt property	Appeal order	CCP §904.1(a)(10); Prob C §1303(d).
Granting, modifying, or terminating family allowance	Appeal order	CCP §904.1(a)(10); Prob C §1303(e).

Determining heirship, succession, entitlement, or person to whom distribution should be made	Appeal order	CCP §904.1(a)(10); Prob C §1303(f).
Directing distribution of property	Appeal order	CCP §904.1(a)(10); Prob C §1303(g).
Determining or confirming property's passage to, or ownership by, surviving spouse	Appeal order	CCP §904.1(a)(10); Prob C §1303(h).
Authorizing investment or reinvestment of surplus by personal representative	Appeal order	CCP §904.1(a)(10); Prob C §1303(i).
Determining whether beneficiary action constitutes contest under former Prob C §§21320-21322	Appeal order	Prob C §1303(j).
Determining priority of debts under Prob C §§11440-11446	Appeal order	CCP §904.1(a)(10); Prob C §1303(k).
Any final order under Prob C §§20100-20125 or 20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1303(*l*).
Motion for Leave to File Creditor's Claim—Denied	Mandate	*Estate of Hoertkorn* (1979) 88 CA3d 461, 151 CR 806 (mandate lies because order not appealable by Prob C §1240).
45. Public Records Act—Govt C §6259(c)	Mandate	*Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844.
46. Receiver—CCP §§564-570		
Petition to Appoint Receiver—Granted	Appeal order	*Carpenson v Najarian* (1967) 254 CA2d 856, 62 CR 687 (order must be appealed under CCP §§904.1(a)(7), 904.2(h)).
	Prohibition	*Rondos v Superior Court* (1957) 151 CA2d 190, 311 P2d 113 (writ available when under circumstances appeal not an adequate remedy).
Petition to Appoint—Denied	Appeal order	*Conaway v Conaway* (1963) 218 CA2d 427, 32 CR 890 (questionable whether order appealable; appeal taken).
	Mandate	*Guay v Superior Court* (1957) 147 CA2d 764,

		305 P2d 990.
Motion to Vacate Appointment—Denied	Appeal order	*Raff v Raff* (1964) 61 C2d 514, 39 CR 366 (order appealable in that essentially it is an order that receiver continue to serve, analogous to original order of appointment); *City & County of San Francisco v Shers* (1995) 38 CA4th 1831, 1837, 46 CR2d 57. But see *Title Ins. & Trust Co. v California Dev. Co.* (1911) 159 C 484, 114 P 838 (appeal judgment).
Motion to Discharge—Granted	Appeal order	*Hibernia Sav. & Loan Soc'y v Ellis Estate Co.* (1932) 216 C 280, 13 P2d 929 (characterized as final order on collateral matter).
Motion to Discharge—Denied	Mandate	*Fairbank v Superior Court* (1917) 34 CA 66, 166 P 864 (without discussion of why writ lies).
47. Reclassification —CCP §403.080		
Motion to Reclassify—Granted	Mandate	*Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108.
48. Remand Proceedings—Superior Court Fails to Follow Court of Appeal's Instructions	Mandate	*Butler v Superior Court* (2002) 104 CA4th 979, 128 CR2d 403.
49. Sanctions—CCP §§128.5, 2023.030		
Motion for Sanctions —Granted against party or attorney if over $5000	Appeal	CCP §904.1(a)(11)-(12).
Motion for Sanctions —Granted against party or attorney if $5000 or less	Mandate, prohibition, or appeal judgment	CCP §904.1(b) (CCP §904.1(a)(11)-(12)).
Motion for Sanctions —Denied	Mandate or Appeal	*Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617 (appealable as collateral order); *Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855.
Motion for Non-Monetary Discovery		

Sanctions—Granted		
	Mandate or prohibition	*Maggi v Superior Court* (2004) 119 CA4th 1218, 15 CR3d 161 (protective order violated Fifth Amendment).
	Appeal order	*Barton v Ahmanson Devs.* (1993) 17 CA4th 1358, 22 CR2d 56 (former attorney).
50. Security for Costs—CCP §§1029.5, 1030; Corp C §800		
Motion for Security for Costs—Granted	Appeal judgment	*Woodman v Ackerman* (1967) 249 CA2d 644, 57 CR 687 (nonappealable order, reviewable on appeal from judgment of dismissal entered after party refused to post security under former Corp C §834 (now Corp C §800)).
	Prohibition	*Hagan v Superior Court* (1960) 53 C2d 498, 2 CR 288 (writ may issue to restrain court from enforcing order to post security).
Motion for Security for Costs—Denied	Appeal judgment	*Efron v Kalmanovitz* (1960) 185 CA2d 149, 8 CR 107 (nonappealable order).
	Prohibition	*Kennaley v Superior Court* (1954) 43 C2d 512, 275 P2d 1.
51. Settlement		
Motion to Determine Good Faith of Settlement—Granted or Denied	Mandate	CCP §877.6(e).
Dismissal of Cross-Complaint After Granting of Motion to Determine Good Faith of Settlement	Appeal order	*Greshko v County of Los Angeles* (1987) 194 CA3d 822, 239 CR 846 (order appealable as final judgment if dismissal terminates action as to party).
52. SLAPP (see Anti-SLAPP)		
53. Stay—CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion for Stay—Granted	Appeal order	CCP §§904.1(a)(3) (if granted on grounds of inconvenient forum), 904.2(d) (same in limited

		jurisdiction cases).
	Mandate	*James v Superior Court* (1968) 261 CA2d 415, 67 CR 783 (without discussion of why writ lies in other cases).
Motion for Stay—Denied	Mandate	CCP §418.10(c) (if inconvenient forum); *Simmons v Superior Court* (1950) 96 CA2d 119, 214 P2d 844 (on grounds of comity).
54. Strike, Motion to—CCP §§435-437, 472c		
Motion to Strike—Granted	Appeal judgment	CCP §472c(b)(3) (nonappealable order, reviewable on appeal from final judgment).
	Appeal order	*Garza v Kantor* (1976) 54 CA3d 1025, 127 CR 164 (order appealable if it terminates action as to at least one party). See also CCP §586(a)(7).
Motion to Strike—Denied	Prohibition	*Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 279 P2d 35 (writ may lie to restrain trial of issues underlying motion).
55. Summary Adjudication of Issues and Orders Under CCP §437c (other than summary judgment)	Mandate or prohibition	CCP §437c(m)(1); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 83 CR 237 (full discussion of when writ lies).
56. Summary Judgment—CCP §437c		
Motion for Summary Judgment—Granted	Appeal judgment	CCP §437c(m)(1).
Motion for Summary Judgment—Denied; Motion for Summary Adjudication Granted or Denied	Mandate or prohibition	CCP §437c(m)(1).
Trial Court Takes Motion off Calendar	Mandate	*Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 254 CR 68
Trial Court Shortens Motion Notice Period	Mandate	*McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407.
Trial Court Denies Oral Argument	Mandate	*Brannon v Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491.

Trial Court Denies Right to File Motion	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 6 CR3d 7.
Trial Court Refused to Consider Summary Adjudication in the Alternative	Mandate	*Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 744, 14 CR3d 643.
57. Tort Claims Act (see Government Claims Act)		
58. Trusts—Prob C §1304		
Any of the following orders are immediately appealable whether they are granted or denied:		
Any final order under Prob C §§17200-17211, except one compelling trustee to submit account or report acts as trustee or accepting trustee's resignation	Appeal order	CCP §904.1(a)(10); Prob C §1304(a).
Any final order under Prob C §§19020-19030	Appeal order	CCP §904.1(a)(10); Prob C §1304(b).
Any final order under Prob C §§20100-20125 and Prob C §§20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1304(c).
Determining whether an action constitutes a contest under former Prob C §§21320-21322	Appeal order	CCP §904.1(a)(10); Prob C §1304(d).
59. Unlawful Detainer—CCP §1176		
Motion for Stay—Denied	Mandate	CCP §1176(a).
60. Venue—CCP §§400, 904.2(c)		
Motion for Change of Venue—Granted or Denied	Mandate	CCP §400; *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 927 n4, 184 CR 296; *Hennigan v Boren* (1966) 243 CA2d 810, 52 CR 748. But see CCP §904.2(c) (order granting or denying motion to change venue in limited civil case is appealable order).

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3A

Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ

Raymond A. Cardozo
Paul D. Fogel

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.1 I. NATURE OF THE CHOICE

§3A.1 I. NATURE OF THE CHOICE

The distinction between a direct appeal and a petition for an extraordinary writ is explained at length in chap 3. This chapter focuses on how to determine which method of appellate review one should pursue in the event that both avenues are available.

A party contemplating an appellate challenge to a trial court order should recognize that there are cases in which:

- It *must* file a notice of appeal or forever lose its ability to obtain appellate review of the order;
- It *must* file a writ petition or forever lose its ability to obtain appellate review of the order;
- It can, but need not, file an immediate writ petition and/or later appeal from any ensuing judgment; and
- A writ petition from the order would be futile.

Counsel must therefore resolve at least four questions before choosing between a writ petition and an appeal:

- Is the order to be challenged appealable?
- Will an appeal provide an adequate remedy?
- How should one proceed if the appealability of the order is not clear?
- Assuming one has both the option of appealing and filing a writ petition, what are the advantages and disadvantages of each procedure?

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.2 A. The Order May Be Immediately Appealable

§3A.2 A. The Order May Be Immediately Appealable

In some instances, a statute makes an interlocutory order immediately appealable. Examples include:

- An order awarding sanctions in excess of $5000 against a party or attorney. CCP §904.1(a)(11).
- An order discharging or refusing to discharge an attachment or granting a right to attach order. CCP §904.1(a)(5). (Note, however, that an order denying a right to attach order is not appealable. See *Islander Yachts, Inc. v One Freeport 36-Foot Vessel* (1985) 173 CA3d 1081, 1086 n6, 219 CR 654; *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 735, 191 CR 227.)
- An order granting a petition for inspection of juvenile court records by media representatives. Welf & I C §827.

See §§3.26-3.47 for a complete summary of appealable orders.

PRACTICE TIP: If the order is immediately appealable, an aggrieved party will have difficulty justifying writ relief unless the party shows that the available avenue of an appeal would be an inadequate remedy. See §1.37. Even if the party can make that showing, the reviewing court may decline to entertain the writ petition on the merits. In that instance, the failure to file a timely notice of appeal from the appealable order will forever bar appellate review. See §3.4. For these reasons, a party who wishes to challenge an order that is immediately appealable probably should file a notice of appeal from the order. If immediate relief is necessary, the party should file a writ petition as well.

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§3A.3 B. The Order May Be Reviewable Only by Writ

Certain trial court orders are reviewable *only* by way of extraordinary writ. Examples include:

- An order compelling or refusing disclosure of public documents under the Public Records Act. See Govt C §6259(c); *Powers v City of Richmond* (1995) 10 C4th 85, 115, 40 CR2d 839.
- An order granting or denying a motion to expunge a lis pendens. See CCP §405.39.
- An order denying a motion to quash service of process for lack of personal jurisdiction. Such an order is not reviewable on appeal from the judgment if the defendant appears and defends against the action (as opposed to suffering a default judgment). *McCorkle v City of Los Angeles* (1969) 70 C2d 252, 257, 74 CR 389. (Note that an order quashing service of summons for lack of personal jurisdiction is appealable. CCP §904.1(a)(3); *H. Liebas & Co. v Erica Shoes, Inc.* (1965) 237 CA2d 25, 27 n1, 46 CR 470.)
- An order concerning judicial disqualification. See CCP §170.3; *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 5 CR3d 532; *Papadakis v Zelis* (1992) 8 CA4th 1146, 11 CR2d 411; but see *People v Brown* (1993) 6 C4th 322, 333, 24 CR2d 710 (criminal defendant may argue on appeal from judgment that judicial bias denied defendant due process, but failure to seek writ relief early in case may be considered waiver of due process claim).
- An order upholding on administrative mandamus review a medical board's revocation of a physician's license. See *Leone v Medical Bd. of Cal.* (2000) 22 C4th 660, 670, 94 CR2d 61 (finding that limitation of such review to extraordinary writ procedure is constitutional).

For a summary of prejudgment trial court orders that may be reviewed by writ, see §3.47.

Some of the limitations on the right to appeal reflect a recognition that waiting to appeal certain types of pretrial orders until after the entry of a final judgment would be of little practical benefit. Those limitations also represent a recognition that the right to an immediate appeal—with the full array of procedural rights that accompany it (full briefing on the merits, the right to present oral argument, written decision with reasons stated)—might unduly consume the appellate court's resources. In these instances, a litigant's *only* option is to file a writ petition.

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.4 C. The Order May Be Appealable Only From the Judgment, But Writ Review May Also Be Available

§3A.4 C. The Order May Be Appealable Only From the Judgment, But Writ Review May Also Be Available

The vast majority of interlocutory orders are reviewable only on appeal from a final judgment. See §3.25. Nevertheless, if the litigant wants appellate review of such an order before judgment and can meet the requirements for writ relief, it should file a writ petition seeking immediate review of that order. For example, a family court order temporarily awarding custody of a child to one parent pending the litigation of other custody issues could deprive a parent of valuable time with his or her child until the entry of a final judgment. By the time the family court enters that judgment and the appellate court reverses the erroneous judgment on appeal, irreversible damage to the parent-child relationship may have occurred.

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§3A.5 D. The Order May Be Reviewable Only After the Entry of Judgment and Not by Writ

In some instances, the appellate courts have declared writ relief unavailable to review certain types of trial court orders. See *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 660, 117 CR 20 (writ review unavailable to resolve admissibility of evidence); *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1010, 58 CR3d 802 (expedited appeal is only recourse to order after election contest under Elec C §16900). Nonetheless, courts have recognized that in truly exceptional circumstances, writ review of such orders is available. See *Hornung v Superior Court* (2000) 81 CA4th 1095, 1098, 97 CR2d 382 (although writ review generally unavailable to resolve admissibility of evidence, writ review is available if issue is of "great public importance" and appeal would be an inadequate remedy "in context of specific case"), and *Aas v Superior Court* (2000) 24 C4th 627, 101 CR2d 718 (writ review available to review order excluding all evidence on particular claim because order is functional equivalent of order granting judgment on pleadings). Thus, although a party may believe that a trial court's evidentiary ruling is erroneous and likely to cause irreparable harm or great prejudice if not immediately reversed, the chance that a reviewing court will entertain a writ petition and overturn an evidentiary ruling is exceedingly slim.

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§3A.6 II. THE PARAMOUNT IMPORTANCE OF THE ISSUE OF APPEALABILITY

The question of which orders are appealable and under what circumstances is the subject of chap 3. That chapter also discusses the paramount importance of the question of appealability. But the discussion in §§3A.7-3A.8 further demonstrates why a party must fully and satisfactorily resolve the appealability question before deciding between an appeal and/or a petition for an extraordinary writ.

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§3A.7 A. Effect of Invoking Improper Procedure

The determination that an appealed order was not appealable may result in a dismissal of the appeal after the time to file a writ petition has elapsed. In most situations when a party contemplates an immediate appeal of a trial court order, the party is seeking appellate relief quickly—*i.e.,* before entry of a final judgment. If the party files a notice of appeal but the appellate court later determines that the challenged order is not appealable, the appellate court will dismiss the appeal without considering the merits. See §3.5. (There are certain exceptions; see §§3.6-3.7.) The dismissal may occur months down the road, when the challenged order's effects are causing or have already caused prejudice to the would-be appellant. At this stage, a writ petition may be too late to remedy the effect of the trial court's order. And any claim of exigency in the writ petition will likely fail against the appellate court's knowledge that the petitioner frittered away months on an improper appeal. See §1.43 (discussing statutory deadlines and need to file writ promptly even in absence of deadline).

If the order is appealable but the litigant files a writ petition, the time to appeal may lapse. If an order is immediately appealable, writ review is normally not available because the litigant ostensibly has the adequate remedy of an appeal. See §1.37. As noted in §3.4, a litigant who nonetheless files a writ petition that challenges an appealable order risks denial of the petition after the time for appealing has passed. But there is no guarantee that the appellate court will decide the writ petition on the merits, much less before the deadline for filing a notice of appeal. Thus, the time to file the notice of appeal may lapse without any indication from the appellate court that the petitioner is entitled to writ review of an appealable order. Moreover, even if the appellate court decides the writ petition before the time to appeal lapses, it may summarily deny the petition without explaining that the challenged order was appealable. And as noted in §3.4, the failure to file a timely notice of appeal from an appealable order forever bars appellate review of that order—even in an appeal after a final judgment.

Thus, while the erroneous pursuit of an appeal from an order can consume valuable time that would be better devoted to a writ petition, the erroneous pursuit of writ relief can preclude appellate review of the order altogether. Accordingly, careful analysis of the question of appealability is a crucial first step in balancing one's appellate options.

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§3A.8 B. An Appellant Must Be Prepared to Articulate Its Theory of Appealability

In California, the right to appeal in civil cases is purely statutory. Thus, a long line of decisions—and a plurality of the California Supreme Court—establish that unless a statute expressly makes a trial court order appealable, it is *not* appealable. See *Powers v City of Richmond* (1995) 10 C4th 85, 108, 40 CR2d 839 (plurality opinion of Kennard, J.) (concluding that right of appeal is purely creature of statute and collecting cases that have so held); *Caruso v Snap-Tite, Inc.* (1969) 275 CA2d 211, 213, 79 CR 642 (unless statute expressly makes order appealable, it is not appealable); see also *Leone v Medical Bd. of Cal*. (2000) 22 C4th 660, 668, 94 CR2d 61 (citing with approval statement in *Powers* plurality opinion that unless statute makes order appealable, it is not appealable).

In addition, every appellant must identify the authority for taking the appeal in a Civil Case Information Statement (Judicial Council Form APP-004) filed and served within 10 days after the reviewing court clerk mails the form to the appellant. Cal Rules of Ct 8.100(g)(1)-(2). In addition, in the opening brief, the appellant must state that the judgment appealed from is final, or explain why the order appealed from is appealable. Cal Rules of Ct 8.204(a)(2)(B). An appellant's failure to explain appealability may draw the reviewing court's ire. *Lester v Lennane* (2000) 84 CA4th 536, 101 CR2d 86 (failure to provide required statement of appealability may result in striking of appellant's opening brief on court's own motion or on motion of party and may result in dismissal of appeal). Again, before filing a notice of appeal, the appellant must carefully analyze the question of appealability and identify the particular statutory provision that authorizes the appeal.

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§3A.9 III. OPTIONS IF APPEALABILITY IS NOT CLEAR

As the discussion in §§3A.6-3A.8 demonstrates, the determination of whether the order to be challenged is appealable is a crucial preliminary consideration that often will dictate the litigant's future course. But the answer to the appealability question is not always clear. When there is such a lack of clarity, a party has several options.

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.10 A. Appeal Immediately From the Order and Also Appeal From the Final Judgment

§3A.10 A. Appeal Immediately From the Order and Also Appeal From the Final Judgment

An aggrieved party who is unsure whether the challenged order is appealable may appeal immediately. If the proceedings result in a final judgment before disposition of the appeal from the order, the litigant may then also appeal from any ensuing final judgment. Under this "dual appeal" approach, the appellant probably has avoided any waiver of its appellate rights and is guaranteed review under at least one of its appeals. (Note that this approach requires the payment of two filing fees.) If the order was immediately appealable, the appellate court will review it on the first appeal; if the order was only reviewable on appeal from the final judgment, the appellate court will dismiss the first appeal but will review the order during the second appeal.

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§3A.11 1. The Dual Appeal Approach Will Not Work When Review Only Lies by Extraordinary Writ

As noted in §3A.3, some trial court orders are reviewable only by extraordinary writ, not by immediate appeal or appeal from a final judgment. In these situations, the dual appeal approach will not guarantee appellate review because *neither* appeal is proper. Although the appellate court has the discretion to treat either of the defective appeals as a writ petition, it usually exercises this discretion only in compelling cases. See §3.9. Thus, unless the appealability question truly was unclear—such that the appealing party could reasonably have made the mistake of appealing instead of seeking writ relief—a litigant should not simply file a notice of appeal "out of an abundance of caution" but should attempt to fully resolve the appealability question and file a notice of appeal only if it entertains a genuine doubt as to appealability. That way, if the respondent challenges appealability by way of a motion to dismiss, the appellant will have a ready explanation as to why he or she filed the appeal.

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§3A.12 2. An Appellate Court May Take a Dim View of a Defective Appeal Filed Solely to Preserve the Aggrieved Party's Appellate Rights

At least one appellate court has criticized a party for filing an appeal when the authority for it was unclear. *Lester v Lennane* (2000) 84 CA4th 536, 101 CR2d 86. In *Lester,* the appellant filed a notice of appeal from two temporary child custody orders. The appealability of both was unclear. In the statement of appealability in his opening brief on appeal, the appellant frankly confessed he was unsure about appealability (84 CA4th at 556):

> Father has been unable to discover a ruling addressing whether temporary custody orders are independently appealable or only reviewable through an appeal of the final judgment. As Father's appeals of the two temporary custody orders have been consolidated with his appeal of the judgment, all issues are properly before the court. For the guidance of the family law bar, however, Father asks that this court make a ruling as to whether temporary custody orders are appealable prior to judgment.

The Third Appellate District criticized this statement of appealability because it "wholly fails to comply with the letter and purpose of [former] rule 13 [now rule 8.204(a)(2)(B)]." Instead, the court stated, the statement "cites no law whatsoever in support of appealability. Rather, it simply serves the question of appealability onto the court's side of the net and invites the court to undertake an independent analysis of appealability." 84 CA4th at 557. The court threatened to dismiss the appeal as a sanction and requested supplemental briefing on whether that would be an appropriate consequence for a failure to comply with former Cal Rules of Ct 13 (now Cal Rules of Ct 8.204(a)(2)(B)).

In the end, the court declined to dismiss the appeal on the ground that no reported case had previously imposed such a sanction. However, the court warned, "appellants should now be on clear notice that, in the future, a failure to comply fully with [former] Rule 13's requirement of a statement of appealability may result in our striking the appellant's opening brief, either on our own motion or upon motion of a party. A further failure to comply fully with [former] Rule 13 may result in our dismissal of the appeal for failure to submit a brief in compliance with the rules of court." 84 CA4th at 557.

Lester's strong reaction to the appellant's approach to the uncertain appealability question seems unfair because the appellant admitted that appealability was unclear and explained in his opening brief why he had filed a notice of appeal. Indeed, *Lester* spent nine pages of its opinion discussing and deciding that previously unresolved appealability question.

Nevertheless, *Lester* underscores two important points. First, a litigant needs to determine that the law is at least unclear before he or she files the appeal. An erroneous determination on that point could risk the court's ire for filing a plainly defective appeal. Second, if a litigant chooses to appeal when appealability is unclear, he or she should articulate and advocate the case for appealability in the Rule 8.204(a)(2)(B) statement (if not before on the Civil Case Information Statement (Judicial Council Form APP-004) or in response to a motion to dismiss) and should be prepared to defend the decision to appeal. Litigants should not simply serve "the question of appealability onto the court's side of the net and invite the court to undertake an independent analysis of appealability."

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§3A.13 B. File Both a Notice of Appeal and a Contemporaneous Writ

For a thorough discussion of the relative advantages and disadvantages of filing both an immediate notice of appeal and a contemporaneous writ petition, see §3.11.

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.14 IV. ADVANTAGES AND DISADVANTAGES OF APPEALING INSTEAD OF FILING A WRIT PETITION

§3A.14 IV. ADVANTAGES AND DISADVANTAGES OF APPEALING INSTEAD OF FILING A WRIT PETITION

Most interlocutory trial court orders are not immediately appealable. Thus, an aggrieved party typically has a choice between filing a writ petition from the order now or appealing after entry of a final judgment, or doing both. This section discusses the factors that a party should consider in making that choice.

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§3A.15 A. An Appeal Is Unlikely to Result in Rapid Relief

The process of appeal is not designed for speedy resolution. The record, based on the reporter's transcript and the clerk's transcript, must be prepared according to prescribed procedures. See Cal Rules Ct 8.120-8.130. The appellant then gets 40 days to prepare the opening brief, the respondent gets an additional 30 days to prepare the responding brief, and the appellant gets 20 more days to prepare a reply brief. Cal Rules of Ct 8.212(a). In addition, extensions of time are routinely granted. When an appellate brief is not filed within the prescribed time, the clerk will issue a default notice that permits the party an additional 15 days to file the brief. Cal Rules of Ct 8.220. In fact, some courts and parties view the Rule 8.220 period as an additional "automatic" extension on which the parties may routinely rely. Once the briefing is complete, the parties may request oral argument, which may occur anywhere from several months to more than a year after the completion of briefing. Finally, the court will decide the appeal in a written opinion filed up to 90 days after the case is submitted.

Writ procedure, by contrast, is designed to accommodate exigencies. If the petitioner provides notice to its adversary along with a copy of the writ petition and the real party in interest is given an opportunity to file opposition, the appellate court may, in limited circumstances, issue a peremptory writ in the first instance (*Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626), or it can order opposition filed on an expedited basis and may then issue a peremptory writ. And, of course, the court can summarily deny relief within days or even hours of the filing of the petition. This flexibility in writ procedure enables an appellate court to quickly grant or deny relief, if it sees fit.

Thus, if time is of the essence, a writ petition is the preferable course.

NOTE: In *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598) 2010 Cal Lexis 588, the California Supreme Court held that it is not improper for a court of appeal to issue a suggestive *Palma* notice and that the appellate court may issue the notice without having received or solicited opposition from the real party in interest.

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§3A.16 B. Is the Cost of a Writ Justified in Light of Its Remote Chance of Success?

The reviewing courts grant very few of the writ petitions presented to them. See *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332; *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66. This is because most writ petitions ask the appellate courts to intervene in an ongoing trial court proceeding and to grant interlocutory review. Appellate courts are reluctant to do so because:

- Routine intervention in trial court matters would cause gridlock at both the trial and appellate levels, since trial court proceedings would routinely be interrupted by the results of the writ proceedings. The relative success of such writ petitions would encourage litigants to flood the appellate courts with challenges to every adverse order. 209 CA3d at 1272.
- The issue presented by the writ petition or the prejudice caused by the challenged order may be mooted or cured in the ensuing trial court proceedings by settlement or further trial court developments. See *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332.

Although appellate courts also affirm the judgment in the majority of direct appeals, an appellant does not face the reviewing courts' additional reluctance to intervene in an ongoing dispute. Moreover, after a final judgment, a party can take stock of the entire case and piece together a package of appellate issues that offers the best chance of success in light of everything that transpired in the lower court. Because the reviewing court will have seen "the whole picture," it will feel more comfortable reversing a lower court than it ordinarily would when offered the fragmentary picture presented by a writ petition and asked to take immediate curative action. Thus, although an appellant also faces an uphill climb in obtaining relief on direct appeal, the slope is less steep than the slope that a writ petitioner confronts.

Because a writ petition has only a remote chance of success, the aggrieved party must consider whether the cost of pursuing writ review is justified in comparison to the remote likelihood of success. Although some of the research and preparation of the writ petition may be helpful in any eventual appeal, the combined cost of both an immediate writ petition and a later appeal from the judgment will assuredly be higher than the cost of an appeal only. The relative importance of securing immediate relief and the aggrieved party's financial resources will affect the decision whether to spend the money on the remote chance that the writ petition will succeed.

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§3A.17 C. Would an Appeal Truly Be an Inadequate Remedy; Is the Error in the Trial Court's Order Manifest?

Given the small percentage of writ petitions that succeed, an aggrieved party must candidly assess whether its claim is truly extraordinary, attention-grabbing, and urgent. Among other things, the aggrieved party should determine whether there is any law holding that an appeal is an inadequate remedy for the type of harm that the aggrieved party would allege in a writ petition. CCP §§1086 (mandate), 1103 (prohibition), 1069 (certiorari). The aggrieved party should also consider whether the trial court's ruling is so clearly wrong that it will grab the reviewing court's attention. And the aggrieved party should contemplate whether there are significant policy ramifications or other attention-grabbing implications of the trial court's order. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 258 CR 66. Unless the aggrieved party's petition would raise at least some of these factors, it should realize that its writ petition has little chance of success. See California Civil Writ Practice §14.1 (4th ed Cal CEB 2008).

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§3A.18 D. How Would a Denial of the Writ Petition Affect the Ongoing Litigation in the Trial Court and the Litigant's Chance of Success in Any Eventual Appeal?

A summary denial of a writ petition is not a ruling on the merits and does not preclude raising the issues in a later appeal from the judgment, assuming the challenged order is reviewable in an appeal. See §1.3. Nevertheless, one could debate whether, during a subsequent appeal, the appellate court's knowledge that it had earlier denied a writ petition raising the same issue might imperceptibly influence the appellate court's reaction to the issue.

Moreover, an opponent on appeal may feel emboldened (perhaps mistakenly so) by the knowledge that the appellate court did not intervene and reverse the challenged order in a pretrial writ petition. And although trial judges should not allow unsuccessful interlocutory appellate challenges to their orders to influence later rulings, judges are human beings and may be annoyed by a party's filing of a writ petition and an attempt to interfere with ongoing trial court proceedings. In contrast, when a party appeals after judgment, there usually is nothing left for the trial court to do, and little if any trial court "retribution" risk that an appellant faces.

It is not clear that the denial of a writ petition would produce any of these adverse consequence—emboldening an opponent or its counsel, alienating the trial court judge, or adversely affecting any subsequent appeal. But parties and counsel must nonetheless be sensitive to those possibilities when evaluating their options.

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Source: Civil Litigation/California Civil Appellate Practice/3A Choosing Between a Direct Appeal and a Petition for an Extraordinary Writ/§3A.19 V. EXAMPLES

§3A.19 V. EXAMPLES

To illustrate how an aggrieved party might apply the principles discussed in the previous part of this chapter, we provide an extended discussion of two common situations in which a party may feel it must take immediate appellate action.

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A. Good Faith Settlement Determinations

§3A.20 1. The Need for Immediate Appellate Review

Code of Civil Procedure §877.6(c) protects a defendant who settles a lawsuit in good faith from claims for equitable comparative contribution or implied equitable indemnity by nonsettling joint tortfeasors or co-obligors. Because of its broad claim-preclusion effect, there are clear benefits that follow from immediate review of a trial court's determination that a defendant has or has not settled in good faith. If the trial court erroneously determines that a defendant did not settle in good faith, that defendant, if unable to obtain immediate review, is forced to remain in the case and undergo discovery and possibly a trial. A reversal on appeal of the good faith determination amounts to a Pyrrhic victory because the settlement was intended to purchase peace, yet the settling defendant was dragged through further litigation. Conversely, if a trial court erroneously determines that a defendant settled in good faith, postponing review until after judgment delays reinstatement of the erroneously dismissed defendant until after a trial has been conducted with a relevant party missing.

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§3A.21 2. Appealability of Good Faith Settlement Determination After Final Judgment Is Unclear

A trial court's good faith settlement determination is not immediately appealable but is reviewable by a petition for a writ of mandate. See CCP §877.6(e) ("[w]hen a determination of the 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"); *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1134, 87 CR2d 108.

Time to file writ petition and time by which the reviewing court must rule. The aggrieved party must file the writ petition within 20 days after service of notice of entry of the order. CCP §877.6(e). The reviewing court must determine whether it will hear the writ within 30 days of its filing. CCP §877.6(e)(1). And if it decides to grant a hearing, the appellate court must give the matter "special precedence" over all other nonpreference civil appellate matters. CCP §877.6(e)(2).

Review may not be available after final judgment. The case law is unclear as to whether writ review is the *exclusive* method of obtaining review of a good faith settlement determination or whether a party may challenge that determination in an appeal after judgment. Compare *Maryland Cas. Co. v Andreini Co.* (2000) 81 CA4th 1413, 1420, 97 CR2d 752 (party who has challenged good faith determination by timely petition for writ of mandate may also challenge that determination on appeal from judgment); *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1134, 87 CR2d 108 (good faith settlement determination "is a nonappealable interlocutory decree," and "Mandamus is the exclusive procedure for obtaining immediate review of such an order").

The *Maryland Casualty* holding—which permitted appellate review after judgment when the party sought writ review before judgment—seems more logical. After all, the legislature cast the writ language in the good faith settlement statute in permissive terms—"any party aggrieved by the [good faith] determination *may* petition the proper court to review the determination by writ of mandate." CCP §877.6(e) (italics added). And nothing in that statute or its legislative history indicates that the legislature sought to *condition* appellate review after judgment on the earlier filing of a writ petition.

Writ petition may be necessary to avoid waiver of subsequent appeal. In *Main Fiber,* the appellant failed to seek writ review of the good faith determination. It then sought to raise in the postjudgment appeal the propriety of the trial court's ruling on that issue. The court of appeal held the earlier failure barred review of that ruling on appeal. In *Maryland Casualty,* however, the appellant had challenged the trial court's good faith finding in a writ petition and the court of appeal permitted the appellant to challenge that finding in its appeal from the final judgment.

These two seemingly inconsistent holdings could be harmonized by finding that the failure to file a timely writ petition *waives* the right to challenge the good faith determination on appeal after judgment. Although the logic of such a holding is questionable (because neither the statute nor the case law state such a rule), an aggrieved party will have the best possible appealability argument if it has sought writ review of the good faith settlement determination and later seeks to challenge that determination (again) on appeal after judgment. And by first seeking writ review and later appealing, a litigant also exhausts all procedures available to challenge a good faith settlement determination and thereby maximizes its chances of successfully overturning that determination.

Application of above analysis to other situations in which statute provides that party "may" seek review by immediate writ. The above analysis of good faith settlement issues also should apply to other situations in which the legislature has provided that a party "may" immediately seek review of a trial court order by filing a writ petition. For example, CCP §400 provides that a party "may" seek writ review of a trial court's ruling on a motion to change venue. Because this provision replaced an earlier provision that rendered venue orders appealable, §400 establishes that a venue ruling is not immediately appealable. See *Hennigan v Boren* (1966) 243 CA2d 810, 815, 52 CR 748. However, a question remains as to whether writ review of such a ruling is the exclusive method of obtaining appellate review.

Employing an appealability analysis similar to that in *Maryland Casualty,* one depublished decision noted that CCP §400 uses the permissive "may," found no evidence in the legislative history that the legislature intended to eliminate the right to review of venue rulings on appeal from a final judgment, and concluded that a party may seek review of a venue ruling on appeal from a final judgment. *Handelman v Mammoth Mountain Ski Area* (ordered depublished; former

opinion at (1993) 15 CA4th 820, 19 CR2d 126). Other courts also seem to recognize that review of venue orders should be available on appeal from the judgment. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 42, 24 CR2d 337 (declining to treat purported appeal from nonappealable venue ruling as writ petition because would-be appellant "has shown no exigent reasons why review … should not, as is usual, await the rendition of a final judgment").

Nevertheless, for the reasons expressed in the analysis of good faith settlement orders, a party aggrieved by a venue ruling should realize that its safest course is to file a writ petition and then challenge the venue ruling on appeal from the judgment. And with venue rulings, parties have a particular incentive to seek review by writ: On appeal, a party will have difficulty showing that an erroneous venue ruling resulted in a "miscarriage of justice" (Cal Const art VI, §13) because the prejudicial effect of the venue ruling will be difficult to demonstrate. See *Handelman v Mammoth Mountain Ski Area, supra* (noting difficulty of establishing on appeal that erroneous venue ruling prejudiced appellant).

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§3A.22 3. Advantages of Writ Petition

Before filing a writ petition, the aggrieved party must weigh the following factors in deciding whether it should appeal now, file a writ petition now, or wait until after judgment:

- **Appealability.** The order is not appealable, but is reviewable by writ.
- **Unique points that might draw appellate court's attention.** The legislature's express authorization of a statutory writ procedure (CCP §877.6(e)) is an implicit recognition that immediate review of good faith settlement determinations is desirable. That statute gives the petitioner at least one circumstance that concretely separates its petition from the bulk of writ petitions that do not grab the attention of the appellate court.
- **Justification of cost of writ petition in light of importance of issue and chances of success.** Because a good faith settlement determination will effectively remove or keep a party in the case, its resolution can have a substantial impact on the litigation, perhaps enough to justify the cost of a writ petition.
- **Risk of alienating trial judge.** Given the significance of a trial court's good faith determination and the existence of express statutory authority for filing a writ, a trial judge can reasonably expect that many of its good faith determinations will be challenged by a writ petition. Thus, the trial judge should not view the seeking of writ relief as an affront.

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B. Preliminary Injunction Orders

§3A.23 1. Order Granting Preliminary Injunction

An order granting a preliminary injunction is immediately appealable, and thus, a writ petition would invoke the wrong procedure. An order granting a preliminary injunction is immediately appealable. CCP §904.1(a)(6); *Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398. Because writ relief is only available when an appeal is an inadequate remedy (see §1.37), a party who wishes to challenge an order granting a preliminary injunction probably must file an appeal, rather than a writ petition, even if the order threatens irreparable harm. But see *366-386 Geary St., L.P. v Superior Court* (1990) 219 CA3d 1186, 268 CR 678 (granting writ relief on petition challenging order denying preliminary injunction but not discussing appealability).

If the injunction is "mandatory," it will be automatically stayed by the perfecting of the appeal, but if the injunction is "prohibitory," a party who believes that irreparable harm would result during the pendency of the appeal should file a petition for writ of supersedeas. All "mandatory" injunctions are automatically stayed by appeal. See CCP §916(a); *Dewey v Superior Court* (1889) 81 C 64, 67, 22 P 333; *ALRB v Superior Court* (1983) 149 CA3d 709, 716, 196 CR 920; *Hayworth v City of Oakland* (1982) 129 CA3d 723, 727, 181 CR 214. However, a "prohibitory" injunction is not automatically stayed by appeal. *Hayworth v City of Oakland, supra.*

An injunction is "mandatory" if it changes the parties' positions and compels them to take action in conformance with the judgment; it is prohibitory if it does not change the status quo. *Keetenhofen v Superior Court* (1961) 55 C2d 189, 191, 10 CR 356; *Davenport v Blue Cross of Cal.* (1997) 52 CA4th 435, 446, 60 CR2d 641. The distinction between a "mandatory" and "prohibitory" injunction turns on the operative effect of the injunction order and not the label that the court gives it. See *Butt v State* (1992) 4 C4th 668, 674, 15 CR2d 480 (when school district announced it lacked funds to complete school year, injunction directing school to ensure that students receive full school term not stayed pending appeal); *Hayworth v City of Oakland, supra* (order directing that city promote racial minorities within fire department in fixed proportion to Caucasians automatically stayed pending appeal).

If the injunction is not "mandatory"—or if the aggrieved party is unsure whether it is "mandatory" or "prohibitory"—an aggrieved party who believes irreparable harm will result absent a stay may file both a notice of appeal and a petition for writ of supersedeas (CCP §923), stating in the petition that he or she is seeking a stay of the injunction during the pendency of the appeal. Depending on the date by which action is needed, the party may also wish to accompany the supersedeas petition with a request for a stay pending the final disposition of that petition. (The supersedeas procedure is discussed at §§6.68-6.85.)

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§3A.24 2. Order Denying Preliminary Injunction

An order denying a preliminary injunction is appealable. CCP §904.1(a)(6); *Valley Casework, Inc. v Comfort Constr. Inc.* (1999) 76 CA4th 1013, 1019 n4, 90 CR2d 779; *Department of Fish & Game v Anderson-Cottonwood Irrig. Dist.* (1992) 8 CA4th 1554, 1560, 11 CR2d 222; *American Builder's Assoc. v Au-Yang* (1990) 226 CA3d 170, 173 n1, 276 CR 262.

A party who believes he or she has met the criteria for preliminary injunctive relief in the trial court probably has satisfied the criteria for writ relief. A showing that irreparable harm would likely result in the absence of injunctive relief is essential to obtain a preliminary injunction. See *King v Meese* (1987) 43 C3d 1217, 1226, 240 CR 829. But if a party can make that showing, then an appeal would not be an adequate remedy. Thus, if a litigant believes the trial court should have granted a preliminary injunction, it should be able to demonstrate that it meets the criteria for writ relief. Of course, because writ relief is entirely discretionary and is seldom granted, such a showing—although ostensibly meritorious—has no guarantee of succeeding.

File both a notice of appeal and a petition for a writ of supersedeas. As with an order granting a preliminary injunction, the availability of an appeal probably means that writ relief is unavailable. Thus, the proper procedure for a party who believes it will be irreparably harmed absent appellate intervention is to file a notice of appeal and petition for a writ of supersedeas that requests temporary injunctive relief during the pendency of the appeal. This method protects against waiver of appellate review and provides the appellate court with a way to protect the petitioner/appellant against the alleged irreparable harm.

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Is There Standing to Appeal?

Ronald M. Greenberg

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I. STANDING OR RIGHT TO APPEAL

§4.1 A. Standing Governed by Statute

Code of Civil Procedure §902 governs whether a person has "standing to appeal," *i.e.,* whether he or she has a sufficient interest in a decision to appeal that decision. The statute provides that "[a]ny party aggrieved may appeal." This provision has been liberally construed, as a procedural statute, with any doubt resolved in favor of a right to appeal. *Koehn v State Bd. of Equalization* (1958) 50 C2d 432, 326 P2d 502 (decided under former CCP §938, replaced by CCP §902); *Aries Dev. Co. v California Coastal Zone Conserv. Comm'n* (1975) 48 CA3d 534, 542, 122 CR 315. See also *Grosset v Wenaas* (2008) 42 C4th 1100, 1119, 72 CR3d 129 (plaintiff no longer had standing to pursue appeal because Govt C §800(b) requires plaintiff in derivative suit to maintain continuous stock ownership throughout pendency of litigation, and plaintiff ceased to be stockholder due to merger). However, courts have held that §902 must be applied strictly in the context of defining whether an aggrieved party is involved. See *Kunza v Gaskell* (1979) 91 CA3d 201, 206, 154 CR 101; *Hensley v Hensley* (1987) 190 CA3d 895, 898, 235 CR 684.

NOTE: It may appear that, because standing is governed by statute, the "right to appeal" is similarly governed. In *Powers v City of Richmond* (1995) 10 C4th 85, 40 CR2d 839, a plurality held that the constitution does not guarantee litigants a direct right to appeal a judgment when superior courts have original jurisdiction. Relying on *Powers,* the supreme court in *Leone v Medical Bd. of Cal.* (2000) 22 C4th 660, 94 CR2d 61, held that Cal Const art VI, §11 does *not* confer a direct right to appeal a judgment when the superior courts have original jurisdiction.

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B. Party of Record Requirement

§4.2 1. At Time Appeal Taken

The term "party" as used in CCP §902 has been construed to mean any person who is a party of record *at the time* the appeal is taken. *Rose v Rose* (1952) 110 CA2d 812, 243 P2d 578 (decided under former CCP §938, replaced by CCP §902); *Rogers v Transamerica Corp.* (1935) 6 CA2d 340, 44 P2d 635 (originally named party dismissed before appeal cannot appeal, despite possibility party might be brought back into case). Thus, merely because a person was a party of record at one time does not necessarily mean that he or she is a party under CCP §902.

The party of record requirement has not always been followed. A nonparty who is "aggrieved" by the trial court's decision may in some circumstances be permitted to appeal. See, *e.g., Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493 (expert witness, although not formally a party to the action, held entitled to appeal order setting expert witness fees; witness treated as "party" to motion to set fees); *Estate of Zabriskie* (1979) 96 CA3d 571, 575, 158 CR 154 (beneficiary under a will failed to participate in probate proceeding). Therefore, if a person is directly and adversely affected by an appealable order or judgment and cannot become a party of record (see §§4.3-4.8), there is still the possibility that the person may directly appeal the judgment.

JUDICIAL PERSPECTIVE: A person's status as a "party" turns on the words "party" and "party aggrieved" as used in CCP §902 (and its identical predecessors, former CCP §§938 and 335). "[It] has been settled as a rule of practice by a long series of decisions that only a *party to the record* can appeal." *Elliot v Superior Court* (1904) 144 C 501, 507, 77 P 1109 (dictum; emphasis the court's). See also *County of Alameda v Carleson* (1971) 5 C3d 730, 97 CR 385; *Eggert v Pacific States Sav. & Loan Co.* (1942) 20 C2d 199, 200, 124 P2d 815. By "party to the record" *Elliot* refers to a party "to the action" as determined by the applicable rule of practice, *i.e.,* a party as ordinarily understood—one who is hauled into court or otherwise joined in the action, as distinguished from the use of "party" as "person," as in CCP §1086. Under this view, a person who is served and defaults (makes no appearance) is a party to the record.

However, the rule of practice is specific to the field of law at issue and is governed by statue. The cases are an uncertain guide to the rule of practice unless viewed against the statutes applicable to the case. In particular, the field of estate law is awash with facially conflicting cases on the question of whether failure to appear in a probate proceeding precludes an appeal. Compare *Estate of McDougald* (1904) 143 C 476, 77 P 443, and *Estate of Kent* (1936) 6 C2d 154, 160, 57 P2d 901 ("interested person" not named as party who fails to appear in probate proceeding was not party to proceeding and not entitled to appeal), with *Estate of Partridge* (1968) 261 CA2d 58, 63, 67 CR 433, and *Estate of Meyer* (1966) 241 CA2d 747, 750, 51 CR 72 (beneficiary's failure to appear in probate proceeding did not preclude appeal). In some cases, it was reasoned that the person whose interest was adjudicated was deemed represented by the executor and thereby had standing to appeal an adverse ruling. For example, *Estate of Zabriskie, supra,* appears to be one of those cases. The difficulty is that the cases rarely do a careful analysis of the applicable statutes to ascertain the status of the interested person and their generalizations cannot be relied on.

I would direct counsel to a careful review of the applicable statutes to determine the nature of the status and claimed interest of the putative appellant. It should be added that failure to appear, when that is an option, is fraught with danger. It may preclude an effective appeal when the issue to be reviewed is not preserved in the record or a default has been entered. See *Ostling v Loring* (1994) 27 CA4th 1731, 33 CR2d 391; *Estate of D'Avila* (1963) 217 CA2d 123, 31 CR 363.

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2. Becoming a Party of Record

§4.3 a. Statutory Intervention

A person not originally named, or subsequently brought into the case by an amendment or cross-complaint, can move to intervene in the trial court. Under CCP §387 such a motion is authorized on "timely application." This provision has been construed to authorize intervention "if otherwise appropriate, at any time, even after judgment." *Mallick v Superior Court* (1979) 89 CA3d 434, 437, 152 CR 503. For procedure and forms, see California Civil Procedure Before Trial, chap 31 (4th ed Cal CEB 2004).

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§4.4 b. Nonstatutory Intervention

Nonstatutory intervention. Standing to appeal may be obtained by nonstatutory intervention through a motion to vacate the judgment (CCP §663) (*County of Alameda v Carleson* (1971) 5 C3d 730, 736, 97 CR 385), or a motion for judgment notwithstanding the verdict (CCP §629) and a motion for a new trial (CCP §657) (*Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1342, 100 CR2d 446). For procedure and forms, see chap 2. See also California Trial Practice: Civil Procedure During Trial, chap 25 (3d ed Cal CEB 1995). Although the relief provided in CCP §663 is limited on the face of the statute to "aggrieved" parties, it has been construed to apply to "one who is legally aggrieved." *County of Alameda v Carleson, supra*. On "persons aggrieved," see §§4.11-4.17. (Although motions under CCP §657 or §663 are authorized by statute, they are "nonstatutory" motions to intervene in the sense that the purpose of the statutes is not specifically to authorize intervention.)

Criteria. A party that intervenes in either way can pursue an appeal from an underlying judgment if it demonstrates in the trial court that interest in the case is immediate, pecuniary, and substantial, rather than nominal or remote. *County of Alameda v Carleson* (1971) 5 C3d 730, 737, 97 CR 385. In *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 286 CR 406, the court recognized these nonstatutory bases for intervention, but dismissed an appeal filed by an individual and a citizen's organization because their interests in the case were too remote.

JUDICIAL PERSPECTIVE: There is a danger that becoming a "party of record" by this procedure may bind the party to the judgment on an inadequate record.

When motion to intervene is denied. A person whose motion to intervene has been denied has no standing to appeal from the judgment. Such a person can, however, appeal from the order denying intervention. *County of Alameda v Carleson* (1971) 5 C3d 730, 736, 97 CR 385.

Compulsory joinder. See CCP §389 on compulsory joinder of a person who claims an interest in the subject of the action.

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c. Death of a Party

§4.5 (1) Before Notice of Appeal

Decedent's personal representative or successor in interest substitutes as party. When a party dies with a matter pending in the trial court, the general rule is that on motion, if the action survives, the decedent's personal representative or successor in interest is substituted as a party. CCP §§377.31, 377.41. See 3 California Decedent Estate Practice, chap 29 (2d ed Cal CEB 2009); California Civil Procedure Before Trial §31.15 (4th ed Cal CEB 2004). The personal representative, or, if none, successor in interest, then becomes the aggrieved party.

If party dies when case is under submission. If submission of the evidence has been completed and the case is under submission (or otherwise ready for decision) when a party dies, the court can enter judgment nunc pro tunc for a date before death, as if the party had not died before the judgment. *Norton v City of Pomona* (1935) 5 C2d 54, 62, 53 P2d 952.

Filing the notice of appeal. The test to decide whether an appeal may be filed on behalf of a deceased party is whether the deceased, if still alive, would have a right of appeal. CCP §903. When a party dies after entry of judgment or when judgment is entered nunc pro tunc effective before death, and if there is sufficient time before a notice of appeal must be filed, the personal representative or, if none, successor in interest, should be appointed and substituted as a party. But if there is not enough time to obtain a substitution before the notice must be filed, the attorney of record representing the decedent in the court in which the judgment was rendered should file the notice of appeal. CCP §903. The appeal should be taken in the decedent's name, not in the name of the prospective personal representative or, if none, of the successor in interest. See *Estate of Harris* (1932) 123 CA 506, 11 P2d 667. The personal representative, or, if none, successor in interest, can then be appointed and substituted as the party of record.

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§4.6 (2) After Notice of Appeal

If appellant dies before submission. When a party dies after a notice of appeal has been filed, but before the matter has been submitted for decision, the more orderly procedure is to immediately substitute a personal representative or successor in interest. But if this substitution is not made, the appellate court retains jurisdiction to decide the appeal. Its decision, as in all cases, can be set aside if fraud or imposition in procuring the decision is shown to have occurred. *Martin v Wagner* (1899) 124 C 204, 56 P 1023.

If appellant dies after submission. When a party dies after the matter has been submitted for decision, the court can render its decision *nunc pro tunc* for a date before death. *Black v Shaw* (1862) 20 C 68. See also *Estate of Kane* (1947) 80 CA2d 256, 268, 181 P2d 751. On when a cause is considered submitted, see §17.1.

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§4.7 d. Transfer of Interest

If the interest of a party in litigation is transferred to another person before judgment and if judgment is rendered in the transferee's name, the transferee becomes the proper party to appeal because the transferor no longer has an interest in the suit. *Fox v Shorter* (1957) 153 CA2d 155, 156, 314 P2d 106. But if the transferee allows the suit to continue in the transferor's name so that judgment is rendered in that name and no substitution is made, the transferor is the proper party to appeal. *McCartney v Campbell* (1930) 208 C 647, 284 P 220 (decided under former CCP §385, replaced by CCP §368.5). If an appeal is taken in the name of the transferor, the transferee can thereafter be substituted as the party of record. *Erickson v Boothe* (1949) 90 CA2d 457, 459, 203 P2d 122.

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§4.8 e. Procedure for Substitution of Party

Substitution of a party is done by serving and filing a motion in the reviewing court, whether or not the matter is on appeal or is an original proceeding in the reviewing court. Cal Rules of Ct 8.36(a). Substitution can occur through stipulation and order, ex parte application by the party seeking to be substituted, or by noticed motion of an existing party who seeks to have a person substituted as a party of record. *Higgins v Kay* (1914) 168 C 468, 143 P 710. Once an order of substitution is obtained, the clerk of the reviewing court must notify the superior court of the ruling. Cal Rules of Ct 8.36(a).

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§4.9 3. Class Actions

An unnamed member in a class action who does not take appropriate steps to become a party of record has no right to appeal. *Eggert v Pacific States Sav. & Loan Co.* (1942) 20 C2d 199, 124 P2d 815. However, if a class member's objections to a class action settlement have been overruled, the member can appeal from a judgment approving a settlement, even though that member could have requested exclusion from the judgment. *Trotsky v Los Angeles Fed. Sav. & Loan Ass'n* (1975) 48 CA3d 134, 139, 121 CR 637; *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 110 CR2d 145 (following *Trotsky*).

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§4.10 4. Amicus Curiae

Persons who appear in the trial court as amici curiae have no standing to appeal. *Estate of Thomas* (1946) 74 CA2d 389, 168 P2d 773. Persons wishing to participate in an appeal as amici curiae must comply with Cal Rules of Ct 8.200(c). See *Estate of Bodger* (1954) 128 CA2d 710, 716, 276 P2d 83. See chap 14 for discussion of qualifying as amicus curiae.

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C. Aggrieved Party Requirement

§4.11 1. When Is a Party Aggrieved?

Criteria. A party is considered aggrieved when he or she has an "immediate, pecuniary, and substantial" interest that is injured by the order or judgment. *County of Alameda v Carleson* (1971) 5 C3d 730, 737, 97 CR 385 (construing CCP §§663, 902). Of course, a party's interests might be significantly affected even though the party has no significant *pecuniary* interest in a matter, *e.g.,* in a case involving the exercise of certain personal liberties. In *Buffington v Ohmert* (1967) 253 CA2d 254, 255, 61 CR 360, the court stated that an aggrieved party "is one who has an interest recognized by law in the subject matter of the judgment and whose interest is injuriously affected by the judgment." Whether the effect of an order or a judgment on a given interest is sufficiently direct to cause injury depends on the particular facts.

Examples of aggrieved parties. For examples of aggrieved parties, see *California Ass'n of Psychology Providers v Rank* (1990) 51 C3d 1, 9, 270 CR 796 (judgment ordered state to issue regulations affecting allocation of responsibility for patient care between psychologists and psychiatrists; although physicians were not directly affected by challenged regulations they were found to be aggrieved because regulations would diminish their sphere of responsibility and could be expected to affect their authority and income); *In re Lauren P.* (1996) 44 CA4th 763, 768, 52 CR2d 170 (though juvenile dependency petition can only be filed by public agency, parent is a party aggrieved by order of dismissal); *Harris v Alcoholic Beverage Control Appeals Bd.* (1966) 245 CA2d 919, 54 CR 346 (licensee whose license to sell liquor was suspended by department of alcoholic beverage control, and who was not named in alternative writ of mandate to superior court by which department sought judicial review of alcoholic beverage control appeal's board's reversal of its decision, entitled to appeal superior court's granting of writ even though he did not participate in superior court proceedings); *Buffington v Ohmert, supra* (judgment against only one of joint obligors entitles other obligor to appeal from deprivation of right to contribution); *Leoke v County of San Bernardino* (1967) 249 CA2d 767, 57 CR 770 (county, which will be bound by res judicata, has right of appeal on tax assessments, even if it is not party of record (dictum)); *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1342, 100 CR2d 446 (parent corporation that assumed obligation of subsidiary to pay judgment is "aggrieved").

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§4.12 2. Capacity of Party

Representative's right to appeal in own name. The capacity in which a person appeals can establish whether he or she qualifies as an aggrieved party. In other words, a person might lack standing to appeal because he or she is not personally affected by a judgment, but that person may still appeal in his or "capacity" as the representative of another. Generally, a person who merely represents another's interests in a matter has no standing to appeal in his or her own name. See *Estate of Ferrall* (1948) 33 C2d 202, 204, 200 P2d 1 (trustee cannot appeal "from orders merely determining which beneficiaries are entitled to share in a particular fund"); *Estate of Kessler* (1948) 32 C2d 367, 369, 196 P2d 559 ("executors and administrators acting in their representative capacities are indifferent persons"); *Edwards v Western Land & Power Co.* (1915) 27 CA 724, 728, 151 P 16 ("receiver, being the mere servant or agent of the court, has no such interest in the action as would entitle him to appeal from an order for his discharge"). In such cases, the appeal should be taken in the name of the person or entity whose interest is affected.

When representative's own interest is affected. A representative may, however, appeal an order or a judgment that affects the representative's ability to carry out his or her duties or that affects him or her personally. See *Estate of Ferrall* (1948) 33 C2d 202, 205, 200 P2d 1 ("trustee may appeal in his representative capacity if it is necessary to protect the interests of those whom he represents"); *Edwards v Western Land & Power Co., supra* ("so far as the order of the court undertaking to settle the accounts of the receiver and fix his compensation is concerned, the receiver has the right of appeal").

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§4.13 3. Prevailing Party

In general, prevailing party may not appeal. Generally, the prevailing party in the trial court is not considered aggrieved by the judgment and thus cannot appeal from it. *Maxwell Hardware Co. v Foster* (1929) 207 C 167, 170, 277 P 327; *Cicinelli v Iwasaki* (1959) 170 CA2d 58, 64, 338 P2d 1005. For example, objectionable findings that are not essential to the judgment's validity may not be attacked or appealed by the prevailing party (*Estate of Funkenstein* (1915) 170 C 594, 150 P 987); a prevailing party cannot appeal to have the court strike a portion of a judgment by which he or she is not aggrieved, even if that portion is outside the pleadings, issues, or evidence in the case (*Custis v Gehele* (1918) 177 C 455, 170 P 1109); and a party who fully secures the relief requested cannot later appeal on the basis that the relief given was wrong (*Forkner v Forkner* (1950) 96 CA2d 363, 369, 215 P2d 482).

Party who does not prevail in all material respects may appeal. A party may, however, appeal from a judgment that, though favorable in form, is one by which he or she is in fact aggrieved. *Spencer v Nelson* (1947) 30 C2d 162, 164, 180 P2d 886. For example, a party may appeal when the judgment amount is less than the amount demanded (see, *e.g., Maxwell Hardware Co. v Foster, supra*) or when the order fails to deal with all issues on which the order was requested (*Spencer v Nelson, supra*). For further discussion of partial appeals, see §7.11.

Protective cross-appeals. A party who prevails at the trial court level may still file a protective cross-appeal to protect the judgment being attacked. For example, the party aggrieved by a judgment successfully moves to vacate judgment, and the party losing the motion appeals the new judgment entered. If the appeal is successful, and there is no cross-appeal from the original judgment, that judgment is reinstated. For an extensive discussion of cross-appeals, see chap 8.

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§4.14 4. Settling Party

Generally, no right to appeal. Generally, a settling party consents to the judgment and thus is not considered "aggrieved." This rule applies even if the settlement agreement purports to preserve a party's right to appeal. *Larner v Los Angeles Doctors Hosp. Assocs.* (2008) 168 CA4th 1291, 1298, 86 CR3d 324. See also *Watkins v Wachovia Corp.* (2009) 172 CA4th 1576, 1588, 92 CR3d 409 (class representative's voluntary settlement of individual claims deprived her of standing to represent class on appeal, even though settlement allowed her to pursue appeal of class claims). See §4.16.

Settling defendant may appeal denial of cross-complaint for indemnity. A defendant who has settled with the plaintiff still has standing to appeal the denial of his cross-complaint for indemnity against a nonsettling defendant. *Tatum v Armor Elevator Co.* (1988) 203 CA3d 1315, 250 CR 775. The court reasoned that the policy behind equitable apportionment of liability and the policy of encouraging settlements should permit a settling defendant to seek indemnity, even if the settling defendant was found to be completely blameless. Otherwise, a settling defendant would be forced to prove his or her own fault before seeking indemnity, although the desire to avoid such a finding is a principle motive for settlement. Because an action for indemnity is not contingent on the settling defendant's actual liability to the plaintiff, the settling defendant can appeal the denial of his or her claim for indemnity even if he or she was not found liable at trial. 203 CA3d at 1321. A defendant, however, who satisfies a judgment may not then appeal that judgment by claiming that it has a right of equitable indemnity against parties to the litigation. *Rancho Solano Master Ass'n v Amos & Andrews, Inc.* (2002) 97 CA4th 681, 119 CR2d 100. Notably, the plaintiff in *Tatum v Armor Elevator Co., supra,* sought indemnity following a *prejudgment* settlement. The unsuccessful appellant in *Rancho Solano* sought equitable indemnity after its *postjudgment* satisfaction of damages.

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§4.15 5. Respondent

Errors affecting respondent generally not reviewed on appeal. Errors affecting a respondent will not usually be reviewed on appeal unless respondent has also appealed the judgment. *Stott v Johnston* (1951) 36 C2d 864, 877, 229 P2d 348; *San Jose Autocar White Co. v Williamson* (1967) 249 CA2d 619, 622, 57 CR 692. But an intermediate ruling, order, or decision affecting a nonappealing party may be reviewed if the reviewing court finds this action appropriate. *Motors Ins. Corp. v Division of Fair Employment Practices* (1981) 118 CA3d 209, 217, 173 CR 332.

Respondent may request determination of prejudice to appellant. A respondent may, without appealing, request a reviewing court to decide whether appellant was prejudiced by the error or errors on which appellant relies. CCP §906. In this technique, respondent argues that the error appellant complains of did not prejudice appellant, because correction of the error, adverse to respondent, would result in the same judgment. See §5.59.

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§4.16 6. Consent to Judgment

Consent to order or judgment bars appeal. As a general rule, a party who expressly consents to an order or judgment is not aggrieved by it and may not take an appeal from it. *Hibernia Sav. & Loan Soc'y v Waymire* (1907) 152 C 286, 92 P 645. A stipulation is a consent within the meaning of this rule, and the rule applies even if the parties to the stipulation expressly state that it is without prejudice to a right of appeal. See *Zinke v Zinke Rebottoming Shoe Co.* (1962) 208 CA2d 690, 695, 25 CR 360.

Doubts about consent resolved in favor of right to appeal. Any doubt that may exist about appellant's intentions in entering into an agreement for judgment, is likely to be resolved in favor of appellant's right to appeal. *Lee v Brown* (1976) 18 C3d 110, 113, 132 CR 649; *Estate of Hart* (1962) 204 CA2d 634, 637, 22 CR 495. That right will survive if the circumstances surrounding the consent to judgment are questionable. For example, consent will not preclude an appeal if (a) the consent was involuntary (*Marriage of Brockman* (1987) 194 CA3d 1035, 240 CR 96; *Wuest v Wuest* (1942) 53 CA2d 339, 345, 127 P2d 934), (b) the record does not clearly show that consent was given (*Keroff v Snyder* (1962) 208 CA2d 429, 432, 25 CR 234), or (c) the consent to judgment occurred in a court that lacked subject matter jurisdiction (*Robertson v Maroevich* (1941) 42 CA2d 610, 613, 109 P2d 708).

On the settling defendant's right to appeal denial of cross-complaint, see §4.14.

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§4.17 7. Consent to Remittitur

Consent to remittitur bars appeal. A party who consents to remittitur in the trial court cannot appeal from the ensuing judgment unless the appeal is "limited to a specific and severable part of the judgment" unrelated to the remittitur. *Templeton Feed & Grain v Ralston Purina Co.* (1968) 69 C2d 461, 468, 72 CR 344 (plaintiff's acceptance of remittitur for amount of compensatory damages did not waive right to appeal on failure to instruct on punitive damages).

Defendant's appeal of damages after remittitur. If defendant appeals the amount of damages after remittitur, however, plaintiff may cross-appeal both the conditional grant of a new trial and the amount of damages. *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 918, 148 CR 389, citing *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 343, 126 CR 731 (unfair to prevent plaintiff from obtaining review of trial court's determination leading to reduction in damages when plaintiff forced to undergo delay and expense of defendant's appeal).

If the defendant's appeal is later dismissed, the plaintiff's cross-appeal must likewise be dismissed. Under CCP §923, a defendant can also be ordered to pay the plaintiff's reasonable attorney fees incurred in preparing a brief as a result of the defendant's delay in dismissing its appeal. *Rosenau v Heimann* (1990) 218 CA3d 74, 78, 267 CR 20.

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II. LOSS OF STANDING

§4.18 A. Waiver

Once filed, an appeal may be dismissed if appellant loses standing to appeal. This loss can occur through a variety of situations, which amount to a waiver of the right to appeal. These situations are discussed in §§4.19-4.21. See also §§4.16-4.17.

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§4.19 1. Compliance With Judgment

Satisfaction of judgment before inadvertent entry of judgment. An appeal may not be maintained when the appealing party satisfied the judgment in full before entry of judgment and the judgment was later entered inadvertently. *A.L.L. Roofing & Bldg. Materials Corp. v Community Bank* (1986) 182 CA3d 356, 227 CR 308. A prejudgment settlement moots the issues between the parties and binds the parties to its terms absent a fundamental defect.

Forced compliance. The right to appeal is not lost if compliance with a judgment occurs as a result of compulsion or coercion, such as by threat of execution. *Selby Constructors v McCarthy* (1979) 91 CA3d 517, 521, 154 CR 164.

Voluntary compliance absent compromise or agreement. Even voluntary compliance with a judgment will not bar a right to appeal unless it is made as a compromise or is coupled with an agreement not to appeal. *Reitano v Yankwich* (1951) 38 C2d 1, 3, 237 P2d 6. Otherwise, a party would be barred from appealing a judgment even though compliance was by compulsion.

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§4.20 2. Acceptance of Benefits

Acceptance of benefits bars appeal. As a general rule, one who accepts the benefits of a judgment cannot later attack that judgment on appeal. *Mathys v Turner* (1956) 46 C2d 364, 294 P2d 947 (acceptance of amount of judgment, execution, and delivery of satisfaction of judgment). See also *Trollope v Jeffries* (1976) 55 CA3d 816, 824, 128 CR 115 (rule also applies to arbitration benefits). An offer to tender back the benefits is of no avail. *Schubert v Reich* (1950) 36 C2d 298, 300, 223 P2d 242. See *Lee v Brown* (1976) 18 C3d 110, 114, 132 CR 649, for a comprehensive discussion of the rule and its exceptions.

Exceptions. To find that a waiver of the right to appeal has occurred, "appellant must demonstrate a clear and unmistakable acquiescence in … the fruits of the judgment." *Marriage of Fonstein* (1976) 17 C3d 738, 744, 131 CR 873. Because of this qualification, the following exceptions to the general rule have developed:

- **Judgment severable.** If an appeal is from a severable portion of the judgment only, appellant can accept the benefits of the severable portion from which he or she is not appealing and still pursue the appeal. Compare *Marriage of Fonstein, supra* (acceptance of portions of judgment dividing community property did not bar appeal from other portions), and *Wold v League of the Cross* (1930) 107 CA 344, 347, 290 P 460 (acceptance of costs and amount awarded on one cause of action did not bar appeal on separate and distinct cause of action), with *Satchmed Plaza Owners Ass'n v UWMC Hosp. Corp.* (2008) 167 CA4th 1034, 1044, 84 CR3d 585 (acceptance of benefits of portion of judgment barred appeal from other portions because judgment was not severable).
- **Amount awarded, accepted, and not contested.** In some cases a party may acknowledge, or the judgment may establish, that a portion of the other party's claim is clearly owing, although the full claim is for a larger amount. If the judgment is for only the lesser uncontested amount, it may be accepted and an appeal taken for the larger amount. See, *e.g.*, *Estate of* H*ubbell* (1932) 216 C 574, 577, 15 P2d 503 (acceptance of amount due did not bar appeal claiming additional sum as interest); *Royat v Roberts* (1951) 107 CA2d 447, 450, 237 P2d 25 (repossession of tractor under judgment did not bar appeal for additional claimed relief). This exception is based on the relief given by the judgment not being in dispute. Thus, if an objection is made to the entire award, acceptance of any part waives the right to appeal. *Mathys v Turner, supra.* Moreover, accepting a judgment amount that is less than the amount claimed, and executing and authorizing to be filed a full and complete satisfaction of the judgment, precludes any right to appeal even if the right otherwise existed. *Guho v City of San Diego* (1932) 124 CA 680, 684, 13 P2d 387.
- **Benefits of judgment retained, but not used by appellant.** In some instances, courts have found no waiver of a right to appeal when the appellant accepts the benefit of a judgment, but then retains or does not use the benefit pending the outcome of the appeal. See, e.g., *H.D. Arnaiz, Ltd. v County of San Joaquin* (2002) 96 CA4th 1357, 1362, 118 CR2d 71 (acceptance and deposit by defendant in separate trust account of amount ordered to be paid as condition for vacating a dismissal of complaint and not used pending appeal of order vacating dismissal held not to constitute waiver of right to appeal).
- **Nothing of value received.** Though certain acts might seem inconsistent with the appeal of a judgment, appellant will not be considered to have waived the right to appeal unless those acts provided appellant with something of substantial value. See, *e.g., Phillips v Isham* (1951) 105 CA2d 608, 611, 233 P2d 637 (payment placed in appellant's counsel's trust account pending appeal); *Menges v Robinson* (1933) 132 CA 647, 650, 23 P2d 526 (recording abstract of judgment).
- **Involuntary acceptance.** When appellant accepts a judgment award to avoid risk or forfeiture, no waiver of the right to appeal occurs. *Lee v Brown* (1976) 18 C3d 110, 116, 132 CR 649 (possible forfeiture of homestead rights by not accepting homestead exemption proceeds). But see *Turner v Markham* (1907) 152 C 246, 92 P 485, on application of this rule to homestead sales. See also *Reitano v Yankwich* (1951) 38 C2d 1, 237 P2d 6 (forfeiture of property if judgment not satisfied).
- **Agreements preserving right to appeal.** There is some doubt whether a party can accept the benefits of a judgment and expressly agree that such action will not bar a right of appeal. In *Estate of Poisl* (1957) 48 C2d

334, 338, 309 P2d 817, the court held that such an agreement would be recognized and that the right to appeal would be preserved. But see *Zinke v Zinke Rebottoming Shoe Co.* (1962) 208 CA2d 690, 694, 25 CR 360, in which the court did not recognize such as agreement. Appellate courts may be reluctant to recognize such agreements because of congested appellate dockets, the courts' policy against advisory opinions, and the possibility that further litigation might result if the party who accepted the benefits of the judgment fails to return the benefits if the case is reversed.

- **Award of custody and of child and spousal support.** Acceptance of the award of custody of a minor child, child and spousal support, and a small portion of the community assets will not bar an appeal of the judgment making the award. *Marriage of Brockman* (1987) 194 CA3d 1035, 240 CR 96. Because an award of custody is beyond the parties' control and is under the court's continuing review, it cannot be characterized as the kind of benefit, that, if accepted, bars appeal. 194 CA3d at 1040. Because the award of spousal and child support is severable from the division of property in a dissolution proceeding, it is appealable even if the benefits of a property settlement have been accepted. 194 CA3d at 1044. Even the acceptance of benefits from a property settlement, however, will not bar appeal of its terms if there is no possibility that reversal could result in a decrease of the benefits conferred by the settlement.

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§4.21 3. Waiver by Counsel

Attorney may not waive right to appeal without client's consent. An attorney has no authority to stipulate without his or her client's consent to submit a case to binding arbitration, thereby waiving the client's right to a trial de novo. *Blanton v Womancare, Inc.* (1985) 38 C3d 396, 212 CR 151. An attorney does not have the power solely because of his or her retention in litigation to "impair the client's substantial rights or the cause of action itself." 38 C3d at 404. The court gave several examples of what would constitute impairment absent some further authority to act: agreeing to a compromise settlement of pending litigation; eliminating an essential defense by stipulation; agreeing to an entry of a default judgment; stipulating to an award of only nominal damages for his or her client; agreeing to an increase of the judgment against the client; waiving findings resulting in a waiver of appeal (38 C3d at 404); and waiver of the right to appeal (38 C3d at 409).

Scrutinize other attorney's authority to effect waiver. If you have any doubt concerning another attorney's authority to take such actions, insist on a statement by the other attorney's client on the record (or, preferably, a written authorization or waiver by the client) that the attorney has that authority.

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§4.22 B. Corporation's Failure to Pay Franchise Tax

Suspension of corporate powers bars appeal. A corporation may not appeal if its powers have been suspended under Rev & T C §23301 or §23301.5 (*Gar-Lo, Inc. v Prudential Sav. & Loan Ass'n* (1974) 41 CA3d 242, 245, 116 CR 389) or if it is defunct under the laws of its domicile (*Fidelity Metals Corp. v Risley* (1946) 77 CA2d 377, 383, 175 P2d 592).

Reinstatement of corporate powers revives right to appeal. Revenue and Taxation Code §23305 provides that a corporation whose powers were suspended under Rev & T C §23301 or §23301.5 may nevertheless be reinstated with its power to engage in litigation restored. If a corporation's powers were suspended for failure to pay taxes when the appeal was taken, and if the corporation's powers were later revived by payment of those taxes before expiration of the time for filing notice of appeal, the corporation will be allowed to proceed with the appeal. *Peacock Hill Ass'n v Peacock Lagoon Constr. Co.* (1972) 8 C3d 369, 374, 105 CR 29. It is unclear, however, whether suspension of corporate powers tolls the time in which to file an appeal. The requirement of timely filing notice of appeal is jurisdictional. *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 125 CR 757; Cal Rules of Ct 8.60(d). If corporate powers are revived, *i.e.,* the certificate of revivor is issued, after the time for filing notice of appeal has expired, it would seem that the appeal should be barred under Cal Rules of Ct 8.104(b), although the broad holding in *Peacock Hill* might allow the appeal to proceed. The safest and wisest approach is to timely file the notice of appeal and diligently seek revival of corporate powers.

Right to pursue derivative suit on appeal despite corporate suspension. A stockholders' derivative suit can be pursued on appeal despite the corporation's suspension under Rev & T C §23301. *Reed v Norman* (1957) 48 C2d 338, 343, 309 P2d 809. The court reasoned that if the suit were not allowed to proceed §23301 could be used to protect dishonest corporation officials. The court also felt that the petitioner should be given an opportunity to reinstate the corporation.

Right of joint venturer to appeal despite suspension of corporation. If a suspended corporation is a member of a joint venture, the venturer still in good standing may maintain the appeal, but the court may ensure that the suspended corporation does not indirectly profit from the appeal. *Laurel Crest, Inc. v Vaughn* (1969) 272 CA2d 363, 77 CR 538.

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§4.23 C. Contempt

Party in contempt risks losing right to appeal. The appeal can be dismissed if appellant is in contempt of court either in the proceeding on appeal (*Kottemann v Kottemann* (1957) 150 CA2d 483, 310 P2d 49) or in an unrelated proceeding (*Estate of Scott* (1957) 150 CA2d 590, 310 P2d 46), or if appellant's conduct is contemptuous even if no adjudication of contempt was made (*Tobin v Casaus* (1954) 128 CA2d 588, 275 P2d 792).

Court may stay appeal or order conditional dismissal pending decision on dismissal. When considering whether to dismiss an appeal because of appellant's conduct, the court may either stay the appeal or order a conditional dismissal until appellant cures the contemptuous conduct. *Krog v Krog* (1948) 32 C2d 812, 198 P2d 510; *Luce v Clear Lake Water Co.* (1968) 266 CA2d 123, 71 CR 665. But the court need not grant a stay or a conditional dismissal if the totality of the circumstances do not warrant it at the time. *Stone v Bach* (1978) 80 CA3d 442, 145 CR 599.

When appellant's contempt will not warrant dismissal. If the parties' rights are not the sole subject of judicial concern, such as in a dissolution proceeding involving minor children, the court should proceed with the appeal even when appellant is in contempt. *Smith v Smith* (1955) 135 CA2d 100, 286 P2d 1009.

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§4.24 D. Bankruptcy

Once a company files a petition for bankruptcy, the company's right to appeal passes to the trustee in bankruptcy. Absent abandonment of the litigation by the trustee, the company has no standing to appeal on its own behalf. *People v Kings Point Corp.* (1986) 188 CA3d 544, 233 CR 227. Faced with the trustee's refusal to appeal a judgment, the bankrupt corporation can still petition the bankruptcy court to compel the trustee to file an appeal, or to authorize the bankrupt to file an appeal on its own behalf. 188 CA3d at 549.

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5

What Are the Prospects for Reversal?

Michael M. Berger

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I. EVALUATION PROCESS

§5.1 A. Scope of Chapter

Three basic questions. Not every trial court error provides a ground for reversal on appeal. An attorney evaluating the legal grounds for appeal must answer three basic questions:

- Did error occur?
- Is the error reviewable on appeal?
- Did the error prejudice the outcome of the case?

The answers to these questions depend on the results of the attorney's research and application of principles of appellate review to the type of error being examined.

Approaching the questions. Although this inquiry usually begins with the first of these questions, a definitive answer to whether error occurred in the trial court may require a substantial commitment of time to research the issue. It often makes more sense to begin by briefly analyzing a suspect ruling but to commit to further research only after determining that the ruling can be reviewed on appeal and could, if erroneous, result in reversal.

Using this chapter. This chapter discusses the principles of appellate review as counsel might encounter them during this evaluation process. Counsel who decides that the ruling is within the scope of appellate review, and that the ruling was wrong, can then decide whether to pursue the appeal and, if so, how to handle it.

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§5.2 B. Method

Evaluation continues throughout appeal. Evaluation of an appeal begins when an adverse, appealable ruling is entered in the trial court and continues throughout the appeal. The purpose and extent of the evaluation will vary, depending on the stage in the case at which the evaluation occurs and who is doing the evaluation.

Determining whether to file notice of appeal. Before filing a notice of appeal, appellant's attorney should make a preliminary evaluation of the case to decide whether to file the notice. Later, when more time can be devoted to the appeal and the full record is available, a more detailed evaluation can be used to decide whether, and how, to pursue the appeal.

Reevaluating decision to appeal. When reevaluation of an appeal reveals that the grounds for the appeal are weaker than originally thought, counsel should inform the client of the reevaluation and consider abandoning the appeal. This step protects both client and attorney from later sanctions for bringing a frivolous appeal (see chap 20). Also, when counsel represents institutional clients, dropping a marginal appeal may prevent setting an unfavorable precedent that will have a broader effect than the decision in the immediate case.

Appellant's evaluation. A useful approach for appellant's attorney in evaluating the grounds for appeal is outlined below. The conclusions of the initial analysis of these issues will need to be refined throughout the case:

- Identify a ruling that might provide a basis for appeal. See §§5.3-5.10.
- Ascertain what standard of review applies to the ruling and analyze it under that standard. See §§5.11-5.28.
- Examine the ruling in the context of the entire case to evaluate the extent to which it affected the outcome. See §§5.29-5.39.
- Verify that a proper record was made in the trial court. See §§5.40-5.45.
- Ascertain the relief the appellate court can grant if it agrees with appellant's arguments on appeal. See §5.46.
- Research the substantive law to confirm that the issue was improperly decided in the trial court. See §§5.47-5.63.

Respondent's evaluation. Respondent's counsel has a different goal in evaluating the case, although many of the same questions will be involved. A preliminary evaluation may be made when the notice of appeal is first filed, to enable counsel to advise respondent to oppose the appeal or to consider another option, such as settlement. Respondent's counsel will probably research the case in detail only after appellant's opening brief has been filed. However, counsel should never assume that respondent's role is merely to respond to appellant's arguments. Independent research and evaluation can reveal arguments favorable to respondent.

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II. IDENTIFYING GROUNDS FOR APPEAL

§5.3 A. Importance of Characterizing Error

Determine whether issues are legal, factual, or both. The first step in evaluating an appeal is to identify trial court rulings that might have been erroneous to see whether the rulings present questions of law, questions of fact, or both.

Impact. The initial characterization of an issue as one of law or fact will establish, in part, the standard under which the appellate court will review the ruling. See §5.16. Moreover, the character of the question presented defines the extent to which new issues may be raised on appeal (see §5.44) and establishes the relief available (see §5.46).

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§5.4 B. Questions of Law

Definition. A question of law is one that can be resolved by examining relevant cases and statutes and applying the rules of law extracted from those sources to an established set of facts. The issue must be resolved without considering conflicting evidence. *Board of Educ. v Jack M.* (1977) 19 C3d 691, 698 n3, 139 CR 700; *Morrison v State Bd. of Educ.* (1969) 1 C3d 214, 218, 82 CR 175.

Identifying errors of law. Errors of law can occur in any phase of a trial court proceeding. One approach appellant's counsel might take to identify errors of law is to analyze the proceeding chronologically and list each action taken by the judge or trial counsel that required consideration of constitutional, statutory, decisional, or other authority. After identifying the issues, counsel may determine, preliminarily, that an issue was decided incorrectly. This preliminary determination can be followed up later with specific research if the error seems to provide a promising basis for appeal.

Absence of evidentiary dispute required. There is a potential pitfall to raising the issue of error of law on appeal: The record on appeal must demonstrate the lack of any evidentiary dispute. See, *e.g., Wagner v Chambers* (1965) 232 CA2d 14, 20, 42 CR 334, in which the court of appeal refused to permit appellant to augment the record to show that all facts were stipulated. On the importance of the record to a successful appeal, see §5.40.

Examples of legal rulings. Trial court rulings that decide a case without weighing the evidence are obvious examples of legal rulings. These include rulings on:

- Demurrers (*Banerian v O'Malley* (1974) 42 CA3d 604, 611, 116 CR 919) and motions for judgment on the pleadings (*Silver v Beverly Hills Nat'l Bank* (1967) 253 CA2d 1000, 1004, 61 CR 751);
- Summary judgment (*Loma Portal Civic Club v American Airlines, Inc.* (1964) 61 C2d 582, 588, 39 CR 708);
- Judgment notwithstanding the verdict (*Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 513, 124 CR 467);
- Interpretation of a fully integrated writing (*Aviointeriors SpA v World Airways, Inc.* (1986) 181 CA3d 908, 915, 226 CR 527 (if interpretation turns on conflicting extrinsic evidence admitted in trial court, issue is not one of law, and trial court's construction will be upheld); *Mattal v American Trust Co.* (1962) 208 CA2d 645, 25 CR 517);
- Interpretation of a statute (*Olson v Cory* (1983) 35 C3d 390, 402, 197 CR 843);
- Determination of the proper scope of statutory language (*Uniroyal Chem. Co. v American Vanguard Corp.* (1988) 203 CA3d 285, 249 CR 787); and
- Application of a statutory standard of behavior to undisputed facts (*Morrison v State Bd. of Educ., supra*).

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C. Questions of Fact

§5.5 1. Recognizing Questions of Fact

Definition. A question of fact is one that can be resolved only by considering conflicting evidence. *Board of Educ. v Jack M.* (1977) 19 C3d 691, 698 n3, 139 CR 700. An issue that requires the trial court to evaluate the evidence by weighing the strength of one party's proof against that of the other, or by considering the credibility of witnesses or other evidence, presents a question of fact.

Examples. The precise issue presented is less important to identifying a question of fact than the state of the evidence. Examples of issues that may be treated as questions of fact include interpretation of a writing dependent on extrinsic evidence (*Marriage of Fonstein* (1976) 17 C3d 738, 746, 131 CR 873), the existence of a partnership (*Sullivan v Schellinger* (1959) 170 CA2d 111, 338 P2d 462), the amount of damages (*Eggink v Robertson* (1961) 191 CA2d 496, 502, 13 CR 76), and whether a party was a guest or a passenger in an automobile (*Baker v Novak* (1956) 144 CA2d 514, 518, 301 P2d 257).

Treatment of inferences. The general rule that a question of fact arises only from disputed evidence has an important exception. When conflicting inferences can reasonably be drawn from undisputed facts, the inferences drawn are treated on review as questions of fact. *Mah See v North Am. Acc. Ins. Co.* (1923) 190 C 421, 426, 213 P 42, overruled in part on other grounds in *Zuckerman v Underwriters at Lloyd's* (1954) 42 C2d 460, 474, 267 P2d 777.

Inferences defined and illustrated. An inference is a deduction of fact drawn from another fact or group of facts. Evid C §600. In *Hamilton v Pacific Elec. Ry.* (1939) 12 C2d 598, 86 P2d 829, the sole witness testified that during one half hour she saw no one enter or leave a room. The jury inferred from this that the room was not inspected during that period. The appellate court found this inference to be a factual one and reviewed it as a question of fact. Other examples of factual inferences may be found in *Mah See v North Am. Acc. Ins. Co., supra* (whether an insured intentionally shot someone), and *McKinney v Kull* (1981) 118 CA3d 951, 173 CR 696 (whether parties agreed to a boundary). For further discussion of the distinction between evidentiary facts and inferences, see Jefferson's California Evidence Benchbook §19.2 (4th ed CJA-CEB 2009).

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§5.6 2. Identifying Questions of Fact in Trial Court Record

To identify a factual determination that might form the basis of an appeal, counsel should first define the material factual issues that the trial judge or jury had to resolve to reach the decision. Express factual findings of the trial judge or jury can be used to identify material facts on which the judgment was based. The next step should be to analyze all evidence introduced on each issue in order to form an opinion on whether the evidence supported the decision.

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§5.7 a. Review Evidence in Support of Judgment or Preliminary Ruling

Questions of fact can arise throughout a trial court proceeding. Although opinions that discuss the concept of question of fact usually do so in the context of reviewing evidence in support of the judgment (see, *e.g., Laymon v Simpson* (1964) 225 CA2d 50, 36 CR 859), many preliminary trial court rulings can require a determination of fact (see, *e.g., Torres v Union Pac. R.R.* (1984) 157 CA3d 499, 203 CR 825 (review of facts on which determination of good faith settlement based); *West v Lind* (1960) 186 CA2d 563, 9 CR 288 (review of facts underlying order of preliminary injunction)). If counsel is evaluating the potential for error in a ruling other than the final judgment, the facts on which the ruling was based should be identified and evaluated.

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§5.8 b. Use Statement of Decision in Nonjury Trial

Compile evidence relied on by court. Counsel can test the sufficiency of the evidence by compiling and analyzing all the evidence supporting each factual determination in a statement of decision made by the court in a nonjury trial.

Request statement of decision. Counsel who intends to seek appellate review of any factual questions must request a statement of decision. CCP §632. A properly drafted statement contains the trial court's resolution of all material questions of fact on which the judgment rests. Failure to issue a written statement of decision, when one is timely requested, usually constitutes reversible error. See, *e.g.*, *Marriage of Ananeh-Firempong* (1990) 219 CA3d 272, 282, 268 CR 83.

Appellate assumption absent statement of decision. If the parties fail to request a statement of decision, the appellate court will assume that the trial court made whatever findings were necessary to sustain the judgment. *Michael U. v Jamie B.* (1985) 39 C3d 787, 792, 218 CR 39. This rule does not apply, however, when the trial court expressly refuses on the record to make a particular factual finding. *Social Servs. Union, Local 535 v County of Monterey* (1989) 208 CA3d 676, 256 CR 325.

Clarifying proposed statement of decision. Counsel must seek trial court clarification of any omissions or ambiguities in a proposed statement of decision. CCP §634. In *Marriage of Arceneaux* (1990) 51 C3d 1130, 275 CR 797, the supreme court held that a party's failure to bring omissions or ambiguities in the statement of decision to the trial court's attention constituted a waiver of the right, under §634, to complain about such errors on appeal.

Use of intended statement of decision as statement of decision. Under Cal Rules of Ct 3.1590(c), a court may convert a tentative decision into a statement of decision under CCP §632. In *Slavin v Borinstein* (1994) 25 CA4th 713, 30 CR2d 745, a statement of intended decision became the statement of decision when the tentative statement provided that it would become the statement of decision in the absence of a request under §632, and no request was made.

Reference. See also Martin, *Statements of Decision*, 12 CEB Civ Litigation Rep 186 (Aug. 1990).

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§5.9 c. Use Special Interrogatories or Special Verdict in Jury Trial

Specific jury fact-finding. In a jury trial, the jury may be required to make findings on material issues of fact by answering special interrogatories in connection with its decision on a general verdict (CCP §625) or by rendering a special verdict (CCP §§624-625). Counsel can use the special findings of the jury in the same way as those of the trial judge (see §5.8) to isolate the critical factual issues. See, *e.g., McCloud v Roy Riegels Chems.* (1971) 20 CA3d 928, 936, 97 CR 910. On special interrogatories and verdicts, see California Trial Practice: Civil Procedure During Trial, chap 22 (3d ed Cal CEB 1995).

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§5.10 D. Questions Difficult to Characterize

Contributing circumstances. Some issues are not easily classified as issues of law or fact. Two circumstances contribute to this difficulty:

- Some issues raise questions of both law and fact. If, *e.g.,* the issue is the adequacy of damages, the court may need to determine both the measure of damages, a question of law, and the amount of damages, a question of fact. See *Fletcher v Webster Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 89 CR 78. See also *Kiick v Levias* (1980) 113 CA3d 399, 404 n4, 169 CR 859, in which the court discusses the issue of foreseeability as raising questions of both law and fact.
- Sometimes an issue can be treated as a question of law in one case and a question of fact in another, depending on the state of the evidence. An issue treated as a factual question in a case in which the evidence is conflicting is decided as a matter of law in a case in which the evidence is undisputed. Compare *Gray v Brinkerhoff* (1953) 41 C2d 180, 183, 258 P2d 834, in which negligence was held to be established as a matter of law, with *Callahan v Gray* (1955) 44 C2d 107, 279 P2d 963, in which it was treated as a question of fact. See also *Laymon v Simpson* (1964) 225 CA2d 50, 36 CR 859, for a discussion of when a factual issue may be held established as a matter of law.

Try to separate issues. If the ruling on which the appeal may be based is difficult to classify, counsel should try to separate the individual issues that had to be resolved to reach the decision. Researching to see how similar issues were treated in other cases may also be helpful.

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III. HOW APPELLATE COURT WILL REVIEW RULING

§5.11 A. Rules Favor Affirmance of Trial Court Ruling

To know how the appellate court will review a particular ruling requires understanding the relationship between the trial and appellate courts and the functions of each. The appellate court examines an appeal within the framework of general rules favoring affirmance: The trial court ruling is presumed correct (see §5.12), appellant has the burden of proving reversible error (see §5.13), and a ruling correct on any basis is generally affirmed (see §5.14).

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§5.12 1. Trial Court Ruling Presumed Correct

Presumptions generally. The appellate court presumes that the judgment or order being appealed was decided correctly by the trial court. *Denham v Superior Court* (1970) 2 C3d 557, 564, 86 CR 65; *Walling v Kimball* (1941) 17 C2d 364, 373, 110 P2d 58. The appellate court adopts all intendments and inferences necessary to affirm the judgment unless the record expressly contradicts them. Thus, unless the record affirmatively demonstrates the error, the appellate court presumes that the evidence and findings support the judgment (*Kompf v Morrison* (1946) 73 CA2d 284, 166 P2d 350) and that the trial court based its decision on appropriate findings and disregarded incorrect or insufficient ones (*Brewer v Simpson* (1960) 53 C2d 567, 583, 2 CR 609).

Presumptions absent a statement of decision. If the parties do not request a statement of decision, the reviewing court generally presumes that the trial court made the findings necessary to sustain the judgment. *Michael U. v Jamie B.* (1985) 39 C3d 787, 792, 218 CR 39. See also *Aviointeriors SpA v World Airways, Inc.* (1986) 181 CA3d 908, 914, 226 CR 527, in which appellant failed to request clarification of an alleged omission or ambiguity in the statement of decision and later attempted, unsuccessfully, to raise that defect on appeal.

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§5.13 2. Appellant Must Prove Reversible Error

The presumption favoring the trial court decision places the burden of proving error on appellant. Counsel must convince the court, by stating the law and calling relevant portions of the record to the court's attention, that the trial court decision contained reversible error. *Marriage of Behrens* (1982) 137 CA3d 562, 574, 187 CR 200; *Rossiter v Benoit* (1979) 88 CA3d 706, 712, 152 CR 65. This remains true even if the respondent does not file a brief. *Kriegler v Eichler Homes, Inc.* (1969) 269 CA2d 224, 226, 74 CR 749.

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3. Trial Court Rulings Correct on Any Legal Ground Are Generally Affirmed

§5.14 a. Application of Rule

Focus is on result, not reasoning. The appellate court is concerned with the correctness of the trial court's ruling, not its reasoning. *Bealmear v Southern Cal. Edison Co.* (1943) 22 C2d 337, 139 P2d 20; *Davey v Southern Pac. Co.* (1897) 116 C 325, 48 P 117. Thus, the appellate courts generally apply the rule that, if the lower court decision was correct on any legal ground, it will be affirmed, even if the reasons cited are wrong. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 19, 112 CR 786.

Examples. For examples of applications of this rule, see *Owsley v Hamner* (1951) 36 C2d 710, 227 P2d 263 (erroneous part of judgment may be treated as surplusage if party is entitled to judgment on some other basis); *Marriage of Fithian* (1977) 74 CA3d 397, 402, 141 CR 506 (order requiring deposit of funds not permitted by statute but permissible under court's inherent power to compel obedience to its judgments).

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§5.15 b. Limitations to Rule

There are limitations to the general rule that if the lower court decision was correct on any legal ground, it will be affirmed, even if the reasons cited are wrong.

Controverted questions of fact. If the new legal theory involves controverted questions of fact or mixed questions of law and fact, the appellate court will not sustain the ruling. *Cramer v Morrison* (1979) 88 CA3d 873, 887, 153 CR 865. See discussion in §5.44 on raising new issues on appeal.

Evidence insufficient under correct legal standard. If the trial court applied an incorrect legal standard, and the evidence cannot, as a matter of law, support the decision under the correct standard, the appellate court will reverse the decision. *Munoz v Purdy* (1979) 91 CA3d 942, 154 CR 472 (summary judgment improperly granted to Doe defendant on ground that plaintiff should have known defendant's identity, when actual knowledge required). The cause must be remanded to the trial court for consideration under the correct standard. See *In re B.G.* (1974) 11 C3d 679, 699, 114 CR 444, in which the trial court failed to find that a custody transfer would be detrimental.

Order granting new trial on grounds of insufficiency of evidence or excessive or inadequate damages. Under CCP §657, a trial court must specify the grounds for an order granting a new trial. The statute also states that an appellate court may not affirm an order granting a new trial on grounds of insufficiency of the evidence or excessive or inadequate damages unless that ground was specified in the trial court order. However, §657 requires an appellate court to affirm a new trial order if it should have been granted on any ground stated in the motion for a new trial other than insufficiency of the evidence or inadequate or excessive damages. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 905, 215 CR 679.

Order granting nonsuit. A party requesting a nonsuit must specify the grounds on which the request is based; the order granting a nonsuit cannot be affirmed on different grounds. *Lawless v Calaway* (1944) 24 C2d 81, 92, 147 P2d 604.

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§5.16 B. Appellate Standard of Review

Legal issues are primary focus. The appellate court's primary function is to review questions of law. *Tupman v Haberkern* (1929) 208 C 256, 280 P 970. The trial court's primary responsibilities are to determine facts and to administer the case in the trial court. This allocation of responsibilities requires that different standards of review be applied to different types of rulings.

Factual rulings entitled to greater deference. The term "appellate standard of review" refers to the degree of deference appellate courts grant a particular type of trial court ruling. Except for questions of law, appellate courts do not reexamine an issue. Factual rulings and rulings committed to the trial court's discretion are reviewed more narrowly than questions of law.

Basic standards. Three standards of review govern civil appeals:

- Questions of law are reviewed de novo. See §5.17.
- Sufficiency of the evidence is reviewed under the substantial evidence test; the lower court decision must be sustained if any substantial evidence supports the judgment. *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 581, 145 CR 665; *Petherbridge v Prudential Sav. & Loan Ass'n* (1978) 79 CA3d 509, 517, 145 CR 87.
- A discretionary ruling is reviewed for abuse; if prejudicial abuse cannot be demonstrated, the ruling must be sustained. *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 932, 184 CR 296.

Argument must be framed to fit applicable standard. To succeed on appeal, counsel must shape the argument to the standard under which the error is reviewed. Arguments that the evidence introduced at trial was unbelievable or that a ruling of the trial judge was not the best alternative may have emotional appeal for the trial attorney and the client, but they are of no interest to the appellate court. For the most accurate prediction of the prospects of an appeal, counsel should consider the ruling from the appellate court's viewpoint, considering only the evidence the court will consider and applying the principles of review the court will apply.

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§5.17 1. Questions of Law

Questions of law are reviewed de novo; the trial court decision on the issue is immaterial. *Estate of Coate* (1979) 98 CA3d 982, 986, 159 CR 794; *Goddard v South Bay Union High Sch. Dist.* (1978) 79 CA3d 98, 105, 144 CR 701.

JUDICIAL PERSPECTIVE: Even when the issue before the appellate court is purely one of law, facts are still important. We must deal with specifics, something we can relate to. The great lawyers are those who can take abstract principles and portray them in everyday commonsense terms. A really effective appellate argument is a great jury argument pitched to a more sophisticated audience.

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2. Sufficiency of Evidence

§5.18 a. Appellate Court Will Reverse Only if No Substantial Evidence to Support Ruling

Substantial evidence rule. The appellate court reviews challenges to the sufficiency of the evidence under the substantial evidence rule: the trial court findings of fact will be upset on appeal only when there is no substantial evidence to support them. *Marriage of Mix* (1975) 14 C3d 604, 614, 122 CR 79; *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 64, 107 CR 45.

Rationale. The rationale for the substantial evidence rule is that the trial judge or jury was in a better position than the appellate court to observe the demeanor of witnesses and others and to get the "feel of the case." *Cummings v Kendall* (1940) 41 CA2d 549, 555, 107 P2d 282; see *Maslow v Maslow* (1953) 117 CA2d 237, 243, 255 P2d 65. Nevertheless, the limitations on appellate review of the trial court's factual determinations also apply to situations that lack this consideration. See, *e.g., Bradley v Superior Court* (1957) 48 C2d 509, 516, 310 P2d 634 (motions heard on affidavits); *Tupman v Haberkern* (1929) 208 C 256, 263, 280 P 970 (motion for new trial not heard by original judge); *Denna v Red River Lumber Co.* (1941) 47 CA2d 235, 117 P2d 689 (determination of fact depended on documentary evidence only). See generally 9 Witkin, California Procedure, *Appeal* §§369-374 (5th ed 2008).

When applicable. The substantial evidence rule is generally used to test evidence supporting a judgment. A trial judge makes factual determinations in deciding other types of rulings, however, and the substantial evidence rule may also apply to them. See, *e.g., Torres v Union Pac. R.R.* (1984) 157 CA3d 499, 203 CR 825 (ruling on good faith settlement reviewed for substantial evidence). Although factual determinations on rulings other than judgments are usually reviewed for abuse of discretion (see §5.24), some opinions have overlapped the two standards. See, *e.g., Johns v City of Los Angeles* (1978) 78 CA3d 983, 990, 144 CR 629 (discretion to order new trial for juror misconduct abused if no substantial evidence supports finding of bias); *West v Lind* (1960) 186 CA2d 563, 9 CR 288 (court's discretion to order preliminary injunction upheld if factual determinations supported by substantial evidence).

Default judgments. The general rule in civil matters is that sufficiency of the evidence cannot be reviewed on an appeal from a default judgment, the defaulting party being limited to raising jurisdictional matters and fundamental defects in pleading. *Heathman v Vant* (1959) 172 CA2d 639, 644, 343 P2d 104. But see *Uva v Evans* (1978) 83 CA3d 356, 363, 147 CR 795 (damages awarded in default judgment may be overturned on appeal when totally unconscionable and without evidentiary justification).

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§5.19 b. Substantial Evidence Defined

Minimum requirements. Substantial evidence is not synonymous with "any" evidence. The evidence supporting the judgment must be credible, reasonable in nature, and of solid value. *Estate of Teed* (1952) 112 CA2d 638, 644, 247 P2d 54.

Focus is on quality, not quantity. The word "substantial" refers to the quality of the evidence, not the quantity. The testimony of a single witness, even that of respondent, can provide the requisite substantial evidence, regardless of the number of witnesses or the amount of evidence to the contrary. See *Marriage of Mix* (1975) 14 C3d 604, 614, 122 CR 79; *Thom v Stewart* (1912) 162 C 413, 420, 122 P 1069. Lay witnesses can prevail over expert witnesses. *Ortzman v Van Der Waal* (1952) 114 CA2d 167, 170, 249 P2d 846. A view of the premises by the trier of fact can overcome testimony. *Arrowhead Mut. Serv. Co. v Faust* (1968) 260 CA2d 567, 576, 67 CR 325.

Improbable evidence. Although appellate courts have occasionally acknowledged, in dictum, their authority to disregard inherently improbable evidence, reviewing courts have uniformly demanded more than mere improbability to warrant reversal: The evidence must be physically impossible or obviously false without resorting to inference or deduction. *Estate of Reed* (1955) 132 CA2d 732, 282 P2d 935; *Evje v City Title Ins. Co.* (1953) 120 CA2d 488, 492, 261 P2d 279. For example, evidence contrary to scientific knowledge might qualify as inherently improbable.

Reversal not impossible. Despite the severe restrictions the substantial evidence rule imposes on evidentiary review, it is possible to gain a reversal for insufficient evidence. See, *e.g., Estate of Lingenfelter* (1952) 38 C2d 571, 241 P2d 990 (evidence favoring appellant did not prove specific issue required for judgment); *Krause v Apodaca* (1960) 186 CA2d 413, 9 CR 10 (trier of fact may not disregard uncontradicted testimony that is not inherently improbable). See also 9 Witkin, California Procedure, *Appeal* §§369-374 (5th ed 2008).

Reference. See Martin, *New Bite for an Old Maxim: Appellate Courts Put Some Teeth Into the Substantial Evidence Rule*, 10 Cal Law 73 (June 1990).

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§5.20 c. Application of Rule: Evidence Generally Viewed in Respondent's Favor

Application favors respondent. In applying the substantial evidence test, the court views the evidence in the light most favorable to respondent. *Nestle v City of Santa Monica* (1972) 6 C3d 920, 101 CR 568; *Leming v Oilfields Trucking Co.* (1955) 44 C2d 343, 349, 282 P2d 23. It accepts respondent's evidence as true, resolves all conflicts in the evidence in respondent's favor, and draws all favorable inferences that may reasonably be drawn. *Estate of Leslie* (1984) 37 C3d 186, 201, 207 CR 561; *Greathouse v Amcord, Inc.* (1995) 35 CA4th 831, 836, 41 CR2d 561. For discussion of factual inferences, see §5.5.

Appellant must fairly summarize evidence. When appellant's brief fails to state the evidence fairly, presenting only the evidence and inferences most favorable to appellant, the court can consider the substantial evidence claim waived. *Oliver v Board of Trustees of Eisenhower Med. Ctr.* (1986) 181 CA3d 824, 832, 227 CR 1.

No reweighing on appeal. The appellate court cannot reweigh the evidence. Even if the court believes the evidence to be in appellant's favor, it will not reverse the trial court's judgment on that basis. *Albaugh v Mount Shasta Power Corp.* (1937) 9 C2d 751, 73 P2d 217; *Thoele v Thoele* (1929) 102 CA 387, 282 P 1001. It may not reevaluate issues of credibility resolved by the trial judge or jury. *Maslow v Maslow* (1953) 117 CA2d 237, 243, 255 P2d 65; *Estate of Filippi* (1935) 9 CA2d 407, 49 P2d 892.

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§5.21 d. Application of Rule: When Evidence Viewed in Appellant's Favor

The rule that evidence is reviewed in the light most favorable to respondent does not apply to appeals from nonsuits, directed verdicts, or judgments notwithstanding the verdict. When judgment is entered after one of these motions is granted, the point of view from which the appellate court reviews the evidence is reversed; it looks only at the evidence favoring appellant. *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 546, 138 CR 705, overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607 (directed verdict); *Dailey v Los Angeles Unified Sch. Dist.* (1970) 2 C3d 741, 745, 87 CR 376 (directed verdict); *Raber v Tumin* (1951) 36 C2d 654, 656, 226 P2d 574 (nonsuit). The judgment must be reversed if the appellate court finds substantial evidence to support appellant's position. *Hasson v Ford Motor Co., supra; Czubinsky v Doctors Hosp.* (1983) 139 CA3d 361, 364, 188 CR 685.

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§5.22 e. Trial Court Rules for Burden of Proof Do Not Apply

Trial court standards for burden of proof do not apply on appellate review. The requirement that a particular fact or issue be proved by "clear and convincing" evidence is a trial court rule that does not affect the appellate court's application of the substantial evidence rule. *Crail v Blakely* (1973) 8 C3d 744, 750, 106 CR 187; *United Prof. Planning v Superior Court* (1970) 9 CA3d 377, 387, 88 CR 551.

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3. Abuse of Discretion

§5.23 a. Appellate Court Will Not Reverse Unless Trial Court Abused Its Discretion

Trial court discretion to choose among competing resolutions. Many trial court issues are susceptible to more than one proper answer. When an issue may be resolved in more than one way, the trial court usually has discretion to choose among competing resolutions. *Brown v Newby* (1940) 39 CA2d 615, 618, 103 P2d 1018. An appeal challenging an exercise of discretion asks the appellate court to review the trial court's choice and find that it was not merely wrong, but legally improper.

Standard for review. The appellate court will review a discretionary ruling solely to decide whether the trial judge abused the court's discretion in reaching the decision. *Clavey v Lord* (1891) 87 C 413, 419, 25 P 493; *Johnson v Banducci* (1963) 212 CA2d 254, 260, 27 CR 764. A determination that discretion was properly exercised requires the appellate court to decide only that the trial court followed procedure and did not reach an unreasonable decision. See §§5.25-5.28. The appellate court will not speculate about whether another resolution may have been more appropriate. *Wilder v Wilder* (1932) 214 C 783, 7 P2d 1032.

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§5.24 b. When Abuse-of-Discretion Standard Applies

Examine trial court action. To determine whether the abuse-of-discretion standard applies to a particular issue, counsel must identify the type of ruling that is challenged and examine relevant statutes and case law to see how it has been treated before. If the question has not been specifically addressed before, case law on similar rulings may provide an analogy.

Procedural motions. The trial court often uses its discretion in the procedural motions that arise during the trial court proceeding. These include motions for:

- Continuance (*Cade v Mid-City Hosp. Corp.* (1975) 45 CA3d 589, 599, 119 CR 571); and
- Attorney fees and costs (see, *e.g., Marriage of Gonzalez* (1976) 57 CA3d 736, 129 CR 566).

Order granting motion for new trial. The abuse-of-discretion standard of review applies to an order granting a motion for a new trial as long as the trial court has supplied a statement of reasons in compliance with CCP §657. However, if the trial court has failed to comply with CCP §657 or a party is appealing the denial of a new trial motion, the appellate court independently reviews the trial court's order. *Whitlock v Foster Wheeler, LLC* (2008) 160 CA4th 149, 158, 72 CR3d 369. For discussion of the requirements of CCP §657, see §2.34.

Evidentiary rulings. Evidentiary rulings may also be discretionary. See, *e.g.,* Evid C §352 (exclusion of evidence as time consuming or prejudicial).

Equitable decisions. Remedies that require the trial judge to weigh equities are commonly discretionary. These issues often arise in family law litigation. See, *e.g., Fay v Fay* (1938) 12 C2d 279, 283, 83 P2d 716 (child visitation schedule); *Marriage of Johnson* (1982) 134 CA3d 148, 184 CR 444 (allocation of specific items of community property).

Other possibilities. There are many other situations in which the power to make discretionary decisions arises. Counsel who is considering a trial court ruling as the basis for an appeal should research the extent of the court's authority to make the ruling.

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§5.25 c. Establishing Abuse of Discretion

Your case may be unique. Unless counsel can find a case directly on point, there is no easy answer to whether the trial court abused its discretion in making a particular ruling. Each ruling must be analyzed according to its procedural requirements, underlying purpose, and effect.

Limits on discretion. Although trial courts have considerable leeway, their exercise of discretion is not unfettered. *Baggett v Gates* (1982) 32 C3d 128, 142, 185 CR 232. The trial court's decision is entitled to deference on appeal when it is "based on a 'reasoned judgment' and complies with the … legal principles and policies appropriate to the particular matter at issue." *Bullis v Security Pac. Nat'l Bank* (1978) 21 C3d 801, 815, 148 CR 22.

Method of analysis. The test articulated in *Bullis v Security Pac. Nat'l Bank, supra,* suggests a three-part analysis of discretionary rulings. Counsel should verify whether (1) the discretion was exercised according to law, (2) the decision was supported by the facts, and (3) other policies suggest a different result. See §§5.26-5.28.

Illustrations of abuse of discretion. For cases reaffirming the principle that the trial court's exercise of discretion is not unfettered, see *Williams v City of Los Angeles* (1988) 47 C3d 195, 252 CR 817 (trial court abused its discretion in reinstating police officer and excluding evidence of his statements to investigators when failure to provide officer with adequate warning of his rights had no logical or causal connection with his dismissal); *Kendall v Allied Investigations, Inc.* (1988) 197 CA3d 619, 243 CR 42 (trial court abused its discretion in granting motion for relief from default when nothing in record supported claim of diligence). The California Supreme Court has stated that a trial court's discretion is not "unfettered" but must be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." *Bettencourt v Los Rios Community College Dist.* (1986) 42 C3d 270, 275, 228 CR 190.

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§5.26 (1) Did Trial Court Exercise Discretion According to Law?

Degree of discretion varies. The trial court's degree of discretion varies with the nature of the ruling before it. The procedure and standards for a particular exercise of discretion may be defined and limited by statutes and case law. Discretion is abused when the trial court fails to comply with these authorities.

Improper procedure. Abuse of discretion may be found when the trial court fails to follow the proper procedure in reaching its decision. See, *e.g., In re Richard E.* (1978) 21 C3d 349, 146 CR 604 (failure to make affirmative showing that child in custody dispute did not need independent counsel); *Ramona Manor Convalescent Hosp. v Care Enters.* (1986) 177 CA3d 1120, 1137, 225 CR 120 (requirement to make affirmative record that court exercised its discretion and weighed probative value against prejudicial effect of evidence under Evid C §352); *Larwin-Southern Cal., Inc. v JGB Inv. Co.* (1979) 101 CA3d 626, 162 CR 52 (failure to grant leave to amend when curing defect was reasonably possible); *Marriage of Lopez* (1974) 38 CA3d 93, 114, 113 CR 58, disapproved in part on other grounds in *Marriage of Morrison* (1978) 20 C3d 437, 452, 143 CR 139 (failure to consider statutory circumstances in award of spousal support).

Wrong legal standard. Similarly, discretion is abused if the trial court applies the wrong legal standard to its decision. See, *e.g., Dockery v Hyatt* (1985) 169 CA3d 830, 215 CR 488 (trial court did not fully consider all factors outlined in former Cal Rules of Ct 373(e) (now Cal Rules of Ct 3.1342(e)) when dismissing case); *Marriage of Kerry* (1984) 158 CA3d 456, 464, 204 CR 660 (assessment of attorney fees as sanction not authorized by statute); *Martin v Cook* (1977) 68 CA3d 799, 137 CR 434.

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§5.27 (2) Do Facts Support Trial Court Decision?

Factual basis required. A trial court's resolution of an issue must be reasonable in light of the facts on which the ruling is based. An exercise of discretion may be reversed if no reasonable basis for the action can be shown. See 9 Witkin, California Procedure, *Appeal* §377 (5th ed 2008). See also *Bailey v Taaffe* (1866) 29 C 422. Evaluating the factual basis for an exercise of discretion is much like analyzing the sufficiency of the evidence under the substantial evidence test. See discussion of overlap between substantial-evidence and abuse-of-discretion standards in §5.18.

Viewed as of time of ruling below. The reviewing court evaluates the exercise of discretion on the facts as they existed when the ruling was made. A hindsight evaluation that a different result might have been preferable or equally appropriate does not warrant reversal. *Wilder v Wilder* (1932) 214 C 783, 7 P2d 1032; *Smith v Smith* (1969) 1 CA3d 952, 958, 82 CR 282.

Illustrations of abuse of discretion. Cases in which discretion has been held abused because the ruling was unreasonable on the facts include *Westside Community for Indep. Living v Obledo* (1983) 33 C3d 348, 188 CR 873 (amount of attorney fees); *Johns v City of Los Angeles* (1978) 78 CA3d 983, 144 CR 629 (new trial based on juror misconduct); *Bustop v Superior Court* (1977) 69 CA3d 66, 73, 137 CR 793 (intervention refused); and *Cohen v Herbert* (1960) 186 CA2d 488, 8 CR 922 (continuance refused).

Resist cursory review. Appellate courts often give cursory attention to a discretionary ruling by noting that the trial court had broad discretion to make the ruling. The term "broad" when used to describe discretionary power generally means that the exercise of discretion is subject to few, if any, express limitations in the statutes and case law. See, *e.g., Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 378, 15 CR 90 (broad discretion to make discovery orders). If counsel can point to specific limits on the trial court's discretion, the appellate court may examine the facts underlying the ruling more carefully. See, *e.g., Johns v City of Los Angeles, supra,* in which the court granted a rehearing to scrutinize the trial court's order granting a new trial after counsel pointed out that the court's discretion to grant the new trial was limited under CCP §657. Note, however, that even the exercise of broad discretion can be overturned if abused. See *Britt v Superior Court* (1978) 20 C3d 844, 143 CR 695 (discovery order violated First Amendment).

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§5.28 (3) Do Other Policies Suggest Different Result?

Impact of other policy considerations. The deference given trial court decisions on appeal is a policy consideration that may be strengthened or weakened by other policy considerations. The same type of ruling may be given broad deference in one case if its effect is consistent with other policies but be given more limited deference in another if it is shown to violate a competing policy.

Policy favoring decisions on merits. For example, to sustain the general policy in favor of deciding cases on the merits, courts have often held that an order relieving a party from default is less likely to be reversed than an order refusing to do so. *Lawrence v State* (1985) 171 CA3d 242, 217 CR 200 (abuse of discretion to deny application to file late tort claim against state under Govt C §946.6); *Friedrich v Roland* (1950) 95 CA2d 543, 552, 213 P2d 423. The reason for this is that when the trial court grants relief from default, the policy of securing trials on the merits and the policy of noninterference in the trial court's discretion operate in favor of the trial court's determination. But when the trial court denies relief, the two principles conflict.

Other policies. Similarly, the degree of scrutiny an appellate court will apply may depend on other policies involved in the particular case. See, *e.g., Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 379, 15 CR 90 (discovery orders must be made consistent with judicial policy favoring liberal discovery).

Facts remain crucial. Even strong policy, however, cannot prevail if appellant's facts are not persuasive. See, *e.g., Scherrer v Plaza Marina Commercial Corp.* (1971) 16 CA3d 520, 94 CR 85, in which the court affirmed the sanction of default for repeated failure to comply with judicial process.

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IV. ANALYZING EFFECT OF ERROR

§5.29 A. Error Must Prejudice Outcome of Case

Prejudice required. Not every trial court error justifies reversal. Trivial errors are not cause for retrial (*Baker v Eilers Music Co.* (1917) 175 C 652, 166 P 1006), and even substantial errors are not reversible if the judgment is correct (*County of Monterey v W.W. Leasing Unlimited* (1980) 109 CA3d 636, 642, 167 CR 12). Only an error prejudicial to the losing party will support a reversal.

Three sources. The requirement that error be prejudicial derives from three sources:

- **Statutory basis.** Under CCP §475, appellate courts may disregard errors that do not affect the parties' substantial rights. Under §475, no error may result in reversal unless it is evident from the record that the error was prejudicial, that the complaining party sustained substantial injury as a result, and that a different result would have been probable had the error not occurred.
- **Constitutional basis.** The rule of CCP §475 was reinforced by the adoption of Cal Const art VI, §13 (former Cal Const art VI, §4-1/2), which prohibits reversal of any judgment unless, after examining the entire cause, including the evidence, the court's opinion is that the error complained of resulted in a miscarriage of justice.
- **Evidentiary basis.** Evidentiary errors are subject to an independent requirement. Evidence Code §§353-354 prohibit reversal of a judgment for erroneous admission or exclusion of evidence unless the appellate court finds that the error resulted in a miscarriage of justice.

Other terms. Researchers looking for cases discussing prejudicial error may encounter different terms for the concept, including "harmless error," "reversible error," and the *"Watson* rule" (after *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243; see discussion in §5.31).

Key to reversal. A finding of prejudice is essential to the success of an appeal. If counsel cannot argue that the error contributed to the result of the case or that the result would have been different had the error not occurred, reversal is impossible.

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§5.30 B. Scope of Inquiry Into Prejudice

Constitutional rule. The appellate court is required by Cal Const art VI, §13 to examine the *entire cause* in evaluating the effect of an error on the outcome of a case. Although §13 implies that the court has an independent duty to examine the record, this is not so. It is appellant's burden to demonstrate not only error, but prejudice. *Tupman v Haberkern* (1929) 208 C 256, 263, 280 P 970; *Givens v Southern Pac. Co.* (1961) 194 CA2d 39, 47, 14 CR 736. Counsel evaluating the case must decide whether the record is strong enough to sustain that burden.

Factual basis. Whether appellant was prejudiced depends on the facts of the case. Prejudice will not be presumed, even with sometimes obvious facts. See, *e.g., Dorsic v Kurtin* (1971) 19 CA3d 226, 96 CR 528, in which the court noted that, although prejudice apparently resulted from the jury's considering inadmissible evidence, the court could not find prejudice, because it was not shown by appellant. But see §5.32 for a discussion of errors held prejudicial per se.

Effect of errors in appellant's favor. The appellate court may consider trial court errors that affected respondent's case to find that appellant was not prejudiced by the errors raised on appeal. CCP §906. Even a respondent who does not or cannot cross-appeal may ask the appellate court to consider these errors. See §4.15.

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C. Test for Determining Prejudice

1. Errors in State Law

§5.31 a. The *Watson* Rule

The test in most civil cases for determining when error is prejudicial is to apply the "*Watson* rule," from *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243: Miscarriage of justice occurs when the appellate court finds it "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Each case depends on its own merits. *Bridgman v Safeway Stores, Inc.* (1960) 53 C2d 443, 450, 2 CR 146.

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§5.32 b. Prejudice Per Se

Errors reversible per se. Although Cal Const art VI, §13 requires a review of the entire record for a finding of prejudice, courts have found some errors to be so significant that they have held them reversible per se on the ground that they deprived the litigant of a fair trial. Errors found prejudicial per se include:

- Denial of the right to a jury trial (*Selby Constructors v McCarthy* (1979) 91 CA3d 517, 527, 154 CR 164);
- Denial of the right to testify (*National Auto. Ins. Co. v Fraties* (1941) 46 CA2d 431, 433, 115 P2d 997);
- Denial of the right to cross-examination (*McCarthy v Mobile Cranes, Inc.* (1962) 199 CA2d 500, 509, 18 CR 750);
- Evidence taken outside of court without consent of parties or counsel (*Noble v Kertz & Sons Feed & Fuel Co.* (1945) 72 CA2d 153, 158, 164 P2d 257); and
- Denial of notice and a hearing (*Estate of Buchman* (1954) 123 CA2d 546, 559, 267 P2d 73).

See generally 9 Witkin, California Procedure, *Appeal* §§453-457 (5th ed 2008).

Rarely used. The concept of prejudice per se has been criticized, and it is seldom invoked in civil cases. See Comment, *The California Constitution and the California Supreme Court in Conflict Over the Harmless Error Rule*, 32 Hastings LJ 687 (1981). Counsel asserting an error considered reversible per se should make an independent argument of prejudice to avoid any problems with the application of the rule.

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§5.33 2. Federal Constitutional Errors

Federal constitutional rights are reviewed under a stricter standard than that of *People v Watson* (1956) 46 C2d 818, 299 P2d 243 (see §5.31). *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, requires that a court reviewing an error raising a federal constitutional claim find that the error was harmless beyond a reasonable doubt. Although this standard is usually applied in criminal cases, it also applies in civil cases raising constitutional issues. See *Cramer v Tyars* (1979) 23 C3d 131, 150, 151 CR 653.

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D. Factors to Look for in Evaluating Prejudice

§5.34 1. Seriousness of Error

Obviously prejudicial. Some errors are so material that they prevent the judge or jury from properly considering the case. See, *e.g., City of Los Angeles v Decker* (1977) 18 C3d 860, 135 CR 647 (attorney misrepresented central issue of case); *Grudt v City of Los Angeles* (1970) 2 C3d 575, 588, 86 CR 465 (court excluded proper theory and critical evidence); *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 507, 90 CR2d 502 (juror misconduct); *McGee v Cessna Aircraft Co.* (1978) 82 CA3d 1005, 1019, 147 CR 694 (erroneous jury instruction on central issue of case). Errors that dispose of the case before the merits can be considered (*e.g.,* granting a demurrer) are obviously prejudicial.

Obviously harmless. Conversely, some errors are so trivial that in almost no circumstance could they be considered prejudicial. Examples are clerical errors (*Collins v Welsh* (1934) 2 CA2d 103, 108, 37 P2d 505 (typographical error in pleading)), minor procedural violations (*Gherman v Colburn* (1977) 72 CA3d 544, 588, 140 CR 330 (failure to have written copy of jury instructions placed in jury room)), and misuse or omission of terms (*Grenell v City of Hermosa Beach* (1980) 103 CA3d 864, 869, 163 CR 315 (failure to name party in introduction to demurrer)).

Context determines. Not all errors can be immediately classified as serious or trivial; the context of the case defines the error. In *Lewis v American Hoist & Derrick Co.* (1971) 20 CA3d 570, 583, 97 CR 798, the court considered the effect of improperly excluded evidence and found it to be of insufficient probative value to have been prejudicial. The converse was found in *Downing v Barrett Mobile Home Transp.* (1974) 38 CA3d 519, 113 CR 277. There is no rule of "inherent" prejudice applicable to civil instructional error, whether of commission or omission; a judgment may not be reversed for instructional error in a civil case absent an examination of the entire cause, including the evidence, to determine if the error complained of has resulted in a miscarriage of justice. *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607.

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§5.35 2. Weight of Evidence

Evidence insufficient to support judgment in appellant's favor. Error is not prejudicial if the evidence introduced at trial could not support a judgment in appellant's favor. Thus, if the evidence overwhelmingly favors respondent's position, the appellate court will find the judgment proper. See, *e.g., Hillman v Garcia-Ruby* (1955) 44 C2d 625, 627, 283 P2d 1033 (error in jury instructions immaterial when evidence did not support finding in appellant's favor under proper instruction); *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 854, 139 CR 888 (improperly admitted evidence not prejudicial when respondent's case proved by sufficient untainted evidence); *Coronet Credit Corp. v West Thrift Co.* (1966) 244 CA2d 631, 647, 53 CR 433 (refusal to make specific finding not prejudicial when finding would be adverse).

Evidence in close conflict. When the evidence is in close conflict, the "*Watson* rule" (*People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243 (reasonably probable that result more favorable to appellant would have been reached absent error)), becomes important. Although the outcome of any case depends on its own peculiar facts, courts are more likely to reverse the judgment in a close case. Cases in which the appellate court found the evidence to be close are instructive. See, *e.g., Clifton v Ulis* (1976) 17 C3d 99, 130 CR 155 (exclusion of prior inconsistent statement); *Hrnjak v Graymar, Inc.* (1971) 4 C3d 725, 94 CR 623 (admission of evidence of collateral payments); *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 45 CR 313 (attorney misconduct); *Walsh v Palma* (1984) 154 CA3d 290, 201 CR 142 (wrong standard of proof applied); *Downing v Barrett Mobile Home Transp.* (1974) 38 CA3d 519, 113 CR 277 (admission of evidence of character).

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§5.36 3. Behavior of Jury

Problems with instructions. Disagreement, compromise, or signs of confusion among jury members can indicate prejudice. When the error claimed is in the jury instructions, the supreme court has identified several factors, including split verdicts, requests for rereading of instructions, and requests to reexamine evidence as items to look for when evaluating the prejudicial effect of the instructions. See *Le Mons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 876, 148 CR 355. See also *Mitchell v Gonzales* (1991) 54 C3d 1041, 1 CR2d 913 (finding prejudice and disapproving former BAJI 3.75 on proximate cause); *Pool v City of Oakland* (1986) 42 C3d 1051, 232 CR 528 (no prejudice found under facts of case).

Problems with evidence. Jury behavior may suggest prejudice in other types of error claims as well. In *Hrnjak v Graymar, Inc.* (1971) 4 C3d 725, 94 CR 623, an unexpectedly small damages award was found to bolster the claim that erroneously admitted evidence influenced the verdict.

Juror misconduct. Juror misconduct can also be a source of prejudicial error. In evaluating a claim of error based on juror misconduct, however, counsel must ensure that the declarations to impeach the verdict are admissible and within the standards required for claiming misconduct. See, *e.g.*, *Mesecher v County of San Diego* (1992) 9 CA4th 1677, 12 CR2d 279.

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§5.37 4. Number of Errors

Can be important. In some cases, the sheer number of errors establishes a miscarriage of justice. Though each may be minor in isolation, the cumulative effect may deprive appellant of a fair trial. See, *e.g., Delzell v Day* (1950) 36 C2d 349, 351, 223 P2d 625 (trial court's comments); *Smith v Shankman* (1962) 208 CA2d 177, 187, 25 CR 195 (multiple defense-oriented instructions); *Maertins v Kaiser Found. Hosps.* (1958) 162 CA2d 661, 667, 328 P2d 494 (multiple improper instructions). If cumulative errors go to the same issue, prejudice is even more likely. See, *e.g., Cortez v Macias* (1980) 110 CA3d 640, 167 CR 905.

Not determinative. Appellant's counsel should not assume, however, that the recitation of a multitude of suspect acts, statements, or rulings will invariably result in a finding of prejudicial error. The general appellate court posture toward scattergun attacks is one of skepticism and criticism. See *Dam v Lake Aliso Riding Sch.* (1936) 6 C2d 395, 399, 57 P2d 1315.

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§5.38 5. Independent Basis for Decision

Error that may be isolated. An error that may be serious in the abstract is harmless if the judgment can be sustained on a theory untainted by the error. Examples include admission or exclusion of evidence on a theory other than that on which the judgment rests (*Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 299, 85 CR 444), erroneous instruction on a theory not necessary to the verdict (*County of Monterey v W.W. Leasing Unlimited* (1980) 109 CA3d 636, 167 CR 12), and judicial misconduct on an issue not submitted to the jury (*Newman v First Cal. Co.* (1975) 47 CA3d 60, 68, 120 CR 494).

Pervasive error. Errors cannot always be neatly allocated to particular theories. Some errors infect the entire proceeding. Misconduct often has this effect. See, *e.g., Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141, 45 CR 313.

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§5.39 6. Prejudicial Effect Cured

Many errors can be cured. An error can be cured by an action that counteracts the prejudicial effect of the error. For example:

- The effect of improperly received evidence or misstatements by the judge or counsel is commonly cured by striking the evidence or comment from the record and instructing the jury to disregard it. See, *e.g., Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 271, 81 CR 849; *Elliott v Federated Fruit & Vegetable Growers* (1930) 108 CA 412, 291 P 681.
- The erroneous exclusion of evidence on damages has been remedied by reducing the amount of damages. *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 315, 74 CR 534.
- An erroneous ruling of law may be cured by reopening the case and vacating the ruling. *Caminetti v Prudence Mut. Life Ins. Ass'n* (1944) 62 CA2d 945, 948, 146 P2d 15.
- Misconduct by plaintiff's counsel has been held cured by the trial court's instructions. *Williams v Volkswagenwerk Aktiengesellschaft* (1986) 180 CA3d 1244, 1269, 226 CR 306.

Some errors cannot be cured. Not all errors can be mitigated. When highly prejudicial evidence or comments are admitted or pervasive misconduct continues, the only remedy may be a new trial. See, *e.g., Stevenson v Link* (1954) 128 CA2d 564, 574, 275 P2d 782. Judicial misconduct is particularly difficult to cure. See *Delzell v Day* (1950) 36 C2d 349, 351, 223 P2d 625.

Seeking remedies for error. Action that will remedy the effect of error in a particular case depends on the nature of both the error and the case. Remedies for errors commonly occurring in trial may be found in California Trial Objections, chaps 52-57 (Cal CEB Annual).

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V. EXAMINING PRESENTATION OF ERROR IN THE RECORD

§5.40 A. Record Must Show Error

Inquiry limited to record. The record on appeal is the "evidence" the appellate lawyer uses to demonstrate to the court that error did or did not occur in the trial court. The appellate court's inquiry into a case is limited to the facts and arguments that appear in the record.

Put aside personal knowledge. The trial attorney's personal knowledge of a case can inhibit the evaluation of the record. Personal knowledge must be put aside and the record meticulously reviewed to verify whether the error was properly preserved for review. The following questions should be asked:

- Do all facts necessary to argue the issue appear in the record?
- Was the error expressly waived?
- Did trial counsel register a proper and timely objection?
- If no objection was made, does the error fall within an exception to the rule that issues must be raised in the trial court to be considered on appeal?

Documentary basis for appellant's counsel's evaluation. When appellant's counsel initially evaluates a case for appeal, the formal record on appeal has not yet been prepared. On the record, see chap 9. The record that exists at that time usually consists of the documents on file with the trial court. There is seldom a transcript of the oral proceedings until after the appeal is filed. If the reporter's transcript is needed for the initial evaluation, counsel should consider having some or all of it prepared.

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§5.41 B. Record Must Contain All Facts Needed for Argument

Absence of facts in record supports respondent. All facts needed to argue the appeal must be in the record. The appellate court presumes that the record supports respondent's position on all facts not appearing. *Denham v Superior Court* (1970) 2 C3d 557, 564, 86 CR 65; *Fox v Federated Dep't Stores* (1979) 94 CA3d 867, 872 n3, 156 CR 893. The term "facts," as used in this rule, refers to both substantive and procedural facts.

All evidence must have been presented, by introduction or offer of proof. All evidence the appellate court will need to consider an argument must have been presented to the trial court, either by introducing it or by making an offer of proof after an objection is sustained. See, *e.g., Doers v Golden Gate Bridge Highway & Transp. Dist.* (1979) 23 C3d 180, 184 n1, 151 CR 837 (necessary documents discussed but not introduced in evidence); *Denham v Superior Court, supra* (no record of evidence on which appellant based argument in trial court). To be considered by the appellate court, documentary evidence must have been introduced, not merely marked for identification. In addition, an offer of proof must consist of admissible material and "must be specific in indicating the purpose of the testimony, the name of the witness and the content of the answer to be elicited." *Semsch v Henry Mayo Newhall Mem. Hosp.* (1985) 171 CA3d 162, 167, 216 CR 913.

Record must reflect any trial court actions on which party will rely. Any actions in the trial court on which a party will rely in argument must be reflected in the record. See, *e.g., Walling v Kimball* (1941) 17 C2d 364, 110 P2d 58 (court must presume verdict proper when basis of decision does not appear in record); *Waller v Waller* (1970) 3 CA3d 456, 83 CR 533 (discussion off record).

Appeal deliberately brought on incomplete record. When the appeal is deliberately brought on an incomplete record, the record must nonetheless contain all facts necessary to decide the appeal. See *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1006 n2, 185 CR 145 (deposition testimony not considered when not made part of record on appeal). When a complete record cannot be filed, as when no transcript is made of the trial court proceeding, the agreed or settled statement must reflect the claimed error, otherwise the appellate court will presume that the challenged action of the trial court was correct. See *Waller v Waller, supra*. On methods of designating the record on appeal, see chap 8.

Issues not raised in trial court. Generally, issues not raised in the trial court will not be considered on appeal. See, *e.g., O'Neil v Spillane* (1975) 45 CA3d 147, 161, 119 CR 245 (appellant's request for reimbursement not cognizable on appeal when amount paid not introduced below). This issue is discussed in more detail in §§5.42-5.45.

JUDICIAL PERSPECTIVE: While the court takes its responsibility to review the record seriously (see Cal Const art VI, §13), it is crucial to bring relevant portions of the record to the court's attention. Appellate justices are human. If there is something important in the record, don't assume that the court will find it. Lawyers always know the case better than judges do.

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C. Error Waived in Trial Court

§5.42 1. Express Waiver; Invited Error; Theory of Case

Forms of waiver. Trial counsel may have waived the error as a basis for appeal by affirmative acts in the trial court. Waiver may be by:

- Express stipulation (see, *e.g., Japan Food Corp. v County of Sacramento* (1976) 58 CA3d 891, 897, 130 CR 392 (stipulation on question of fact));
- Statements favorable to the adverse party's position (see, *e.g., Estate of Kretschmer* (1965) 232 CA2d 789, 790, 43 CR 121); or
- Expressly withdrawing an objection after it has been properly registered (*Buchanan v Nye* (1954) 128 CA2d 582, 275 P2d 767).

However, a stipulation to an erroneous legal conclusion does not bind the appellate court. *Burrows v State* (1968) 260 CA2d 29, 33, 66 CR 868.

Invited error. The doctrine of invited error is closely related to express waiver: When appellant's own actions induced the error, it cannot be complained of on appeal. *Bondulich v O.E. Anderson Co.* (1962) 210 CA2d 12, 17, 26 CR 147. Examples of invited error include:

- Offering inadmissible evidence on direct (*People v Moran* (1970) 1 C3d 755, 762, 83 CR 411) or cross-examination (*Zarafonitis v Yellow Cab Co.* (1932) 127 CA 607, 609, 16 P2d 141);
- Requesting an erroneous jury instruction (*Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 7, 113 CR 771);
- Submitting a form of jury verdict that had the potential for inconsistency and compromise (*Mesecher v County of San Diego* (1992) 9 CA4th 1677, 12 CR2d 279); and
- Making an erroneous objection to evidence, which results in an element of respondent's case not being proved (*Watenpaugh v State Teachers' Retirement Sys.* (1959) 51 C2d 675, 680, 336 P2d 165; *Kessler v Gray* (1978) 77 CA3d 284, 290, 143 CR 496).

Theory of case. Closely related to the doctrine of invited error is the doctrine of "theory of the case." Under this doctrine, a party cannot argue the case in the trial court on the assumption that a particular issue is controlling or a particular statute is applicable, and argue on appeal that a different issue or statute should control. *Planned Protective Servs. v Gorton* (1988) 200 CA3d 1, 12, 245 CR 790 (failure to raise applicability of statute), disapproved on other grounds in *Martin v Szeto* (2004) 32 C4th 445, 451 n7, 9 CR3d 687. See also *Richmond v Dart Indus.* (1987) 196 CA3d 869, 242 CR 184 (failure to argue particular theory).

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§5.43 2. Implied Waiver

Circumstances. An error may be impliedly waived by counsel's failure to act in the trial court. Two circumstances usually give rise to an implied waiver:

- Failure to raise an issue in the trial court; and
- Failure to register a timely and proper objection to errors.

Failure to present evidence. Failure to present evidence on an issue may also lead to a waiver of error on that issue on appeal. In *Pat Rose Assocs. v Coombe* (1990) 225 CA3d 9, 275 CR 1 (disapproved on other grounds in *Adams v Murakami* (1991) 54 C3d 105, 116, 284 CR 318), defendant, who had failed to present evidence on his net worth at trial, was held to have waived any error in the amount of punitive damages awarded. See also *In re Mark C.* (1992) 7 CA4th 433, 8 CR2d 856 (failure to make adequate offer of proof precludes consideration of alleged error on appeal). For further discussion of offers of proof, see California Trial Practice: Civil Procedure During Trial §§15.50-15.60 (3d ed Cal CEB 1995).

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§5.44 a. Issues Not Raised at Trial; Exception for Issues of Law

General rule. An issue must ordinarily be raised in the trial court to be argued on appeal. *Parker v City of Fountain Valley* (1981) 127 CA3d 99, 117, 179 CR 351; *In re Joseph E.* (1981) 124 CA3d 653, 657, 177 CR 546. Although the appellate court has discretionary power to hear new issues (*Bayside Timber Co. v Board of Supervisors* (1971) 20 CA3d 1, 4, 97 CR 431), it rarely does so.

Exception for pure issues of law. One rather large and nebulous exception to this rule has been carved out in case law. Opinions frequently note that issues purely of law may be raised for the first time on appeal. *California Pools, Inc. v Pazargad* (1982) 131 CA3d 601, 182 CR 568 (interpretation of statutes); *Wilson v Lewis* (1980) 106 CA3d 802, 805, 165 CR 396 (legal significance of postdated check). If the issue requires review of any controverted fact, however, it will not be considered. *Bogacki v Board of Supervisors* (1971) 5 C3d 771, 780, 97 CR 657; *Westcon Constr. Corp. v County of Sacramento* (2007) 152 CA4th 183, 195, 61 CR3d 89 (court declined to consider new argument because it did not involve purely legal question).

Examples. The exact boundaries of this exception are unclear. It is used most often to permit consideration of new issues involving the underlying theory of a case, such as:

- The constitutionality of a statute on which a claim is based (see, *e.g., Hale v Morgan* (1978) 22 C3d 388, 394, 149 CR 375);
- The legal theory of a claim (see, *e.g., Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534); and
- The legal effect to be given undisputed evidence (see, *e.g., Powell v Premier Ins. Co.* (1981) 118 CA3d 336, 345, 173 CR 383).

Related principles. In *Fisher v City of Berkeley* (1984) 37 C3d 644, 654 n3, 209 CR 682 (affirmed on substantive antitrust grounds only in *Fisher v City of Berkeley* (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045), the California Supreme Court discussed several related principles on when an appellate court will consider issues not raised at trial:

- Parties can advance new theories on appeal when the issue posed is purely one of law based on undisputed facts and concerns an important question of public policy;
- An appellate court will consider a new point of law decided by another court while the appeal was pending; and
- On appeal from a judgment granting or denying an injunction, the court applies the law in effect as of the time of its decision.

In *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 6, 74 CR2d 248, the supreme court indicated that, in addition to the above factors, the court will also consider:

- Whether the parties have extensively briefed the issue on appeal; and
- Whether it is in the public interest to decide the issue at the time of the appeal.

Respondents fare better than appellants. Because appellate courts evaluate the correctness of the judgment itself, rather than the trial judge's reasoning, a new theory offered to *affirm* a judgment is more likely to be accepted than one offered to *reverse* it. See §5.14. In *State ex rel Pub. Works Bd. v Bragg* (1986) 183 CA3d 1018, 228 CR 576, however, the appellate court considered the interpretation of a statute that was raised by the state for the first time on appeal, even though the issue was being offered to reverse the trial court decision. The court held that the statute should have been applied by the trial court on its own motion (183 CA3d at 1023), which might have played a role in the appellate court's decision to reverse based on the statute.

On appellate court's motion. An extreme example of considering a new issue for the first time on appeal occurred in *Myers Bldg. Indus. v Interface Technol., Inc.* (1993) 13 CA4th 949, 17 CR2d 242. In *Myers,* the appellate court reversed an award of punitive damages because the jury had based the award on a breach of contract, not a tort, even though appellant never raised that argument in any of the briefs. Appellant did raise several other grounds on which the punitive award was alleged to be reversible. The court of appeal also gave the parties the opportunity to brief this novel ground before deciding the issue on appeal. 13 CA4th at 957 n3.

Reference. See also 9 Witkin, California Procedure, *Appeal* §402 (5th ed 2008) for further discussion of this exception.

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§5.45 b. Error Not Preserved by Proper and Timely Objection

Objection essential. Counsel must object to errors brought about by other trial court participants to preserve those errors for appeal. Failure to register a proper and timely objection waives the issue. See, *e.g., Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 318, 74 CR 534; *Kinney v County of Contra Costa* (1970) 8 CA3d 761, 771, 87 CR 638; *Russell v Geis* (1967) 251 CA2d 560, 570, 59 CR 569. See also Evid C §353(a), which precludes appeals based on evidentiary errors unless the objection was properly raised in the trial court.

Implied waiver. Waiver can be implied when counsel's actions after objecting suggest that the objection has been abandoned or withdrawn. Error is waived if, for example, after an objection to evidence is overruled, the objecting party uses the evidence affirmatively to prove part of the case. *Heiman v Market St. Ry.* (1937) 21 CA2d 311, 315, 69 P2d 178 (after objecting to introduction of motion picture, plaintiff exhibited film to jury again to prove case). However, if the objector uses the evidence defensively to explain or contradict the other party's use of it, the objection is not waived. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 299 n17, 85 CR 444; *De Roulet v Mitchel* (1945) 70 CA2d 120, 125, 160 P2d 574. Nor is the error waived if counsel complies with the ruling after registering a proper objection. *People ex rel Department of Pub. Works v Lagiss* (1958) 160 CA2d 28, 36, 324 P2d 926 (pleading amended after adverse ruling).

Manner of objection. The requirements for registering an objection vary with the type of error. Generally, the ground on which the objection is made must be stated and a ruling obtained unless it is apparent from the record that the ruling must have been adverse. See *Vannier v Superior Court* (1982) 32 C3d 163, 175, 185 CR 427. For some errors, other procedural remedies, including motions to strike or for a new trial, must be attempted. See, *e.g., Sholar v Barker* (1962) 211 CA2d 31, 32, 27 CR 451 (adequacy of damages). For detailed requirements for objecting to specific errors, see California Trial Objections, chaps 52-57 (Cal CEB Annual).

Some issues not waived. Some orders and rulings are not waived by failure to object. Issues of jurisdiction and of failure to state a cause of action may be raised at any time. *Heitz v County of Sacramento* (1978) 87 CA3d 754, 757 n2, 151 CR 429; *O'Neil v Spillane* (1975) 45 CA3d 147, 156, 119 CR 245. Certain errors are reserved without exception by statute under CCP §647. Counsel should examine this statutory list when evaluating the case.

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§5.46 VI. RELIEF AVAILABLE ON APPEAL

Remand likely result of successful appeal. Counsel contemplating an appeal may envision that success will result in a new decision in the client's favor, but this is rarely the immediate result. The appellate court may affirm, modify, or reverse the trial court's judgment in whole or in part. CCP §43. Seldom does a successful appeal result in the appellate court's ordering entry of a new judgment. Far more often, the appellate court remands the case to the trial court for further proceedings.

Nature of error controls. The relief available on appeal depends on the nature of the error and the relationship of the error to other issues in the case. The appellate court will reverse the trial court judgment and direct entry of a new judgment only if the error is one of law and does not require reexamination of contradictory evidence. *Pacific Home v County of Los Angeles* (1953) 41 C2d 844, 854, 264 P2d 539. More often, the appellate court reverses the judgment, with or without directions, and returns it to the trial court. If the error affects an issue that is severable from other issues in the case, such as issues of liability and damages, the court may reverse only the affected part of the case, with instructions to reconsider or retry that part. See, *e.g., People ex rel Department of Pub. Works v Mascotti* (1962) 206 CA2d 772, 23 CR 846.

Consider relief at outset. Before taking on an appeal, appellant's counsel should ascertain the relief that can be granted for each error that will be raised in the appeal. A detailed discussion of the relief available on appeal is set forth in chap 17.

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VII. RESEARCHING THE APPEAL

§5.47 A. Goals and Method of Research

Questions to address. When counsel has identified an issue or issues that might provide a basis for reversal, legal research will usually be needed to confirm the evaluation. The research may address two distinct questions:

- Can it be argued that the trial court acted improperly or reached an incorrect result?
- How do the principles of appellate review (discussed in this chapter) apply to the particular facts of the case?

Goal. Counsel's goal in researching an appeal for evaluation is to find a rule of law that governs each legal issue and to determine whether applying that rule to the facts of the case is likely to result in a favorable outcome for the client. Cases should be read with the following questions in mind:

- Does the rule of law clearly apply to the present case? Can it be factually distinguished? See §5.51.
- If the rule clearly applies, is it sound and consistent with established precedent and policy? See §§5.52-5.57.
- If no rule clearly applies, or if counsel will argue that precedent should not be followed, what rule of law should apply? Can a strong argument be made for a rule that favors the client? See §§5.58-5.63.

Start with the record. When the focus of the research is whether the trial court result was incorrect, the starting point for the research will usually be the trial court record. However, research should not be limited to the reasons stated by the trial court to justify the decision. The appellate court's primary concern is whether the trial court reached the correct decision. If an alternative legal basis supports the ruling, the appellate court will affirm the decision. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 18, 112 CR 786. See discussion in §5.14.

Find a sound basis. Counsel should devote significant time to researching an appeal before deciding to pursue it. Doing so protects appellant by reducing the chance that a frivolous appeal will be taken. See chap 20 on sanctions for frivolous appeals. If the appeal is pursued, the preliminary research will provide the raw material for the opening brief.

JUDICIAL PERSPECTIVE: Judges are not computers. One of the reasons we relish oral argument is human contact—real people with real problems. Judges are human, and the emotion of a situation will have an effect. Judges cannot help but be influenced by the result of the case. Such emotion is not, though, a determining factor in our decisions, and it's something we must often put aside. Nonetheless, it is something lawyers can apply to their advantage. For example, respondent should "thump the tub" to show that the trial court result is the way it *should* have resulted. Dressing up the plate is always important. It may be only garnish, but do it.

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B. Analyzing Precedent

§5.48 1. Stare Decisis

Precedent on point. When case law is directly on point, counsel must establish whether the doctrine of stare decisis requires that the precedent be followed. Stare decisis is a judicial policy requiring certain courts to follow established precedent. It is a jurisdictional limit on the power of lower courts; a decision rendered in violation of it is void. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321. Higher courts may reject precedent, however, when changing policies dictate a new rule of law. *Commissioner v Hallock* (1940) 309 US 106, 84 L Ed 604, 60 S Ct 444; *County of Los Angeles v Faus* (1957) 48 C2d 672, 679, 312 P2d 680.

Holding or dictum? When stare decisis applies, only the ground on which the decision rests is precedent for later cases; dicta are not binding. To distinguish the law of the case from dicta, the court identifies the material facts of the case and statements of law necessary to the decision. *Hart v Burnett* (1860) 15 C 530, 598; *Achen v Pepsi-Cola Bottling Co.* (1951) 105 CA2d 113, 124, 233 P2d 74. If more than one independent ground justifies the decision, each ground is precedent. *Bank of Italy v Bentley* (1933) 217 C 644, 650, 20 P2d 940. For discussion of the application of these principles to particular cases, see 9 Witkin, California Procedure, *Appeal* §§509-512 (5th ed 2008).

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§5.49 a. California Cases

Decisions of the California Supreme Court are binding on all lower courts in the state. Appellate courts decisions are binding on lower state courts (*Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321) and are generally considered nonbinding on other courts of appeal in either the same or different districts or divisions. See *Theresa Enters. v Davis* (1978) 81 CA3d 940, 947, 146 CR 802; *Slapin v Los Angeles Int'l Airport* (1976) 65 CA3d 484, 489, 135 CR 296. See also 9 Witkin, California Procedure, *Appeal* §§486-508 (5th ed 2008).

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§5.50 b. Cases From Other Jurisdictions

Federal courts. United States Supreme Court decisions on questions of federal law are binding on all state courts. *Chesapeake & Ohio Ry. v Martin* (1931) 283 US 209, 220, 75 L Ed 983, 51 S Ct 453. Lower federal court decisions are generally not considered binding on state courts, although they are "persuasive and entitled to great weight." *Debtor Reorganizers, Inc. v State Bd. of Equalization* (1976) 58 CA3d 691, 696, 130 CR 64.

Courts of other states. When a question arises in a California court about the construction or effect of another state's statute, the California court must follow the other state's decisions on that issue. *Jones v Jones* (1960) 182 CA2d 80, 83, 5 CR 803. In other situations, the California court, although not bound by the decision of a sister state, may find that decision helpful in reaching its own decision, particularly when California law has not yet been interpreted and the sister-state decision deals with construction of a similar statute or uniform act (see, *e.g., Baldwin v State* (1972) 6 C3d 424, 433, 99 CR 145; *Albers v County of Los Angeles* (1965) 62 C2d 250, 269, 42 CR 89) or with construction of a standard agreement (see, *e.g., Crane v State Farm Fire & Cas. Co.* (1971) 5 C3d 112, 116, 95 CR 513).

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§5.51 2. Applying Related Case Law

Applying or distinguishing theories. Most often, research will lead not to a single conclusive answer but to an argument for a theory or theories that apply to the case. If the theory is favorable to the client's position, counsel will want to persuade the court that it is precedent and should be followed. If it is unfavorable, counsel will try to distinguish it. In either situation, the process of analysis is similar. Counsel must analyze the procedural and substantive facts underlying both the case at hand and the precedent to find material factual similarities and distinctions.

Begin with precedent. The analysis should begin with the precedent. Counsel should consider all factors that might have affected adoption of the rule of law. These factors include the identity of the parties, the procedural posture of the case, the content of the pleadings, the facts on which the court based the decision, and the effect of the rule on the outcome of the case.

Move to case at hand. Next, the same analysis should be directed to the case at hand to see whether the cases are similar in all material respects or whether material distinctions suggest that a different rule of law be applied.

Look to purposes. The process of persuading a court to choose one rule of law over another is not limited to analyzing case law; it also requires critical analysis of the rule itself. Often, the most important part of the analysis will be to determine whether the rule of law serves the same or a related purpose in both cases. Particular care should be taken to identify the policies promoted by the rule of law and to evaluate whether they are affected in a positive, neutral, or negative way by the application of the rule to the appeal. Factors that influence a court to adopt a rule of law are discussed in §§5.58-5.63.

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§5.52 3. Rejecting Precedent

Sometimes a reversal of precedent is warranted. Even clearly applicable precedent may be rejected if the proper argument is presented to the appellate court. When adverse case law is discovered, counsel should look behind the cases to analyze whether any factors are present that might induce the court to reject the precedent. See, *e.g., Muskopf v Corning Hosp. Dist.* (1961) 55 C2d 211, 213, 11 CR 89 (overturning rule of sovereign immunity as "mistaken and unjust," but later superseded by statute).

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§5.53 a. Review Legal Basis of Precedent

The starting point for this analysis is the principal case or cases establishing the precedent. Counsel should determine whether the issue was fully presented and discussed and whether the court's reasoning was sound. See *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 780, 140 CR 383. All cases and statutes cited as authority in the opinion should be read to see whether they are accurately cited, and researched to learn whether they have been overruled or amended. See *Whitcombe v County of Yolo* (1977) 73 CA3d 698, 704, 141 CR 189.

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§5.54 b. Consider Underlying Circumstances and Policies

Circumstances and policies that influenced the precedent should be given particular attention. Different economic or social policies may be given current emphasis by the courts. See, *e.g., Fujii v State* (1952) 38 C2d 718, 734, 242 P2d 617 (racially discriminatory rule abandoned). Changes in social practices may dictate a new rule of law. See, *e.g., DeBurgh v DeBurgh* (1952) 39 C2d 858, 867, 250 P2d 598 (punitive attitude toward divorcing party inappropriate in light of modern divorce rate).

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§5.55 c. Analyze Subsequent History of Precedent

The subsequent history of the precedent should be analyzed. Later cases may have criticized the precedent, which might suggest that it is ripe for overruling, or impliedly overruled it. The supreme court may have implied in dictum that a different result might be appropriate if the proper case appeared. *MacFadden v Walker* (1971) 5 C3d 809, 816, 97 CR 537. Decisions of the courts of appeal may conflict, raising the possibility of supreme court review and resolution in the client's favor. See, *e.g., Cobbs v Grant* (1972) 8 C3d 229, 240, 104 CR 505.

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§5.56 d. Consider Composition of Court

The individuals on the court that will be hearing the appeal should be considered. Personnel changes on the supreme court may give hope to the client's cause, despite unfavorable case law. See, *e.g., Dillon v Legg* (1968) 68 C2d 728, 69 CR 72, in which (by a 4-to-3 vote) the supreme court overruled the 4-to-3 decision in *Amaya v Home Ice, Fuel & Supply Co.* (1963) 59 C2d 295, 29 CR 33. The change seemed to result from the elevation to the supreme court of Justice Tobriner, the author of both the *Dillon* opinion and the vacated court of appeal opinion in *Amaya.* See also the dissenting opinion in *Muskopf v Corning Hosp. Dist.* (1961) 55 C2d 211, 224, 11 CR 89, which suggests that personnel shifts were responsible for that decision.

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§5.57 e. Other Factors

Stability is important. Factors that influence a court to follow precedent should be identified. The most important of these factors is the need for stability in the law. The courts are particularly reluctant to overturn a rule of law when property rights have developed on the basis of current interpretation (see *Sorensen v Hall* (1934) 219 C 680, 683, 28 P2d 667), when a particular rule of behavior has long been relied on without generating criticism (see, *e.g., Darsie v Darsie* (1942) 49 CA2d 491, 495, 122 P2d 64), and when the legislature has had an opportunity to change the law but has not done so (see, *e.g., Estate of Fritz* (1951) 102 CA2d 385, 394, 227 P2d 539).

Reference for factors supporting change. For an extensive discussion of factors supporting rejection of recent precedent, see *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116 (supreme court overruled earlier decision that had allowed private right of action for bad faith against insurers under Ins C §790.03).

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§5.58 C. Developing Argument for Rule of Law

When an issue is not addressed in existing case law or when the party seeks to have precedent overturned and a new rule of law adopted, counsel must provide the court with a reason to adopt the new rule. Factors to consider when analyzing whether an argument can be made in support of a new rule of law are discussed in §§5.59-5.63. The argument in the individual case depends on the combination of facts presented and may include factors other than those discussed in these sections. Counsel faced with arguing a new rule of law might find it valuable to examine some recent supreme court decisions to get an idea of the type of arguments that sway the court.

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§5.59 1. Related Cases

If no case law directly on point resolves an issue, the first place to look in developing an argument is related cases. Basic principles should be extracted to apply to the facts of the immediate case. This technique is clearly illustrated in cases on constitutional doctrine. See, *e.g., Bakke v Regents of Univ. of Cal.* (1976) 18 C3d 34, 49, 132 CR 680 (equal protection principles applied to new facts). It can be used in any type of case, however. See, *e.g., Wellenkamp v Bank of America* (1978) 21 C3d 943, 148 CR 379 (doctrine prohibiting restraints on alienation of property applied to new facts). Basic principles may even be extracted from cases discussing the issue in an entirely different context. See, *e.g., Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 98, 160 CR 733 (protection of property logically compels protection of people residing on it); *Marriage of Brown* (1976) 15 C3d 838, 848, 126 CR 633 (court borrowed definition of nonvested pension rights from contract law to apply in dissolution proceeding).

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§5.60 2. Cases From Other Jurisdictions

Treatment of an issue in other jurisdictions may suggest a persuasive theory. See, *e.g., Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 389, 115 CR 765. This is particularly true when the issue is identically presented in the other jurisdiction, as when uniform statutes or standard agreements are construed. See, *e.g., Crane v State Farm Fire & Cas. Co.* (1971) 5 C3d 112, 95 CR 513. Sister-state treatment may also be used for other purposes. See, *e.g., Li v Yellow Cab Co.* (1975) 13 C3d 804, 827, 119 CR 858 (application of law in other states used to show practicality of alternative resolutions).

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§5.61 3. Policies Advanced

Determine public interests promoted. Often the most persuasive argument for a rule of law is found in the policies that will be advanced by its adoption. Taking this approach requires the lawyer to analyze the effect of the proposed rule to discern the public interests it promotes. For example, society may have an interest in the economic effects of a rule (see, *e.g., Wellenkamp v Bank of America* (1978) 21 C3d 943, 950, 148 CR 379), its effect on behavior (see, *e.g., Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 440, 131 CR 14), or its social consequences (see, *e.g., Bakke v Regents of Univ. of Cal.* (1976) 18 C3d 34, 61, 132 CR 680).

Sources of public policy. Recognized public policies are expressed in several places. Policies considered critical to a particular subject may have already been spelled out by the courts. In the area of torts, for example, the policies underlying the system of allocation of fault have been discussed on numerous occasions. See, *e.g., Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 438, 131 CR 14; *Ramos v County of Madera* (1971) 4 C3d 685, 692, 94 CR 421. The legislature may express a clear statement of policy, often as a preface to adopting a major piece of legislation. See, *e.g.,* CC §51.3. Law review articles and other commentary may analyze the policies underlying the court's treatment of a particular subject. Finally, the lawyer analyzing the case should depend on his or her own analysis of the interests involved to evaluate both the effect of a rule and its usefulness.

Reference for public policy analysis. For an example of a California Supreme Court analysis of public policy factors, see *Kendall v Ernest Pestana, Inc.* (1985) 40 C3d 488, 220 CR 818 (policies against restraints on alienation and implied contractual duty of good faith and fair dealing require adoption of rule that, when commercial lease provides for assignment only with lessor's consent, consent can be withheld only for commercially reasonable reasons; this holding was superseded by statute).

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§5.62 4. Practicality

Counsel should consider whether the proposed rule conforms with common sense and whether its application would be practicable. Rules contrary to logic or common sense are unlikely to be adopted. See *Sanchez v South Hoover Hosp.* (1976) 18 C3d 93, 98, 132 CR 657. Similarly, courts may consider whether the proposed rule would be difficult to administer or apply (see *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 439, 131 CR 14), or whether it would increase court congestion and costs (see *Borer v American Airlines, Inc.* (1977) 19 C3d 441, 447, 138 CR 302).

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§5.63 5. Statutory Interpretation

When an issue turns on the interpretation of a statute, the focus of research may be to discern legislative intent. Several sources can aid in this inquiry. General rules of statutory construction are set out in case law and collected in secondary authorities. See, *e.g.,* 7 Witkin, Summary of California Law, *Constitutional Law* §§112-128 (10th ed 2005). To discern specific meaning, courts look to the language of the statute (see, *e.g., Sanchez v South Hoover Hosp.* (1976) 18 C3d 93, 97, 132 CR 657) and to other statutes construing similar language (see, *e.g., Hunstock v Estate Dev. Corp.* (1943) 22 C2d 205, 138 P2d 1; *Frediani v Ota* (1963) 215 CA2d 127, 133, 29 CR 912). The statute's legislative history may also be revealing. Even relatively ancient legislative history may be considered by the court. See, *e.g., Li v Yellow Cab Co.* (1975) 13 C3d 804, 814, 119 CR 858.

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6

Staying Enforcement During Appeal

David M. Axelrad

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I. GENERAL CONSIDERATIONS

§6.1 A. Scope of Chapter

Stays of superior court judgments and orders pending appeal. This chapter discusses procedures for staying enforcement of a superior court judgment or order while an appeal is pending. The assumption in this chapter is that the appellant has decided that an appeal is meritorious. Criteria for evaluating the substantive merits of an appeal are examined in chap 5.

Stays of criminal, trial court, and federal judgments and orders not included. Staying enforcement of judgments and orders in federal courts, trial courts, and in criminal cases is beyond the scope of this chapter, as is the power of federal courts to stay proceedings in California courts. On staying enforcement of trial court judgments and orders, see §§10.26-10.34. On staying enforcement of judgments in criminal cases, see Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007).

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§6.2 B. Overview of Procedure

Procedures governed by statute. The procedures for obtaining a stay pending appeal are defined by statute, serving two purposes (see *Lewin v Anselmo* (1997) 56 CA4th 694, 65 CR2d 682):

- They protect appellant by preserving the status quo so that the issues on appeal are not rendered moot and respondent cannot dispose of the money or property at issue.
- They protect the respondent by ensuring that he or she will be able to enforce the judgment or order if it is affirmed on appeal.

Legislature may impose any conditions on obtaining stay. Because there is no constitutional right to appeal, the legislature may impose any condition on obtaining a stay of enforcement pending appeal. *Trede v Superior Court* (1943) 21 C2d 630, 134 P2d 745. The imposition of conditions does not violate due process. *Grant v Superior Court* (1990) 225 CA3d 929, 939, 275 CR 564.

Principal methods of obtaining stay. There are four principal methods of obtaining a stay pending appeal:

- Automatic stay. Some judgments and orders are stayed automatically pending appeal. CCP §916.
- Stipulation of the parties. Under CCP §995.230, the parties to an appeal may stipulate to conditions for a stay.
- Compliance with statutory procedures or obtaining a trial court order as set forth in CCP §§917.1-917.9 (*e.g.,* posting an appeal bond or deposit in lieu of bond).
- Obtaining an order from the reviewing court. Under CCP §923 a reviewing court may stay a proceeding pending appeal, issue a writ of supersedeas, or make other orders to preserve the status quo.

Obtaining immediate, temporary stay. In addition, CCP §918 authorizes the trial court to order a stay in any action. This procedure is normally used to obtain an immediate, temporary stay to prevent enforcement of the judgment or order, pending consideration of posttrial motions and the filing of a notice of appeal. Appellant should always request an immediate temporary stay in the trial court to allow time to consider these options. For procedures for requesting a temporary stay, see §6.16.

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C. Scope of Trial Court Jurisdiction Pending Appeal

§6.3 1. Jurisdiction Limited to Matters Not Affected by Judgment or Order Appealed

Trial court's jurisdiction limited after appeal is perfected. Once appellant perfects the appeal, *i.e.,* timely files notice of appeal, the trial court cannot enforce or conduct further proceedings on the judgment or order appealed from or "upon the matters embraced therein or affected thereby," including enforcement of the judgment or order. CCP §916; *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1427, 103 CR2d 174; *In re Natasha A.* (1996) 42 CA4th 28, 39, 49 CR2d 332. The trial court, however, is not divested of all jurisdiction in the case; it may still proceed on any matter "embraced in the action and not affected by the judgment or order." CCP §916(a). See exceptions discussed in §6.4.

Interpretation of rule. The purpose of the CCP §916 rule depriving the trial court of jurisdiction once the appeal is perfected is to protect the appellate court's jurisdiction. *Marriage of Horowitz* (1984) 159 CA3d 377, 381, 205 CR 880. Thus, most courts have determined whether a matter is "embraced within or affected by" a judgment or order based on whether further proceedings in the case would limit the "effectiveness" of the appeal (*Franklin & Franklin v 7-Eleven Owners for Fair Franchising* (2000) 85 CA4th 1168, 102 CR2d 770; *Marriage of Varner* (1998) 68 CA4th 932, 936, 80 CR2d 628; *Betz v Pankow* (1993) 16 CA4th 931, 20 CR2d 841; *Marriage of Horowitz, supra; Beckstead v International Indus.* (1982) 127 CA3d 927, 933 n3, 179 CR 767; *Hollaway v Scripps Mem. Hosp.* (1980) 111 CA3d 719, 723, 168 CR 782; *United Prof. Planning v Superior Court* (1970) 9 CA3d 377, 383, 88 CR 551) or render the appeal "futile" (*Elsea v Saberi* (1992) 4 CA4th 625, 5 CR2d 742). See *Laidlaw Waste Sys., Inc. v Bay Cities Servs., Inc.* (1996) 43 CA4th 630, 641, 50 CR2d 824.

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§6.4 2. Exception to General Rule Because of Statute or Court Rule

The trial court retains jurisdiction to consider some matters under the specific authority of various statutes or rules of court. For example, it may order substitution of parties (Cal Rules of Ct 8.36(a)), consider a new cause of action under the same real property rental agreement that is the subject of an appeal (CCP §1176(b)), and consider matters related to fixing the amount of security for a stay of enforcement pending appeal (see, *e.g.,* CCP §§917.1-917.9).

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3. Illustrations of General Rule and Exceptions

§6.5 a. Matters Within Trial Court Jurisdiction

Case law supports trial court jurisdiction pending appeal to:

- Consider a motion for new trial (*Weisenburg v Molina* (1976) 58 CA3d 478, 486, 129 CR 813).
- Vacate a void judgment (*Betz v Pankow* (1993) 16 CA4th 931, 20 CR2d 841; *Lovret v Seyfarth* (1972) 22 CA3d 841, 854, 101 CR 143).
- Release exempt property from attachment (*Hallam Cooley Agency v Superior Court* (1938) 30 CA2d 20, 85 P2d 457).
- Permit intervention in a class action (*Mallick v Superior Court* (1979) 89 CA3d 434, 437, 152 CR 503).
- Expunge a lis pendens (*United Prof. Planning v Superior Court* (1970) 9 CA3d 377, 384, 88 CR 551).
- Disallow certain costs (*Hollaway v Scripps Mem. Hosp.* (1980) 111 CA3d 719, 723, 168 CR 782).
- Punish violation of an injunction by contempt (*Associated Lumber & Box Co. v Superior Court* (1947) 79 CA2d 577, 581, 180 P2d 389).
- Correct clerical errors in the record or judgment (*Boylan v Marine* (1951) 104 CA2d 321, 231 P2d 92), unless proof of additional facts is required (*Fewel v Fewel* (1943) 23 C2d 431, 144 P2d 592).
- Consider separate steps in probate proceedings (*Estate of Kennedy* (1948) 87 CA2d 795, 797, 197 P2d 844).
- Consider separate steps in dissolution proceedings (*Harrold v Harrold* (1954) 43 C2d 77, 85, 271 P2d 489; *Faught v Faught* (1973) 30 CA3d 875, 106 CR 751).
- Make all orders necessary to prepare the record on appeal (*Imperial Beverage Co. v Superior Court* (1944) 24 C2d 627, 150 P2d 881).
- Tax costs (*Hennessey v Superior Court* (1924) 194 C 368, 371, 228 P 862).
- Modify spousal support (*Marriage of Horowitz* (1984) 159 CA3d 377, 205 CR 880).
- Award, as part of the judgment, prospective damages that would accrue during the appeal period and become payable if the judgment is affirmed on appeal (*Warsaw v Chicago Metallic Ceilings* (1984) 35 C3d 564, 573, 199 CR 773).
- Hear and determine a motion for judgment notwithstanding the verdict (*Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204, 238 CR 130 (but see *Weisenburg v Molina* (1976) 58 CA3d 478, 129 CR 813, which reached a contrary conclusion)).
- Award attorney fees on appeal in a paternity action (*Sherry H. v Thomas B.* (1988) 203 CA3d 1500, 250 CR 830).
- Award attorney fees when claimed as costs (see *Bankes v Lucas* (1992) 9 CA4th 365, 11 CR2d 723).
- Set aside a void order (*Andrisani v Saugus Colony Ltd.* (1992) 8 CA4th 517, 10 CR2d 444). (Note: If the trial court sets aside the order as void, any pending appeal from that order is rendered moot.)
- Order an accounting of business profits (*Palmco Corp. v Superior Court* (1993) 16 CA4th 221, 19 CR2d 682).
- Renew a judgment or vacate an erroneous renewal (*Jonathan Neil & Assocs., Inc. v Jones* (2006) 138 CA4th 1481, 1489, 42 CR3d 350).
- Issue a preliminary injunction (*Novartis Vaccines & Diagnostics, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 CA4th 1284, 1302, 50 CR3d 27).

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§6.6 b. Matters Outside Trial Court Jurisdiction

Code of Civil Procedure §916 has been held to divest the trial court of jurisdiction to:

- Continue trial court proceedings on the merits after appeal from denial of a special motion to strike under CCP §425.16 (anti-SLAPP statute) (*Varian Med. Sys. v Delfino* (2005) 35 C4th 180, 191, 25 CR3d 298).
- Modify a judgment or enter a supplemental judgment (*California State Auto. Ass'n Inter-Ins. Bureau v Jackson* (1973) 9 C3d 859, 862 n3, 109 CR 297).
- Correct the judgment other than for clerical errors (*O'Hare v Peacock Dairies* (1940) 39 CA2d 506, 103 P2d 594).
- Dismiss a preliminary injunction (*Environmental Coalition of Orange County, Inc. v Avco Community Developers, Inc.* (1974) 40 CA3d 513, 115 CR 59).
- Permit an amended complaint or a cross-complaint to be filed (*Olson v Superior Court* (1969) 274 CA2d 311, 79 CR 136; *Karp v Dunn* (1964) 229 CA2d 192, 40 CR 96).
- Hear and determine a motion for judgment notwithstanding the verdict (*Weisenburg v Molina* (1976) 58 CA3d 478, 129 CR 813; but see *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204, 238 CR 130, which held to the contrary).
- Set aside a foreclosure sale (*Nelson v Orosco* (1981) 117 CA3d 73, 80, 172 CR 457).
- Relieve a guardian ad litem or counsel for a minor plaintiff (*Hollaway v Scripps Mem. Hosp.* (1980) 111 CA3d 719, 168 CR 782).
- Vacate a judgment for extrinsic fraud (*Hurst v Hazel Hurst Found. for the Blind* (1955) 134 CA2d 686, 286 P2d 53).
- Approve a petition for compromise of a minor's claim (*Anderson v Latimer* (1985) 166 CA3d 667, 212 CR 544).
- Vacate an arbitration award on the ground of arbitral prejudice (*Betz v Pankow* (1993) 16 CA4th 931, 20 CR2d 841).
- Hear a case pending the appeal of an order denying arbitration, even though the case is scheduled on the trial court's "fast track" (*Prudential-Bache Sec. v Superior Court* (1988) 201 CA3d 924, 247 CR 477).

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§6.7 4. Effect of Stay on Postjudgment Orders

A stay of enforcement of a postjudgment order will not stay enforcement of the original judgment. *Crowley v Superior Court* (1936) 17 CA2d 52, 61 P2d 372. Likewise, a stay of the original judgment will not necessarily stay postjudgment orders. Each postjudgment order must be individually analyzed for appealability. See chap 3.

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§6.8 5. Effect of Stay on Partial Appeals

If only a portion of a judgment is appealed, the part not appealed will not be stayed except by writ of supersedeas. *Macario v Macario* (1929) 208 C 601, 283 P 291; *Carit v Williams* (1885) 67 C 580, 8 P 93.

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§6.9 6. Effect of Stay When Obtained by Fewer Than All Parties

A stay of enforcement of the judgment obtained by one party will not stay enforcement proceedings against any other party. *Cullinan v Mercantile Trust Co.* (1924) 193 C 562, 226 P 4.

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§6.10 D. Evaluating Need for Stay

A stay pending appeal is not always necessary or desirable. Appellant must evaluate the need for a stay by comparing the costs and benefits of compliance with the effort and expense of obtaining the stay. Generally, economic considerations will be the determinative factor. See §§6.11-6.12. For some types of rulings, however, the risk of loss may outweigh financial considerations. See, *e.g.,* the discussion in §6.13 on the need for a stay of child custody orders.

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1. Economic Considerations

§6.11 a. Cost of Complying With Judgment or Order

No need for stay if appellant complies. A stay pending appeal is unnecessary when appellant complies with the judgment or order. This approach has certain advantages, but it can also be risky. The considerations for each type of judgment or order are different.

Advantages of paying money judgment. The advantages of paying a money judgment pending an appeal are twofold:

- The interest on the judgment, currently 10 percent per year on the unsatisfied amount of the judgment (CCP §685.010), stops accruing. Because appeals often require 2 years or more to conclude, the amount of interest can be substantial.
- Appellant saves the amount that would be paid or lost by posting security (*e.g.,* the premium on an appeal bond). See §6.24. Note, however, that if appellant posts a bond and wins the appeal, the bond premium will be a taxable cost on appeal. CCP §995.250; Cal Rules of Ct 8.278(d)(1)(F).

Disadvantages of paying money judgment. There are, however, usually more disadvantages to paying a money judgment. The greatest disadvantage is the risk of losing the money paid if appellant prevails on appeal. An appellant should never pay the judgment pending appeal unless it is reasonably certain that the money can be recovered if the judgment is reversed. Even though CCP §908 contemplates restitution of all property and rights lost by an erroneous judgment or order, collection may prove extremely difficult. If recoverability is in significant doubt, it may be better to post an appeal bond or deposit the money as security. See §6.21.

Another disadvantage of paying the judgment is that appellant loses the use of the money pending the appeal. This factor can be particularly important when appellant is a business or when investment opportunities might earn more than the interest accruing on the judgment.

Advantages and disadvantages when judgment or order requires delivery of real or personal property. When the judgment or order requires delivery of real or personal property, appellant can be required to pay any damages for waste that accrue during the appeal and for respondent's loss of use of the property. CCP §§917.2, 917.4. Compliance with the ruling can prevent the accrual of these damages, but it can also cause appellant to suffer similar damages if the judgment or order is reversed on appeal and the property returned to appellant. Although a successful appellant may obtain restitution and other relief for loss incurred as a result of an erroneous judgment or order (CCP §908), if there is any risk that respondent will damage or destroy the property, or if appellant's loss of use would be significant, appellant would benefit from a stay.

Preventing waiver of right to appeal. When complying with a judgment or an order pending appeal, the payment or other act of compliance should be accompanied by a statement disclaiming any intent to waive the right to appeal. You must make it clear that you are complying only under threat of execution and not voluntarily. A party who voluntarily complies with the judgment or order impliedly waives the right to appeal if the compliance is a compromise or is coupled with an agreement not to appeal. *Lee v Brown* (1976) 18 C3d 110, 115, 132 CR 649. However, no waiver can be implied if compliance is compelled or coerced by, for example, threat of forfeiture or seizure of property under execution. 18 C3d at 116; *Coldwell Banker & Co. v Department of Ins.* (1980) 102 CA3d 381, 401, 162 CR 487. See §4.19 for further discussion of the effect of complying with a judgment.

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§6.12 b. Obtaining a Stay

Principal costs. The primary cost of obtaining a stay is the cost of providing security, if required. If the stay is discretionary with the court, the attorney fees for obtaining the stay are an additional expense. A final consideration in computing the cost of a stay is the likelihood of accruing additional damages while the appeal is pending. See discussion in §6.11.

Form of security can determine cost. The cost of furnishing security to perfect a stay depends on the form of the security. The Bond and Undertaking Law (CCP §§995.010-996.560) presents alternative methods for providing security, any of which will satisfy the security requirement. These methods include providing an undertaking or a bond by two or more sufficient personal sureties (CCP §995.310; see §6.23) or one sufficient admitted surety insurer (CCP §995.310; see §6.24), or by depositing money or negotiable securities (CCP §995.710; see §6.25).

Stay obtained by waiver of security or stipulation. The cost of furnishing security can be eliminated if respondent waives security. See CCP §995.230. This approach has an advantage for respondent in that a respondent who loses an appeal is liable for the premium on the bond or undertaking as an item of cost. CCP §995.250. Thus, respondents will sometimes waive security if appellant is a wealthy individual or a solvent company with a clear ability to pay the judgment plus other items recoverable under the relevant statute. See §6.43 for a form of waiver.

In general, a stay obtained by stipulation (through a waiver of security or otherwise) can benefit both parties by reducing both the cost of obtaining a stay and the risk of increased costs on appeal. Appellant should try to obtain a stipulated stay whenever that option seems appropriate.

Court's discretion to eliminate security requirement. The trial court has discretion to eliminate the requirement for an undertaking when appellant is indigent (CCP §995.240; *Progressive Concrete, Inc. v Parker* (2006) 136 CA4th 540, 552, 38 CR3d 939) or when appellant is a personal representative (CCP §919). In either event, there is no cost. (Although the Bond and Undertaking Law (CCP §§995.010-996.560) does not define "indigent," it has been defined with some precision elsewhere; see, *e.g.,* Bus & P C §6213(d).)

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§6.13 2. Noneconomic Considerations

Economic considerations must be weighed against noneconomic factors. Each judgment or order must be evaluated for noneconomic factors that affect the decision to obtain a stay. For example, the economic aspects of an order removing an individual from public office may be insignificant compared with the individual's change in status.

Noneconomic considerations of child custody order. A common example of a situation in which noneconomic factors are more important is a child custody order. When evaluating the need for a stay, counsel must consider the psychological factors, including damage to child or client, and the possibility that failure to obtain a stay will make it more difficult to obtain custody after further proceedings. See §6.64 for further discussion of stays in child custody proceedings. See also *Marriage of Russo* (1971) 21 CA3d 72, 93, 98 CR 501, for discussion of the court's position on reversal of a child custody order.

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§6.14 3. Adverse Consequences of a Stay

A respondent may use the fact that appellant obtained a stay to bolster an argument that the appeal is frivolous and was taken solely for delay. See *Hersch v Citizens Sav. & Loan Ass'n* (1983) 146 CA3d 1002, 194 CR 628. See §§20.20-20.26.

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§6.15 4. Preserving Attachment or Lien

Additional security required for attachment or lien. When appellant is a plaintiff who has an attachment or a lien, additional security must be filed to continue the attachment pending appeal. CCP §§489.410, 921.

Obtaining attachment in trial court. To obtain an attachment in the trial court, plaintiff must provide security to cover any amount defendant may recover for wrongful attachment. CCP §489.210. The amount of this security is fixed by statute at $7500 unless defendant objects and the court determines that the probable recovery by defendant would exceed that amount. CCP §489.220.

Additional security to continue attachment when defendant wins at trial. If defendant wins at trial, the attachment is discharged and defendant's property released unless plaintiff/appellant furnishes additional security to continue the attachment. CCP §§489.410, 921. The amount of the security required depends on the procedure followed to establish the amount.

When defendant moves to increase security. Before the appeal is perfected, defendant may move the trial court for an increase in the security. The trial court may then order that the security be increased to the amount "justified by the detriment reasonably to be anticipated by continuing the attachment." CCP §489.410(a). If the court makes an order for security under this procedure, the amount of security set by the court will satisfy the requirements of CCP §921 for preserving an attachment pending appeal. CCP §921.

When defendant does not move to increase security. If no motion is made under CCP §489.410, plaintiff/appellant must provide increased security in the amount of double the debt claimed in the trial court proceeding to preserve the attachment while posttrial motions are made, and pending appeal. CCP §§489.410(c), 921. If respondent is dissatisfied with that amount or with the amount set by the court in any order under CCP §489.410, a new motion may be brought within 60 days after an appeal is perfected to increase the amount of security to an amount "justified by the detriment reasonably to be anticipated by continuing the attachment." CCP §921.

Requirement that appellant file security. Appellant must file the security with the trial court within 10 days after an order setting the amount of security required under CCP §489.410 or §921. Otherwise, the attachment is discharged and the property released. CCP §§489.410(a), 921. Moreover, the appeal must be perfected within 5 days after written notice of entry of the order appealed. CCP §921.

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E. Obtaining Immediate Temporary Stay

§6.16 1. Procedure

Consider obtaining immediate, temporary stay in trial court. A party aggrieved by an appealable order or judgment should normally obtain an immediate temporary stay, in the trial court, to prevent enforcement of the adverse ruling pending any posttrial motions and an analysis of whether to appeal. If this stay cannot be obtained by stipulation, the trial court can order a temporary stay under CCP §918(a) without an undertaking or other security. Absent consent of the adverse party, the stay may extend no longer than 10 days beyond the last day on which a notice of appeal could be filed if an undertaking would be required to stay the judgment or order on appeal. CCP §918(b). The trial court may expressly order that the stay extinguishes and prevents the creation of judgment liens. CCP §697.040(b).

Oral motion to obtain immediate, temporary stay. If the judgment or order is announced in open court, the aggrieved party should routinely make an oral motion for an immediate stay, citing the authority of CCP §918 and stating as grounds for the motion the likelihood of posttrial motions and the need for time to consider an appeal. The stay should run from entry of the judgment or order and extend until 10 days past the last day on which a notice of appeal could be filed. See chap 7 on notice of appeal.

Trial court's issuance of immediate, temporary stay. Issuance of the stay is discretionary. CCP §918. If granted on oral motion, counsel should prepare a written order and send it to the judge's clerk (with copies to all counsel) for signature and filing. For a sample order, see §6.17.

Stipulation or ex parte application for immediate, temporary stay. If the stay is not requested in open court, seek a stipulated stay from the prevailing party. If that fails, submit an ex parte application or if necessary a noticed motion on shortened time. The application or motion should cite CCP §918 and state the reason the stay is requested. It should be combined with or accompanied by a declaration briefly stating the terms of the judgment, the date of entry, the date of notice of entry of judgment, and any facts supporting issuance of the stay order. For a form for such an application and accompanying order, see §6.17.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.17 2. Form: Ex Parte Application for Temporary Stay of Enforcement; Order

§6.17 2. Form: Ex Parte Application for Temporary Stay of Enforcement; Order

▶ To download **Word** version, right click and choose *Save Target As*

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6.17-1 Ex parte application for temporary stay of enforcement; order

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**EX PARTE APPLICATION FOR TEMPORARY STAY OF ENFORCEMENT (CCP §918)**
_ _[*Name(s)*]_ _, **Defendant(s)**	

_ _[*Name*]_ _ **declares:**

1. I am the attorney for _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, **in this action.**

2. On _ _[*date*]_ _, **a** _ _[*briefly describe judgment or order, e.g., judgment in the amount of $5000*]_ _ **was entered against** _ _[*plaintiff/defendant*]_ _.

3. _ _[*Name*]_ _, _ _[*plaintiff/defendant*]_ _, **requests that the court, under Code of Civil Procedure section 918, stay enforcement of the** _ _[*judgment/order*]_ _ **to allow** _ _[*plaintiff/defendant*]_ _ **time to consider filing posttrial motions and a notice of appeal from the** _ _[*judgment/order*]_ _ **and to evaluate the proceedings and consult with** _ _[*his/her*]_ _ **attorney.**

[*Add if appropriate*]

4. _ _[*Name*]_ _, _ _[*plaintiff/defendant*]_ _, **will not suffer any undue hardship if enforcement of the** _ _[*judgment/order*]_ _ **is temporarily stayed, because** _ _[*briefly describe facts showing lack of undue hardship*]_ _.

[*Add if appropriate*]

[5]. If _ _[*name*]_ _, _ _[*plaintiff/defendant*]_ _, **files a notice of appeal from the** _ _[*judgment/order*]_ _, _ _[*plaintiff/defendant*]_ _ **may under** _ _[*specify statute*]_ _ **stay enforcement and further proceedings on the** _ _[*judgment/order*]_ _, **pending appeal.**

[*Add if notice of application has been given*]

[6]. I have notified _ _[*name*]_ _, **the attorney for** _ _[*name*]_ _, **and** _ _[*name*]_ _, **the attorney for** _ _[*name*]_ _, **by** _ _[*state method*]_ _, **that this application would be made on** _ _[*date*]_ _.

[*Continue*]

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, **at** _ _[*address*]_ _, **California.**

__[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*party*]_ _

ORDER

Good cause appearing,

IT IS ORDERED that _ _[*insert terms of order*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (filed with court clerk with proof of service); copy for each attorney of record and unrepresented party; office copies.

Comment: It may be helpful to state, when there are no exceptional facts or harm to other parties, that a stay will not cause undue hardship. See discussion of discretionary stays in §§6.64-6.67. An allegation that the party seeking the temporary stay will be able to obtain a statutory stay if an appeal is filed may strengthen the case for a temporary stay. A statement of supporting memorandum, including, for example, a citation to the code section and a case citation, might be attached.

This form is to be used only when ex parte relief is allowed. A noticed motion may be required.

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II. DETERMINING APPROPRIATE PROCEDURE FOR STAYING PARTICULAR JUDGMENTS AND ORDERS

§6.18 A. Statutory Basis for Procedure

The starting point for determining the appropriate procedure for obtaining a stay in a particular case is CCP §§916-917.9, which establish the methods for obtaining a stay in the trial court. These sections contain three different procedures. Which procedure to use will depend on the nature of the judgment or order that appellant wishes to stay. The three procedures are:

- **Automatic stay.** The filing of a valid notice of appeal automatically stays enforcement of some judgments or orders (see §6.19).
- **Filing of security.** Appellant may stay other judgments or orders by filing security with the trial court in the form of an undertaking, a bond, or other deposit (see §6.21).
- **Trial court order.** Other judgments and orders can be stayed by order of the trial court after notice and hearing (see §§6.64-6.67).

The chart in §6.20 lists the procedures required to stay particular judgments.

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§6.19 B. Judgments and Orders Stayed by Notice of Appeal Alone

Actions automatically stayed. Generally, enforcement of superior court judgments or orders is automatically stayed by perfection of the appeal unless the judgment or order is one specified in CCP §§917.1-917.9. CCP §916(a). Despite the broad phrasing of CCP §916, the automatic stay rule affects relatively few judgments because most come within the "exceptions" listed in CCP §§917.1-917.9 and require appellant to satisfy some additional condition in order to effect a stay.

Examples. Examples of judgments and orders that are automatically stayed pending appeal include:

- Mandatory injunctions. *Byington v Superior Court* (1939) 14 C2d 68, 92 P2d 896; *Agricultural Labor Relations Bd. v Superior Court* (1983) 149 CA3d 709, 713, 196 CR 920. Note that a prohibitory injunction is not automatically stayed by appeal. *Paramount Pictures Corp. v Davis* (1964) 228 CA2d 827, 835, 39 CR 791.
- Judgments that are solely for certain types of costs. CCP §917.1(d); *Bank of San Pedro v Superior Court* (1992) 3 C4th 797, 801, 12 CR2d 696; *Ziello v Superior Court* (1999) 75 CA4th 651, 89 CR2d 398; *Estate of Neilsen* (1960) 181 CA2d 769, 772, 5 CR 542. Compare *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 467, 100 CR2d 884 (appeal bond required to stay enforcement of judgment for expert witness fees under CCP §998 but not for costs under CCP §1032), with *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1431, 103 CR2d 174 (appeal bond required to stay enforcement of judgment for reasonable attorney fees and costs awarded to prevailing party defending against strategic lawsuit against public participation (SLAPP) lawsuit under CCP §425.16(c)).
- Decrees of distribution. *Estate of Dabney* (1951) 37 C2d 402, 407, 232 P2d 481.
- Orders appointing personal representatives. *Estate of Hultin* (1947) 29 C2d 825, 833, 178 P2d 756 (executor); *Rungie v Superior Court* (1942) 55 CA2d 115, 130 P2d 140 (guardian of minor).
- Writs of mandamus. *Johnston v Jones* (1925) 74 CA 272, 239 P 862. But see CCP §1110a, which provides writs of mandate for delivery of irrigation water not stayed by perfection of appeal, and CCP §1110b, which provides that the trial or appellate court can remove the stay because of irreparable damage. *Social Servs. Union v County of San Diego* (1984) 158 CA3d 1126, 1131, 205 CR 325.
- Judgments requiring assignment or delivery of personal property not in appellant's possession. *Keeling Collection Agency v McKeever* (1930) 209 C 625, 627, 289 P 617.
- Judgments against public entities and public officers. CCP §995.220. See *Whittier Redev. Agency v Oceanic Arts* (1995) 33 CA4th 1052, 1059, 39 CR2d 396.
- Mandatory but not prohibitory portions of a superior court judgment enforcing an order of the Agricultural Labor Relations Board. *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 238 CR 780. (If affirmative relief is necessary to preserve the status quo pending appeal, the appellate court can use its supersedeas power under CCP §923 to order a stay. 43 C3d at 709.)
- Certain guardianship and conservatorship orders. Prob C §1310(a).
- Orders allowing removal of minor child from state (automatically stayed for 7 days after order of juvenile court in a dependency proceeding or 30 days for any other trial court). CCP §917.7.

Discretion to require security. The superior court has the discretion under CCP §917.9 to require security to effect a stay when it would otherwise be automatic under CCP §916. See §6.36.

Automatic stay rule inapplicable to certain actions and proceedings not specifically excepted in CCP §916. The automatic stay provisions of §916 have been held inapplicable to three types of judgments and orders not specifically excepted in the statute:

- Special proceedings. Code of Civil Procedure §916 applies only to *actions,* not special proceedings. *Veyna v Orange County Nursery, Inc.* (2009) 170 CA4th 146, 154, 87 CR3d 658; *Agricultural Labor Relations Bd. v Superior Court* (1983) 149 CA3d 709, 196 CR 920. On the distinction between "action" and "special proceeding," see CCP §§22-23.

- Unlawful detainer actions. Code of Civil Procedure §916 does not automatically stay unlawful detainer actions, but the court issuing the judgment has the power to order a stay. CCP §1176(a). See *Selma Auto Mall II v Appellate Dep't of Superior Court* (1996) 44 CA4th 1672, 52 CR2d 599; *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138. See §6.65.
- "Self-executing" judgments. These judgments can be stayed only by appellate court order. See §6.68.

A chart listing judgments and orders that are not automatically stayed on appeal can be found in §6.20.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.20 C. Chart: Judgments and Orders Not Automatically Stayed by Notice of Appeal

§6.20 C. Chart: Judgments and Orders Not Automatically Stayed by Notice of Appeal

Procedure Required to Stay Judgments and Orders Not Automatically Stayed by Appeal

Type of Judgment or Order	Definition	Condition for Obtaining Stay of Security	Method for Computing Amount	Procedure for Perfecting Stay	Procedure for Objecting
1. Payment of money. CCP §917.1.	See §6.28.	Post security.	Set by statute. See §6.29.	File security in statutory amount. See §§6.44-6.50.	File objections within 10 days; set for hearing. See §6.54.
2. Assignment, sale, or delivery of personal property. CCP §917.2.	See §6.30.	Post security.	Fixed by court. See §6.31.	Set motion to fix amount. See §6.39. File security. See §§6.44-6.50.	Object to amount of security in hearing on motion to fix. See §6.39. Object to sureties by filing objection within 10 days. See §6.54.
3. Execution of instrument. CCP §917.3.	See §6.63.	File executed document with court. See §6.63.	N/A	Deposit executed document. See §6.63.	None specified.
4. Sale, conveyance, or delivery of real property. CCP §917.4.	See §6.32.	Post security.	Fixed by court. See §6.33.	Set motion to fix amount. See §6.39. File security. See §§6.44-6.50.	Object to amount of security in hearing on motion to fix. See §6.39. Object to sureties by filing objection within 10 days. See §6.54.
5. Appointment of receiver. CCP §917.5.	See §6.34.	Post security.	Fixed by court. See §6.34.	Set motion to fix amount. See §6.39. File security. See §§6.44-6.50.	Object to amount of security in hearing on motion to fix. See §6.39. Object to sureties by filing objection within 10 days. See §6.54.

6. Attachment orders.					
a. Appealable order to attach. CCP §917.65.	See §6.35.	Post security.	Fixed by court in right-to-attach order. See §6.15.	File security in amount set by court in right to attach order. See §6.15.	File objections within 10 days. See §6.54.
b. Stay to continue attachment after judgment. CCP §921.	See §6.15.	Post security.	Set by statute (CCP §921) unless court orders otherwise under CCP §489.410. See §6.15.	File security in statutory amount unless respondent sets hearing under CCP §489.420. See §6.15.	File motion under CCP §489.410 before appeal perfected. See §6.15. File motion under CCP §921 to increase security after appeal perfected. See §6.15. Object to sureties by filing objection. See §6.54.
7. Child custody; exclusion from dwelling. CCP §917.7.	See §6.64.	Stayed only by order of trial or appellate court. CCP §917.7. See §6.64.	Not required; may be ordered by court. CCP §917.9.	Motion for stay. See §§6.66-6.67.	Object to motion for stay. See §§6.64, 6.66.
8. Public office wrongly held. CCP §917.8.	See §6.65.	Stayed only by order of trial court. CCP §917.8. See §6.65.	Not required; may be ordered by court. CCP §917.9.	Motion for stay. See §§6.66-6.67.	Object to motion for stay. See §§6.65-6.66.
9. Inspection of corporate records. CCP §917.8.	See §6.65.	Stayed only by order of trial court. CCP §917.8. See §6.65.	Not required; may be ordered by court. CCP §917.9.	Motion for stay. See §§6.66-6.67.	Object to motion for stay. See §§6.65-6.66.
10. Closure or discontinuance of building as public nuisance. CCP §917.8.	See §6.65.	Stayed only by order of trial court. CCP §917.8. See §6.65.	Not required; may be ordered by court. CCP §917.9.	Motion for stay. See §§6.66-6.67.	Object to motion for stay. See §§6.65-6.66.
11. Remedy threatened release of hazardous substances. CCP §917.15.	See §6.73.	Stayed only by order of appellate court.	Not required; may be ordered by court. CCP §923.	Petition for writ of supersedeas in court of appeal. See §§6.77-6.82.	Oppose petition for writ of supersedeas. See §6.83.

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III. STAY OF ENFORCEMENT BY FURNISHING SECURITY

§6.21 A. Forms of Security

Security often required as condition of stay. Enforcement of many judgments and orders can be stayed only if appellant posts security. The purpose of the security is to ensure that the judgment or order will be enforceable and that the damages and costs accruing during the appeal period will eventually be paid. See *Lewin v Anselmo* (1997) 56 CA4th 694, 700, 65 CR2d 682; *Grant v Superior Court* (1990) 225 CA3d 929, 934, 275 CR 564. Whether security will be required to stay a particular ruling depends first on the nature of the ruling entered in the case. See chart in §6.20. Moreover, the trial court has discretion to order that security be posted to stay judgments and orders not specifically subject to a statutory condition. CCP §917.9. See §6.36.

Undertakings, bonds, and deposits. When security is required to perfect a stay, the security may be in the form of an undertaking, a bond, or a deposit of money or certain negotiable securities in lieu of a bond. An "undertaking" means a surety, indemnity, fiduciary, or similar undertaking executed by sureties alone. CCP §995.190. A "surety" is one who promises to answer for the debt of another. CC §2787. A "bond" includes both an undertaking and a surety executed by both the principal and sureties. CCP §995.140. A "deposit" means that appellant has deposited cash or certain types of negotiable securities with the court. CCP §995.710. The term "security" is used here to denote all three devices.

NOTE: Restrictions making the use of a deposit unavailable after January 1, 1999, have been removed. See CCP §995.710(e).

Forms of security generally interchangeable. Any form of security undertaking, bond, or deposit (see Note above) may be used to satisfy the requirements for security for any judgment or order unless that form is inconsistent with the governing statute. Thus, when the statute specifies an undertaking, a bond may be given instead, and when it specifies a bond, an undertaking may be used. CCP §§995.210, 995.710.

Amount of security depends on specific judgment or order. When security is required to perfect a stay, both the formula for fixing the amount and the actual amount required will vary, depending on the nature and specific provisions of the judgment or order to be stayed. See §§6.27-6.35. The amount of security required to stay money judgments is fixed by statute. See §6.29. The amount needed for other types of judgments must be fixed by order of the trial court. See §§6.30-6.35. Once the amount is fixed, the procedures for obtaining the stay, objecting to the security, and enforcing the stay are the same for all judgments and orders requiring security.

Time limit on furnishing security. There is no time limit for seeking a stay of enforcement of a judgment or order. Security may be given at any time before execution. *Bradley Co. v Mulcrevy* (1913) 166 C 325, 136 P 60; *Hill v Finnigan* (1880) 54 C 493, 494. See §6.52.

Waiver of security. Indigents and personal representatives may, in the superior court's discretion, obtain a waiver of the requirement for posting security. CCP §§919, 995.240. See *Progressive Concrete, Inc. v Parker* (2006) 136 CA4th 540, 552, 38 CR3d 939. The waiver must be obtained by noticed motion, supported by declaration establishing the facts that justify the waiver. If this type of relief is available, it must be requested from the trial court before seeking relief from an appellate court. *Nuckolls v Bank of Cal.* (1936) 7 C2d 574, 577, 61 P2d 927.

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B. Types of and Qualifications for Security

§6.22 1. Undertaking or Bond by Surety

An undertaking or a bond is a surety's written obligation, under oath, to pay appellant's obligation. CCP §995.320. The two types of sureties are "personal sureties" and "admitted surety insurers." CCP §§995.185, 995.310. An admitted surety insurer is an insurance company that has been issued a certificate under Ins C §105. CCP §995.120. See §6.24. All other sureties are personal.

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§6.23 a. Personal Sureties

Who may qualify as surety. Generally, personal sureties are friends or relatives willing to incur the contingent obligation to pay if appellant loses the appeal and fails to pay the judgment. Two or more personal sureties are required to achieve a stay. CCP §995.310. Each personal surety must be:

- A resident of, and either an owner of real property or a householder in, California; and
- Worth the amount of the undertaking in real or personal property, or both, located in California, in excess of all debts and liabilities, exclusive of property exempt from enforcement of a money judgment, or, if the amount of the undertaking exceeds $10,000 and is executed by more than two personal sureties, collectively worth twice the amount of the undertaking. CCP §995.510.

Who may not qualify as personal surety. The appellant, members of the state bar, and officers of the court may not be personal sureties. CCP §995.510(a).

No need to encumber assets. Nothing in the statutory scheme requires that a personal surety encumber assets in order to provide security. See *Buzgheia v Leasco Sierra Grove* (1994) 30 CA4th 766, 772, 36 CR2d 144 ("declarations of the personal sureties merely list assets to demonstrate their net worth"). However, sureties may not be released from liability without a court order. *Lewin v Anselmo* (1997) 56 CA4th 694, 698, 65 CR2d 682.

Assets of individuals may be aggregated. The governing statutes specifically provide for the aggregation of assets by individuals who may be worth less than the amount of the necessary bond in order to provide security for large judgments. See CCP §995.510(b).

Personal surety should consider using an undertaking. When personal sureties are used, the security should be in the form of an undertaking rather than a bond, to avoid the need for the principal's signature. If the word "bond" is used with personal sureties, the principal must sign or the security may be defective. CCP §995.140. A bond by an admitted surety insurer, however, need not be signed by the principal. *Associates Capital Servs. Corp. v Security Pac. Nat'l Bank* (1979) 91 CA3d 819, 154 CR 392.

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§6.24 b. Admitted Surety Insurer

Definition. An admitted surety insurer is "a corporate insurer or a reciprocal or interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in this state, as defined in Section 105 of the Insurance Code." CCP §995.120(a).

A single admitted surety insurer may give an undertaking to stay enforcement of a judgment. CCP §995.610. Two or more such insurers may provide separate undertakings to stay enforcement of a judgment or may join in the same undertaking. CCP §995.620.

Conditions to admitted surety insurer's undertaking. To provide an undertaking, an admitted surety insurer must (CCP §995.630):

- Either have on file, in the office of the county clerk where the action was heard, certified documentation that the person signing the undertaking is authorized to do so *or* attach a copy of a power of attorney to the bond; and
- Execute the undertaking in the name of the insurer under penalty of perjury or by notarized signature.

An admitted surety insurer must also comply with Ins C §12090 (limiting the amount of liability on an undertaking in relation to an insurer's capital and surplus).

Cost of admitted surety insurer's undertaking. If appellant's obligation is secured by an admitted surety insurer, the cost can be significant. An admitted surety insurer typically charges 2 percent of the undertaking amount per year, with a reduced percentage as the amount of the undertaking increases. Unless appellant is a very large company, most insurers also require appellant to provide collateral, such as a letter of credit or certificate of deposit, before they will supply such an undertaking. If appellant provides the insurer with collateral, the premium rate on the undertaking is slightly less and the interest on dividends on the security is paid to appellant.

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§6.25 2. Deposit in Lieu of Undertaking

Deposit of money or negotiable securities. An appellant can stay enforcement of a judgment or an order by depositing money or certain types of negotiable securities with the court clerk instead of posting an undertaking. CCP §§995.710(a), (e), 995.730. See *Cooper v Westbrook Torrey Hills, LP* (2000) 81 CA4th 1294, 97 CR2d 742. Securities that qualified for deposit are listed in CCP §995.710. Subject to the specific limitations in that statute, they included federal and state bearer bonds and notes, certificates of deposit, savings accounts, investment certificates and share accounts issued by savings and loan associations, and certificates for funds and share accounts issued by credit unions.

Requirements of deposit. Unless the deposit is in a form negotiable by any bearer, it was to be made payable to or assigned to the officer of the court accepting the deposit, normally the clerk of the court. Every deposit must be accompanied by an agreement executed by the principal (1) authorizing the clerk to collect, sell, or otherwise apply the deposit to enforce appellant's liability, and (2) giving the address at which the principal may be served with notices, papers, and other documents. CCP §995.710(c). For procedure, see §§6.48-6.49.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.26 3. Form: Authorization (Agreement) to Apply Certificates of Deposit to Enforce Judgment (CCP §995.710(c))

§6.26 3. Form: Authorization (Agreement) to Apply Certificates of Deposit to Enforce Judgment (CCP §995.710(c))

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6.26-1 Authorization (agreement) to apply certificates of deposit to enforce judgment

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

AUTHORIZATION TO APPLY CERTIFICATES OF DEPOSIT TO ENFORCE JUDGMENT (CCP §995.710(c))

Under Code of Civil Procedure §995.710(a)(3), _ _[*name*]_ _ **defendant and appellant In an action titled** _ _[*name of case*]_ _ **(Superior Court Case No.** _ _[*case number*]_ _**), is depositing certificate of deposit number** _ _[*certificate of deposit number*]_ _**, issued by** _ _[*name of bank*]_ _ **Bank, in the amount of** _ _[*dollar amount*]_ _**, and certificate of deposit number** _ _[*certificate of deposit number*]_ _**, Issued by** _ _[*name of bank*]_ _ **Bank, in the amount of** _ _[*dollar amount*]_ _**. In lieu of a bond to stay enforcement of the judgment. The certificates of deposit have been purchased by** _ _[*name of purchaser of deposit*]_ _**. I am the** _ _[*appellant/purchaser of deposit*]_ _**.**

Under Code of Civil Procedure §995.710(c), I hereby authorize the clerk of the _ _[*name of county*]_ _ ***County*** **Superior Court to collect, sell, or otherwise apply these certificates of deposit to enforce the liability of** _ _[*name of principal*]_ _ **in accordance with Code of Civil Procedure §995.750.**

All notices, papers, and other documents under the Bond and Undertaking Law (Code of Civil Procedure §§995.020-996.560) may be served on _ _[*name of principal*]_ _ **at the following address:** _ _[*address at which principal may be served*]_ _**.**

Executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Name of appellant purchaser of deposit*]_ _

Comment: It is important to consult local procedures in the clerk's office or finance department of the county where the form is to be filed. Forms similar to the one above have been accepted in the Los Angeles Superior Court.

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C. Judgments and Orders Requiring Security

§6.27 1. Overview of Statutory Scheme

Under CCP §916, enforcement of a judgment or an order is automatically stayed by perfection of an appeal except for the judgments and orders specified in CCP §§917.1-917.9. See §6.20. Sections 917.1-917.9 list requirements for obtaining stays for particular judgments and orders. Requirements for these specified judgments and orders are discussed in §§6.28-6.35, 6.63. A judgment or order that falls within more than one of CCP §§917.1-917.5 must meet the requirements of each applicable section for enforcement to be stayed. CCP §917.6.

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2. Judgments and Orders for Payment of Money and Awards of Costs

§6.28 a. Judgments and Orders Included

When security is required. Security must be given to stay enforcement of a judgment or an order for payment of money, whether the money is payable by appellant or someone else, including judgments directing payment from a special fund. CCP §917.1(a). A party must also furnish an undertaking to stay enforcement pending appeal of costs awarded under CCP §998 or §1141.21 that would otherwise not have been awarded as costs under CCP §1033.5. CCP §917.1(a)(2)-(3). See *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 100 CR2d 884.

Security furnished on condition of payment. The security must be given on the condition that the amount of the judgment or order, interest accruing over the duration of the appeal, and costs awarded on appeal will be paid if the judgment is affirmed or the appeal withdrawn or dismissed. CCP §917.1(b). Judgments or orders for payment of money in the actual or constructive custody of the court are governed by CCP §917.2, not CCP §917.1. CCP §917.1(b).

Exceptions to rule. The rule requiring security to stay a money judgment does not apply to judgments:

- That are limited to costs awarded under CCP §§1021-1038. CCP §917.1(d); *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1427, 103 CR2d 174; *Ziello v Superior Court* (1999) 75 CA4th 651, 655, 89 CR2d 398 (but see *Bank of San Pedro v Superior Court* (1992) 3 C4th 797, 803, 12 CR2d 696 (appeal bond required for expert witness fees awarded under CCP §998(c) because such fees are nonroutine costs; see also *Gallardo v Specialty Restaurants Corp*. (2000) 84 CA4th 463, 100 CR2d 884 (undertaking required for some, but not other, costs));
- For which the payment of money is incidental or ancillary to other provisions in the judgment, *e.g.,* a money deficiency in a judgment for the sale of property (see *Freeman v Donohoe* (1922) 188 C 170, 204 P 593); or
- For which the payment of money is an alternative to delivery of property (*United States Fid. & Guar. Co. v More* (1909) 155 C 415, 101 P 302).

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§6.29 b. Amount of Security Required

Calculating amount. The security must be one and a half times the amount of the judgment or order if given by admitted surety insurers or by deposits, and must be double the amount of the judgment or order if given by personal sureties. CCP §§917.1(b), 995.710(b). For purposes of CCP §917.1(a)(1), (b), costs awarded under CCP §§1021-1038 must be included in the amount of a judgment or order when calculating the amount of the undertaking, unless the judgment is solely for such costs. CCP §917.1(d). However, for purposes of CCP §917.1(a)(2), (3) costs awarded under CCP §§1021-1038 are not included when calculating the amount of the undertaking, because of the express wording of CCP §917.1(d). *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 100 CR2d 884.

Attorney fees. Attorney fees awarded under CC §1717, which are considered an element of costs, should be included in the money judgment when calculating the amount of the undertaking. *Chamberlin v Dale's R.V. Rentals* (1986) 188 CA3d 356, 232 CR 785. The enactment of CCP §917.1(d) is consistent with the result in *Chamberlin*.

Installment and periodic payments. When a money judgment or an order requires installment or periodic payments, the amount of the security is one and one-half times the present value of the judgment. *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 211, 85 CR3d 203. However, in appeals from spousal support orders, the amount of the security is usually based on any lump-sum portion of the judgment plus the installments or periodic payments that will come due during the probable duration of the appeal. *Sharon v Sharon* (1885) 67 C 185, 220, 7 P 456; see *Marriage of Horowitz* (1984) 159 CA3d 377, 382, 205 CR 880; *Smith v Smith* (1928) 91 CA 743, 744, 267 P 709; *Hogan v Locke Paddon* (1928) 91 CA 606, 612, 267 P 392; *Schallman v Haas* (1917) 33 CA 28, 30, 164 P 336. The logic behind this procedure is that there is no need to stay enforcement of anything that cannot be enforced in the first place, *i.e.,* installments or periodic payments that will not come due while the case is on appeal.

An undertaking for installment or periodic payments issued by an admitted surety insurer may state that it is for an amount per month (one and a half times the monthly installment). Note, however, that the total amount should be estimated, if personal sureties are used, to meet the requirement of CCP §995.510 that the personal sureties be worth the amount of the undertaking.

When amount of undertaking will be inadequate. If there is a substantial possibility that the undertaking will prove insufficient by the time the appeal is completed, a respondent on appeal may request that the trial court increase the amount of the undertaking. *Grant v Superior Court* (1990) 225 CA3d 929, 275 CR 564 (accumulation of interest during lengthy appeal rendered original undertaking inadequate). For further discussion, see §6.62.

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3. Judgments and Orders Directing the Assignment, Delivery, or Sale of Personal Property

§6.30 a. Judgments and Orders Included

When security is required. Under CCP §917.2, security is required to stay enforcement of judgments and orders to:

- Assign or deliver personal property, including documents, whether the order is directed to appellant or another party to the action; or
- Sell personal property on foreclosure of a mortgage or lien.

Purpose of security. The security ensures that the party obligated by the judgment or order will assign or deliver the property, undamaged, and pay the value of the use of the property during the appeal period if the ruling is later affirmed or the appeal abandoned or dismissed. CCP §917.2. See *Hein v Highlands Ins. Co.* (1976) 64 CA3d 627, 134 CR 592, for discussion of damages recoverable under §917.2.

Exception to basic rule. Code of Civil Procedure §917.2 does not apply if appellant is not in possession of the property, because compliance with the judgment or order is then impossible. In that event, the judgment or order is automatically stayed. See 9 Witkin, California Procedure, *Appeal* §242 (5th ed 2008). See also *In re Ringgold* (2006) 142 CA4th 1001, 1010, 48 CR3d 507, for discussion of the applicability of §917.2 when appellant is not in possession of the property.

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§6.31 b. Amount of Security Required

Calculating amount. No fixed amount of security is specified under CCP §917.2. The trial court is directed to set the security in an amount that considers:

- Whether appellant or another party ordered to assign or deliver the property will do so if the judgment or order is affirmed and will not damage the property;
- The amount of damage that might occur to the property; and
- The value of the use of the property during the appeal.

When perishable property ordered sold. The trial court may order that perishable property be sold and the proceeds deposited with the clerk. Any such order will be considered in setting the amount of the security. CCP §917.2.

Procedure to fix amount. The appellant must file a motion asking the court to fix the amount of the security. For further discussion, see §§6.38-6.41. In addition, appellant may move the trial court to permit deposit of the property at issue with the clerk, or some other officer designated by the court. The court is not required to accept a deposit of the property. *Mason v Superior Court* (1972) 23 CA3d 913, 100 CR 557. To persuade the court, appellant should file a declaration with the motion explaining why the custody procedure should be used. The court will consider the fact that the property has been deposited in setting the amount of the security. CCP §917.2.

Decline of property's value during appeal. If the property declines in value during the appeal, respondent may recover the loss from appellant or from the security. *Hein v Highlands Ins. Co.* (1976) 64 CA3d 627, 134 CR 592. Because deposit of the property with the court might not prevent a loss, respondent may argue that an appropriate amount should therefore be added to the security.

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4. Judgments and Orders Directing the Sale, Conveyance, or Delivery of Real Property

§6.32 a. Judgments and Orders Included

When security is required. The appellant must provide security to stay enforcement of a judgment or an order directing the sale, conveyance, or delivery of possession of real property if the property is in the possession or control of appellant or some other party against whom the judgment operates. CCP §917.4. The right to possession is equivalent to actual possession and requires that security be given to effect a stay. A mortgagor is normally in possession through a tenant and thus must give security, even if the tenant is paying rent to respondent who purchased at a foreclosure sale. *McClintock v Powley* (1930) 210 C 333, 337, 291 P 833.

Special requirements for defendants in forcible entry, forcible detainer, and unlawful detainer actions. Defendants who appeal judgments or orders in forcible entry, forcible detainer, and unlawful detainer cases must obtain the trial court's discretionary approval to stay the judgment or order of possession. CCP §1176(a). The security requirements of CCP §917.4 are not applicable. *Selma Auto Mall II v Appellate Dep't of Superior Court* (1996) 44 CA4th 1672, 1681, 52 CR2d 599. See §6.65.

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§6.33 b. Amount of Security Required

No set amount of security is required; appellant must move the trial court to fix the amount. For procedure on moving to fix the amount of security, see §§6.39-6.41. The trial court will set the amount of the security by considering (1) damages resulting from any waste, (2) the value of loss of use of the property from the time the appeal is taken until the delivery of possession of the property, and (3) the amount of any deficiency judgment. CCP §917.4. Appellant and respondent should discuss these factors in the motion and response and should support all factual statements by declaration.

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§6.34 5. Appointment of Receiver

To stay enforcement of a judgment or an order appointing a receiver, the trial court must fix security in an amount that will cover all damages respondent may incur from the stay. CCP §917.5. Appellant must file a motion in the superior court to determine the amount of security required. See §§6.38-6.41 for a discussion of procedure for fixing the amount of security.

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§6.35 6. Right to Attach Orders

Security required pending appeal. Prejudgment attachment orders are appealable. CCP §904.1(a)(5). An appeal, however, will not stay the attachment order unless security is given in the amount secured by the attachment. CCP §917.65. The security must be furnished on the condition that, if the right to attach order is not reversed and plaintiff recovers judgment in the action, appellant shall pay the amount of the judgment, together with any interest that may have accrued. CCP §917.65.

Requirements when defendant prevails at trial. If defendant's property has been attached, but defendant prevails at trial and plaintiff appeals, the attachment is dissolved unless appellant complies with CCP §921. See discussion in §6.15.

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D. Security Required in Discretion of Superior Court

§6.36 1. Judgments and Orders for Which Security May Be Ordered; Procedure

Trial court's discretion to order security. The superior court has the discretion under CCP §917.9 to require security to stay enforcement of judgments and orders that would otherwise be automatically stayed under CCP §916. Security may be ordered whether the judgment or order requires performance by appellant or by any other party. *Estate of Murphy* (1971) 16 CA3d 564, 94 CR 141.

Motion for order requiring security. Respondent must move in the superior court for an order requiring that security be given in a particular amount. See §§6.39-6.41 for discussion of considerations for fixing the amount of security for judgments and orders. The motion should explain why the unique attributes of the case require security, and should establish the potential damages that respondent will incur while the case is on appeal. All facts should be supported by declaration. See the form in §6.40.

Calculating the amount of security. The amount of the security must be sufficient to cover damages respondent may sustain because of the stay. Damages are expressly limited to "reasonable compensation for the loss of use of the money or property," *or* to payments of the amounts specified in CCP §917.9(a)(3) (judgment solely for costs awarded to the respondent by trial court under CCP §§1021-1038). CCP §917.9(d). This definition substantially narrows the broad construction of damages found in *Estate of Murphy, supra*.

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§6.37 2. Form: Notice of Motion for Order Requiring Security; Declaration

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6.37-1 Notice of motion for order requiring security; declaration

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF MOTION FOR ORDER REQUIRING _ _[*PLAINTIFF/DEFENDANT*]_ _ TO FURNISH SECURITY; SUPPORTING MEMORANDUM; DECLARATION

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department No.** _ _[*number*]_ _ **of this Court, located at** _ _[*address*]_ _**, California,** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the Court under Code of Civil Procedure section 917.9 for an order requiring** _ _[*defendant/plaintiff*]_ _ **to furnish, pending appeal, security in the amount of** _ _[*dollar amount*]_ _ **to ensure that** _ _[*moving party*]_ _ **can enforce the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**, and recover payment to which** _ _[*he/she*]_ _ **is legally entitled for other losses incurred during the appeal period. This motion is made on the grounds that** _ _[*state grounds for motion, e.g., unique attributes of case require security and moving party will suffer damage if security is not provided*]_ _**.**

[*Continue*]

This motion is based on all pleadings, papers, and records in this action and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

DECLARATION

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., attorney for plaintiff*]_ _ **in this action.**

2. This action was begun on _ _[*date*]_ _**, to recover** _ _[*describe*]_ _**. On** _ _[*date*]_ _**,** _ _[*a judgment/an order*]_ _ **was entered against** _ _[*e.g., defendant*]_ _ **requiring** _ _[*e.g., defendant*]_ _ **to** _ _[*specify*]_ _**.**

3. Notice of appeal was filed on _ _[*date*]_ _**, staying further proceedings on the** _ _[*judgment/order*]_ _ **appealed from.**

4. An order that appellant be required to furnish security to continue the stay of enforcement is necessary because _ _[*state facts showing why unique attributes of case require security and why respondent will suffer damage if it is not furnished*]_ _**.**

5. Security in the amount of _ _[*dollar amount*]_ _ is necessary because _ _[*state facts establishing amount as reasonably necessary to cover respondent's potential loss*]_ _.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Comment: The notice of motion should include a supporting memorandum citing the court's discretion, under CCP §917.9, to order security and any appropriate cases.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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§6.38 E. Procedure for Obtaining Stay

Generally, appeal must be perfected before stay can be granted. The statutes authorizing a stay of enforcement pending appeal generally presuppose the perfecting of an appeal, *i.e.,* timely filing of notice of appeal. See, *e.g.,* CCP §917.1(a): "Unless an undertaking is given, *the perfecting of an appeal* shall not stay enforcement of the judgment or order in the trial court" (emphasis added). Thus, without an express authorization (*e.g.,* CCP §918(b)), a stay of enforcement is ordinarily not effective until an appeal is perfected. For discussion of notice of appeal, see chap 7.

When stay of money judgment becomes effective. As a rule, a stay becomes effective as soon as appellant files the security required by statute or ordered by the court. See CCP §995.420. If the ruling to be stayed is a money judgment, the formula for determining the amount of security that will be required to secure the stay is fixed by statute. CCP §917.1. See §6.29. To achieve an immediate stay, appellant's counsel need only apply the statutory formula to the amount of the judgment, obtain an undertaking or bond or deposit property in that amount, and comply with the statutory conditions for filing the security. The court becomes involved in the procedure only if respondent files a motion objecting to the adequacy of the security. See §§6.53-6.61.

Obtaining stay for most nonmoney judgments. For most other judgments and orders stayed by filing security, the amount of the security must be fixed by order of the trial court. CCP §§917.2-917.9. (See §§6.30-6.35 for discussion of these judgments and orders.) When the amount must be fixed by the court, appellant begins the process of obtaining a stay by filing a motion to fix the amount. See §§6.39-6.41. Respondent's objections to the amount of the security will be heard in conjunction with this motion, thus eliminating the need for an objection hearing on this ground. An objection hearing, however, may still be needed if respondent objects to appellant's sureties. See §§6.53-6.61 for discussion of the substance of, and procedure for, respondent's objections.

Fixing amount of security by stipulation. The parties may also fix the amount of security by stipulation. CCP §995.230. See §6.42.

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1. Motion to Fix Amount

§6.39 a. Procedure

Appellant's motion to fix amount of security. When the amount of security is not fixed by statute, the trial court, on appellant's motion, must enter an order fixing the amount. CCP §§917.2-917.5. It has been held that an order fixing the amount of security may be obtained ex parte (*McClintock v Powley* (1930) 210 C 333, 291 P 833), but it is better practice to give respondent an opportunity to be heard (*Hubbard v University Bank* (1898) 120 C 632, 52 P 1070). Indeed, some courts require a noticed motion before issuing any order to stay execution on a judgment. The factors the court will consider in fixing the amount of security depends on the particular judgment or order to be stayed. See discussion of requirements for specific judgments and orders in §§6.27-6.35.

Review of order fixing amount of security. An order fixing the amount of security is itself appealable. *Vangel v Vangel* (1953) 116 CA2d 615, 632, 254 P2d 919. An appeal from the underlying judgment, however, will not give the appellate court jurisdiction to modify the amount of the security required. *Jameson v Chanslor-Canfield Midway Oil Co*. (1916) 173 C 612, 160 P 1066.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.40 b. Form: Notice of Motion for Order Fixing Amount of Security; Declaration

§6.40 b. Form: Notice of Motion for Order Fixing Amount of Security; Declaration

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6.40-1 Notice of motion for order fixing amount of security; declaration

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF MOTION FOR ORDER FIXING AMOUNT OF SECURITY; SUPPORTING MEMORANDUM; DECLARATION

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department No.** _ _[*number*]_ _ **of this Court, located at** _ _[*address*]_ _**, California,** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the Court under** _ _[*insert applicable code section, e.g.,* Code of Civil Procedure §917.2]_ _ **for an order fixing at** _ _[*dollar amount*]_ _ **the amount of security** _ _[*defendant/plaintiff*]_ _ **must furnish to stay enforcement, pending appeal, of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**. This motion is made on the ground that** _ _[*dollar amount*]_ _ **is the amount reasonably necessary to** _ _[*specify, e.g., ensure that appellant will deliver the property to respondent and that respondent may recover for any damage suffered to the property, and the value of the use of the property, should the judgment appealed from be affirmed, or the appeal be dismissed or withdrawn (see CCP §917.2)*]_ _**.**

[*Continue*]

This motion is based on all pleadings, papers, and records in this action and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

DECLARATION

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., attorney for defendant*]_ _ **in this action.**

2. This action was begun on _ _[*date*]_ _**, to recover** _ _[*describe*]_ _**. On** _ _[*date*]_ _**,** _ _[*a judgment/an order*]_ _ **was entered against** _ _[*e.g., defendant*]_ _ **requiring** _ _[*e.g., defendant*]_ _ **to** _ _[*specify*]_ _**. Notice of appeal from this** _ _[*judgment/order*]_ _ **was filed on** _ _[*date*]_ _**.**

3. Security in the amount of _ _[*dollar amount*]_ _ **is sufficient to protect the parties' interests pending appeal in that** _ _[*state facts justifying amount; considerations for fixing amount of security vary depending on type of judgment or order for which stay is sought; see §§6.27-6.35 for considerations for specific judgments and orders*]_ _**.**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was

executed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Comment: The notice of motion should be accompanied by a supporting memorandum. A simple case may require no more than a discussion of the statutory considerations for fixing the amount of security. See CCP §917.2 for an example of statutory conditions. More complex issues may require citations to other statutes and case law.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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§6.41 c. Form: Order Fixing Amount of Security

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6.41-1 Order fixing amount of security

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER FIXING AMOUNT OF SECURITY

The motion of _ _[*name*]_ _ **for an order fixing at** _ _[*dollar amount*]_ _ **the amount of security required to stay enforcement of the** _ _[*judgment/order*]_ _ **pending appeal was regularly heard on** _ _[*date*]_ _**. Appearing as attorneys were** _ _[*names of attorneys with parties they represented*]_ _**.**

Good cause appearing,

IT IS ORDERED that security in the amount of _ _[*dollar amount*]_ _ **be furnished to stay, pending appeal, enforcement of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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§6.42 2. Waiver of Security

Respondent can waive security or consent to a lesser amount than required by statute or fixed by the court. CCP §995.230. The waiver renders compliance with any statutory condition that appellant post security unnecessary and effects an immediate stay under CCP §916.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.43 a. Form: Waiver of Security

§6.43 a. Form: Waiver of Security

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6.43-1 Waiver of security

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

WAIVER OF SECURITY

Under Code of Civil Procedure §995.230, _ _[*e.g., plaintiff*]_ _ **waives the requirement that** _ _[*e.g., defendant*]_ _ **furnish security or deposit money or property with the superior court as required by** _ _[*state applicable code section*]_ _ **as a condition to staying enforcement of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**, during pendency of the appeal taken on** _ _[*date*]_ _**, and agrees that enforcement of the** _ _[*judgment/order*]_ _ **is hereby stayed, pending appeal.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Plaintiff/Defendant*]_ _

Comment: This form is designed to be executed by respondent because CCP §995.230 specifies that the beneficiary may consent in writing. If the waiver is filed in court, it is possible that the attorney's signature would be sufficient (CCP §283), but because of the statutory language, this wording is preferable.

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3. Obtaining and Filing Security

§6.44 a. General Procedures for All Surety Undertakings and Bonds

Filing and service of undertaking or bond. Appellant must file the original undertaking or bond in the superior court where the action was heard. CCP §995.340. A copy of any undertaking or bond must be served on opposing counsel and proof of service filed with the undertaking. CCP §995.370; *Lewin v Anselmo* (1997) 56 CA4th 694, 701, 65 CR2d 682.

JUDICIAL PERSPECTIVE: Although there is no time requirement for the filing, it should be done promptly to avoid execution on the judgment or order. See §6.52.

Withdrawal of security after filing. Once the security has been filed, it may not be withdrawn from the court's files except by court order on (1) the stipulation of respondent or (2) proof that the purpose for which the security was filed has been abandoned without any liability having been incurred. CCP §995.360; Cal Rules of Ct 3.1130(c).

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b. Procedures for Personal Surety Undertakings

§6.45 (1) Affidavit or Declaration of Personal Sureties

Necessity of affidavit or declaration. Each personal surety must file an affidavit or a declaration with the undertaking or bond to demonstrate that the signers are qualified to act as personal sureties. CCP §995.520. See §6.23 on requirements for personal sureties.

Basic requirements of affidavit or declaration. To comply with CCP §995.520(b), the affidavit or declaration of a personal surety must state:

- The name, occupation, residence address, and business address (if any) of the surety;
- That the surety is a resident of, and either an owner of real property or a householder in, California; and
- That the surety is worth the amount of the undertaking in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

Although "householder" is not defined in the Bond and Undertaking Law (CCP §§995.010-996.560), the term was formerly defined in Rev & T C §224 to mean "any person owning, purchasing or renting property which he is using regularly, if not continuously as a residence or residences."

Requirements if undertaking exceeds $5000. If the amount of the undertaking exceeds $5000, CCP §995.520(c) requires that the affidavit contain, in addition to the information required by CCP §995.520(b), all the following information:

- A description sufficient to identify the surety's real and personal property located in California and the nature of the surety's interest in the property that qualifies the surety on the undertaking;
- The surety's best estimate of the fair market value of each item of property;
- A statement of any charge or lien and its amount, known to the surety, whether of public record or not, against any item of property; and
- Any other impediment or cloud known to the surety on the free right of possession, use, benefit, or enjoyment of the property.

Requirements if undertaking exceeds $10,000. If the amount of the undertaking exceeds $10,000 and is executed by more than two sureties, the affidavit may state that the surety is worth less than the amount of the undertaking, and the undertaking may stipulate that the surety's liability is limited to the worth of the surety stated in the affidavit, as long as the aggregate worth of all sureties executing the bond is twice the amount of the undertaking. CCP §995.520(d).

Special requirement when surety's worth includes community property. When community property is included in the worth of the surety, both husband and wife should sign, and together they count as one surety. The same rule applies to property held in joint tenancy. See *Isaak v Evidon* (1961) 197 CA2d 453, 17 CR 339.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.46 (2) Form: Declaration of Personal Surety in Support of Undertaking on Appeal From Money Judgment (CCP §995.520)

§6.46 (2) Form: Declaration of Personal Surety in Support of Undertaking on Appeal From Money Judgment (CCP §995.520)

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6.46-1 Declaration of personal surety in support of undertaking on appeal from money judgment

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

DECLARATION OF PERSONAL SURETY IN SUPPORT OF UNDERTAKING ON APPEAL FROM MONEY JUDGMENT (CCP §995.520)

_ _[*Name*]_ _ **declares:**

1. I am a personal surety for the undertaking on appeal in _ _[*name of case*]_ _, _ _[*name of county*]_ _ **County Superior Court case number** _ _[*case number*]_ _. **The following information is true and correct and is based on my own personal knowledge.**

2. My occupation is _ _[*specify*]_ _. **My residential address is** _ _[*address*]_ _. _ _[*My business address is* _ _[*address*]_ _]_ _.

3. I am not a principal debtor who is otherwise obligated to pay this judgment, an officer of the court, or a member of the California State Bar.

4. I am a California resident and _ _[*own real property/am a householder*]_ _ **in the state.**

5. I am worth _ _[*dollar amount*]_ _ **in real or personal property, or both, in this state, over and above all debts and liabilities, exclusive of property exempt from enforcement of money judgments.**

[*Add if amount of bond exceeds $5000*]

6. The property relied on and my interest in it, which qualifies me as a surety on the above undertaking is as follows: _ _[*Describe sufficient for identification all real and personal property that is owned by the surety, is situated in California, and is being used as security for the undertaking; list the surety's interest in the property*]_ _.

[*Continue*]

[7]. My best estimate of the fair market value of each item of property is as follows: _ _[*List*]_ _.

[8]. Charges or liens and their amounts, whether of public record or not, against this property are as follows: _ _[*List*]_ _.

[9]. Other impediments or clouds on the free right of possession, use, benefit, or enjoyment of this property are as follows: _ _[*List*]_ _.

I declare under penalty of perjury under California law that the foregoing is true and correct and that this declaration was executed at _ _[*city*]_ _, _ _[*state*]_ _, **on** _ _[*date*]_ _.

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Comment: On permissible additions to the form when the undertaking exceeds $10,000, and for special requirements when the surety's worth includes community property, see §6.45.

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§6.47 c. Procedure for Admitted Surety Insurer Undertakings

How to obtain undertaking from admitted surety insurer. Appellant obtains an undertaking from an admitted surety insurer by contacting a person or an organization authorized to do business as an admitted surety insurer in the county in which the superior court judgment was entered. On requirements for admitted surety insurers, see §6.24. An admitted surety undertaking can often be obtained on less than 24 hours' notice. Agents authorized to provide undertakings can be located in the yellow pages of most telephone directories under "Bonds."

Necessary information and documentation. Counsel will need to inform the agent for the insurer of the superior court caption of the case and the amount of the judgment. Insurers usually have their own forms for the undertaking and supporting documentation, and, if counsel desires, the agent will prepare the documentation and file it with the court clerk. Prudent counsel may wish to prepare the documentation themselves and should at least review the undertaking before it is filed.

Agent of admitted surety insurer must be duly authorized. The person signing the undertaking (usually an agent) must have on file with the county clerk a certified document, attested by the seal of the insurer, that the person is authorized to issue such undertakings. CCP §995.630. This may be accomplished by making the agent an attorney-in-fact and filing the power of attorney, certification, and undertaking all together. The signature on the undertaking must be authenticated by declaration or notary acknowledgment. CCP §995.630. As an alternative to having certified documentation on file in the clerk's office, the person signing the undertaking may attach a copy of a power of attorney to the undertaking. CCP §995.630(b).

Counsel should verify insurer's status. Carefully check to ensure that all statutory requirements have been met. In particular, confirm that the requisite documents, which show that the person signing the undertaking has authority to do so, are on file with the clerk, or file such documents with the undertaking *and* confirm with the insurance commissioner's office or with the clerk (CCP §995.640) that the company issuing the undertaking is authorized by the commissioner to write surety insurance.

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§6.48 4. Procedure for Obtaining Stay by Deposit

Option to obtain stay by deposit. When security is required to stay enforcement of a judgment or order, appellant may deposit with the superior court clerk (1) money or other security negotiable by the officer of the court (court clerk) and (2) an agreement executed by appellant that authorizes the clerk to negotiate the security to satisfy appellant's obligation on the judgment. CCP §995.710. See also CCP §§995.750-995.760.

NOTE: A deposit with the Secretary of State to secure a stay under CCP §995.710 may not be used after January 1, 1999. Such deposits made before that date remain effective; however, they are not renewable under the statute. CCP §995.710(e).

Consult clerk for local procedures. Practices for securing a stay by deposit may vary with each county. Because the clerk is permitted to prescribe terms and conditions for implementing this procedure (CCP §995.710(d)), counsel should consult the clerk's office to ascertain local practices. The procedure may also vary with the form of deposit used. See CCP §995.710. See also §6.25.

Appellant's right to interest on deposit. Although one and a half times the judgment amount is required for a deposit (CCP §§917.1(b), 995.710(b); see §6.29), interest still runs on the judgment at 10 percent a year (CCP §685.010). Fortunately, appellant receives the interest on the deposit during the appeal (CCP §995.740) and is protected if the judgment is reversed.

If the deposit is in the form of cash, the court clerk must keep the deposit in an interest-bearing trust account. CCP §995.710(a)(1). Interest, or interest coupons due on any deposit, must be paid to appellant on demand while the appeal is pending. CCP §995.740.

Appellant's right to return of deposit. The deposit may be returned to appellant if (1) a sufficient undertaking is substituted for the deposit, (2) the parties so stipulate, or (3) the purpose for which the deposit was given has passed without any liability to appellant. CCP §§995.360, 995.770; Cal Rules of Ct 3.1130(c). Although CCP §995.770 does not expressly require a court order for return of a deposit, CCP §995.360 and Cal Rules of Ct 3.1130 do provide for such an order. Thus, a court order should be obtained.

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§6.49 a. Establishing Value of Bearer Bonds or Notes

Value of bearer bonds or notes must be determined. If the deposit is in the form of bearer bonds or notes, either the parties must agree on the value or the court must determine it. The value of bearer bonds listed in Standard and Poor's or in Mooney's Guide can readily be established by a stock broker at the "sell" price, less a commission.

Stipulate to value of bonds or notes. Always try to obtain a stipulation of value from the opposing party. A certified copy of the stipulation should be filed with the clerk, together with the bonds, to complete the deposit. CCP §995.720(a).

Motion for determination of value. If the parties cannot agree on value, appellant should file a written application with the court to determine market value. CCP §995.720(b). The application should be by noticed motion accompanied by a declaration supporting all factual statements or a request to take judicial notice of an indisputable market price listing. CCP §995.720. The motion should include a specific description of the bonds or notes, a statement of the market value on the day the application is filed, and "a statement of the amount of the bonds or notes that the principal believes would be equal to the required amount of the deposit." CCP §995.720(b). For a form of this motion, see §6.50.

Setting date for motion. A hearing to determine the amount of the bonds or notes must be held within 5 to 10 days after service of the application. CCP §995.720(c). Appellant should prepare and submit to the court an order shortening time for service, citing §995.720(c), to obtain a hearing date on such short notice. The order should recite that counsel for respondent must be personally served with the motion by a particular date and time-usually the same or the next day. The order may also specify a date for filing any objection by respondent.

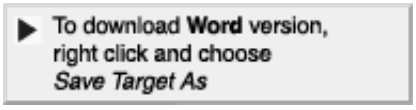
Offering evidence of value. At the hearing, the court will fix the amount of the bonds or notes at the market value alleged in the application unless respondent objects. If respondent does object, appellant must offer evidence of value and respondent can offer evidence in opposition. CCP §995.720(c). Unless a local court rule or the order shortening time provides otherwise, respondent has no time limit to object before the hearing; thus appellant should be prepared to introduce evidence of value at the hearing.

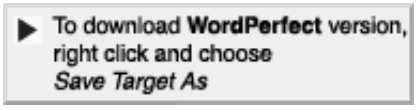
Court's order of determination of value. The court must make an order determining the value at the conclusion of the hearing. CCP §995.720(c). Appellant's counsel should supply the court with a form for the order. A certified copy of the order must be filed with the bonds or notes when appellant deposits them with the clerk. CCP §995.720(a).

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.50 b. Form: Notice of Motion for Order Determining Market Value of Deposit; Declaration

§6.50 b. Form: Notice of Motion for Order Determining Market Value of Deposit; Declaration





6.50-1 Notice of motion for order determining market value of deposit; declaration

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF MOTION FOR ORDER DETERMINING MARKET VALUE OF DEPOSIT; SUPPORTING MEMORANDUM; DECLARATION

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _ **or as soon thereafter as the matter can be heard, in Department No.** _ _[*number*]_ _ **of the above court, located at** _ _[*address*]_ _**, California,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court under Code of Civil Procedure §995.720(b) for an order fixing at** _ _[*dollar amount*]_ _ **the market value of** _ _[*bearer bonds or notes*]_ _ **to be deposited by** _ _[*defendant/plaintiff*]_ _ **as security to stay enforcement, pending appeal, of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**. This motion is made on the grounds that** _ _[*state grounds, e.g., that the market value as of date motion is filed is* _ _[*dollar amount*]_ _]_ _**.**

[*Continue*]

This motion is based on all pleadings, papers, and records in this action and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

DECLARATION

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., attorney for defendant*]_ _ **in this action.**

2. This action was begun on _ _[*date*]_ _**, to recover** _ _[*describe*]_ _**. On** _ _[*date*]_ _**,** _ _[*a judgment/an order*]_ _ **was entered against** _ _[*e.g., defendant*]_ _ **requiring** _ _[*e.g., defendant*]_ _ **to** _ _[*specify*]_ _**. Notice of appeal from this** _ _[*judgment/order*]_ _ **was filed on** _ _[*date*]_ _**.**

3. Under _ _[*specify statute or court order*]_ _ _ _[*e.g., defendant*]_ _ **is required to furnish security in the amount of** _ _[*dollar amount*]_ _ **to stay enforcement of the** _ _[*judgment/order*]_ _ **pending appeal.**

4. _ _[*E.g., defendant*]_ _ **intends to deposit with the court bearer** _ _[*bonds/notes*]_ _ **in the amount necessary to satisfy the requirement for security. The** _ _[*bonds/notes*]_ _ _ _[*e.g., defendant*]_ _ **proposes to deposit are** _ _[*describe with specificity*]_ _**.**

5. The market value of the _ _[*bonds/notes*]_ _ _ _[*e.g., defendant*]_ _ **proposes to deposit was on** _ _[*date*

motion was filed]_ _, _ _[*dollar amount*]_ _.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at _ _[*address*]_ _, California.

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Comment: The notice of motion should include a supporting memorandum.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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§6.51 F. Duration of Stay

Effective date of security. Security given to stay enforcement of judgments and orders is ordinarily effective when given. See CCP §995.410, 995.420; *Lewin v Anselmo* (1997) 56 CA4th 694, 699, 65 CR2d 682. If the state is the beneficiary of the security, however, court approval is required. CCP §§995.810, 995.840. When approval is required, the security becomes effective on approval. CCP §995.420.

Security's continued effectiveness. The security continues in effect until one of three events occurs:

- A successful objection is made to the sufficiency of the security. In that event, the security continues to stay enforcement of the judgment for 5 days (to permit new security to be given), but not thereafter. However, the original sureties continue to be responsible for liabilities incurred before the time for giving the new bond expired. CCP §995.960(b)(1)-(2). See §6.59.
- The purpose for giving the security is satisfied. CCP §995.430.
- The sureties withdraw from or cancel the security, or new security is given in place of the original. CCP §995.430. However, released sureties continue to be responsible for liabilities incurred before the release. CCP §§996.150(a), 996.240(a), 996.360(a). See §6.59.

Under the present statutory scheme, the security is effective unless it is found to be ineffective. CCP §995.960. Older case law holding that a defective bond is ineffective to stay enforcement of the judgment (see 9 Witkin, California Procedure, *Appeal* §§257-262 (5th ed 2008)) has been replaced by statutory changes. See generally *Lewin v Anselmo, supra*.

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§6.52 G. Effect of Security on Enforcement Proceedings

Security's effect on judgment liens. Once security has been given, judgment liens that may have been placed against appellant's property are extinguished and new liens may not be created during the period of the stay afforded by the security. CCP §697.040(a).

Staying enforcement proceedings already under way. An appellant who has not stayed enforcement of a judgment or an order may stop enforcement proceedings that are under way but not completed by giving sufficient security. 9 Witkin, California Procedure, *Appeal* §305 (5th ed 2008). Property that has been levied on may then be released. See *California Commerce Bank v Superior Court* (1992) 8 CA4th 582, 10 CR2d 418 (posting sufficient bond *after* marshal has taken possession of money under writ of execution results in stay of enforcement of judgment and requires return of funds levied upon to judgment debtor; court found no statutory ground existed that precluded release of funds and thus issued peremptory writ directing trial court to vacate its order denying stay of execution); *First Nat'l Bank v McCoy* (1931) 112 CA 665, 297 P 571. Appellant may seek to enforce the stay by an order from the appellate court. 9 Witkin, Procedure, *Appeal* §290. See §6.68.

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H. Objections to Security

§6.53 1. Grounds

Grounds for objecting to sufficiency of admitted surety insurer. Respondent may object to the sufficiency of the sureties, the amount of the security, or other defects in the security. CCP §995.920. Normally, objection to the sufficiency of an admitted surety insurer will be made on one of three grounds:

- The person executing the undertaking is not authorized to do so;
- The insurer is not authorized by the insurance commissioner to transact surety insurance; or
- The insurer's assets are insufficient to cover its liability on the undertaking.

For further discussion of grounds for objecting to an admitted surety insurer, see §6.55. On requirements for admitted surety insurers, see §6.24.

Grounds for objecting to sufficiency of personal surety. The principal objections to the sufficiency of personal sureties are:

- The surety does not have sufficient property to secure the undertaking (CCP §995.510);
- The surety is a member of the state bar, an officer of the court, or the principal (CCP §995.510);
- The affidavit required by CCP §995.520 either has not been filed or is inadequate; and
- The sureties' statements in the affidavit are incorrect.

For further discussion of grounds for objecting to a personal surety, see §6.56. On requirements for personal sureties, see §6.23. For discussion of affidavit requirements, see §6.45.

Technical defects in security document. Defects in the security document, however, do not relieve the surety of liability. CCP §995.380; *Conservatorship of O'Connor* (1996) 48 CA4th 1076, 1103, 56 CR2d 386. Thus, respondent need not object to technical defects that do not affect the amount of the security or recoverability.

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§6.54 2. Procedure for Objecting

Respondent must file noticed motion. To object to the sufficiency of the security given in an action or proceeding (see CCP §995.910), respondent must file a noticed motion within 10 days after being served with the security document. CCP §995.930. The motion must state the precise ground for the objection, and, if the ground is that the *amount* of the security is insufficient (see §6.57), the motion must also state an amount that respondent deems sufficient. CCP §995.930(a). For a form of this motion, see §6.58.

Motion must be timely. A respondent who fails to file a timely objection waives all objections except those due to changed circumstances unless good cause for failing to make a timely objection can be shown. CCP §995.930(c); *Chodos v Insurance Co. of N. Am.* (1981) 126 CA3d 86, 178 CR 831. However, all the time limits for making or opposing objections to the security may be extended (1) by stipulation or (2) up to 30 days by order of the superior court. CCP §§995.050, 995.950(a). See *Williams v Thomas* (1980) 108 CA3d 81, 166 CR 141. Further, the extra 5 days under CCP §1013 applies if the document to which a response is due was served by mail. *Williams v Thomas, supra*.

Setting the hearing. The hearing on a motion objecting to the security must be held "not less than two or more than five days after service of the notice of motion," unless the parties agree otherwise. CCP §995.950(a). Respondent should obtain from the court an order shortening time for service to set a hearing on such short notice. The order should require personal service on counsel for appellant the same day. For a form of application for an order shortening time, see California Civil Litigation Forms Manual §10.6 (Cal CEB 1980).

Conduct of hearing. At the hearing, the court may, but need not, permit witnesses to testify and evidence to be introduced, as in a civil trial. CCP §995.950(b). The court may also appoint an appraiser to determine the value of property. CCP §995.950(c). The superior court, however, may refuse to permit an evidentiary hearing to be conducted on 5 days' notice. Counsel should anticipate that the evidence will be submitted by declaration and should prepare declarations containing all the material facts necessary to support the party's position at the hearing. If the court, after hearing, finds the security sufficient, respondent must show changed circumstances to object further. CCP §995.960(c).

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a. Particular Objections

§6.55 (1) Sufficiency of Admitted Surety Insurer

Facts in support of objection must be established by affidavit, declaration, or certificate. The facts supporting an objection to the sufficiency of an admitted surety insurer must be established by affidavit or declaration or by certificate of the county clerk. CCP §995.650. If the ground for the objection is that the insurer is not listed as an admitted surety insurer on the Department of Insurance website, that fact may be established by a certificate of the county clerk to that effect. CCP §995.650(a). If it is likely to be difficult to obtain a certificate from the county clerk within the 10-day limit for filing an objection, respondent should call the insurance commissioner's office to learn whether the insurer is authorized. If the insurer is not, a declaration so stating should be obtained from the commissioner's office. An objection that the person who executed the undertaking was unauthorized to do so should be established by a declaration from the insurer.

Insurer must submit specified documents. If an objection is made to the sufficiency of an admitted surety insurer, CCP §995.660(a) provides that the insurer shall submit to the court:

- The original, or a certified copy, of the unrevoked appointment, power of attorney, bylaws, or other instrument entitling or authorizing the person who executed the undertaking to do so, within 10 calendar days after the insurer's receipt of a request to submit the instrument.
- A certified copy of the certificate of authority of the insurer issued by the insurance commissioner, within 10 calendar days after the insurer's receipt of a request to submit the copy.
- A certificate, from the clerk of the county in which the court or officer is located, that the certificate of authority of the insurer has not been surrendered, revoked, canceled, annulled, or suspended or, if it has, that renewed authority has been granted, within 10 calendar days after the insurer's receipt of the certificate.
- Copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance under Ins C §§900-925.4 within 10 calendar days after the insurer's receipt of a request to submit the statements.

Filing of documents. If requested or otherwise required, all four documents must be filed regardless of the precise ground on which the objection of insufficiency is based. CCP §995.660(a). If the insurer cannot produce these documents by the time of the hearing, appellant should ask the court to extend the time for hearing under the authority of CCP §995.050. The request should be made by ex parte application before the hearing date (giving notice to respondent's counsel when the application will be made) and should be accompanied by a declaration setting forth the facts on which the request is based and a proposed order.

Insurer's acceptance as surety on satisfaction of criteria. Subject to Ins C §12090, which limits the amount of insurance it can underwrite, the insurer must be accepted as a surety on the undertaking if all requirements of CCP §995.660(a) are met and the court finds that:

- The bond was duly executed;
- The insurer is authorized to transact surety insurance in California; and
- The insurer's assets exceed its liabilities in an amount at least equal to the amount of the bond. CCP §995.660(b).

If the insurer does not meet all these requirements, the court may order that they be met within 5 days or the stay will be dissolved. See §6.59.

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§6.56 (2) Sufficiency of Personal Surety

Declaration should support objection. The procedure for objecting to the sufficiency of a personal surety is less specific than that for admitted surety insurers. If an objection is made on this ground, respondent should support the objection by submitting a declaration stating the facts on which the objection is based. On requirements for personal sureties, see §6.23.

When objection attacks sufficiency of property. If respondent's objection is that the personal surety does not have sufficient property to secure the undertaking, that is an objection to "the value of property or an interest in property," and is presumably subject to the appraisal provisions of CCP §995.950(c). For discussion of the court's estimate of value under §995.950(c), see §6.57.

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§6.57 (3) Inadequate Security

Required contents of objection. If the objection is that the amount of the security is insufficient, the noticed motion must state the reason for the insufficiency and an amount that would be sufficient. CCP §995.930(a). If the objection is that the value of the property on which the amount of the undertaking is based is understated in the undertaking, the objection must state respondent's estimate of value. CCP §995.940(a). Appellant may then accept respondent's estimate and file an increased undertaking based on the estimate, and the hearing need not be held. CCP §995.940(b).

When valuation of property is an issue. When the value of property, or an interest in property, is a ground for the objection, the court must estimate the value of the property in question. It may appoint an independent person to appraise that property. CCP §995.950(c).

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§6.58 b. Form: Notice of Motion for Order Determining Security Insufficient

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6.58-1 Notice of motion for order determining security insufficient

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF MOTION FOR ORDER DETERMINING SECURITY INSUFFICIENT; SUPPORTING MEMORANDUM; DECLARATION

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department No.** _ _[*number*]_ _ **of this Court, located at** _ _[*address*]_ _**, California,** _ _[*plaintiff/defendant*]_ _ _ _[*name*]_ _ **will move the Court under Code of Civil Procedure §995.930 for an order determining that the** _ _[*specify form of security, e.g., undertaking*]_ _ **filed by** _ _[*defendant/plaintiff*]_ _ **to stay enforcement, pending appeal, of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**, is insufficient. This motion is made on the following grounds:**

[*State grounds for alleged insufficiency, e.g., if security is furnished by admitted surety insurer*]

_ _[*Name of admitted surety insurer*]_ _**, the admitted surety insurer that provided the undertaking, is** _ _[*specify insufficiency, e.g., not authorized by the Insurance Commissioner to do business in this county*]_ _**.**

[*Or, e.g., if security is furnished by personal surety*]

_ _[*Name of personal surety*]_ _**, one of the personal sureties who furnished the undertaking, is not qualified to act as surety, because** _ _[*he/she*]_ _ **is not worth the amount of the undertaking.**

[*Or, e.g., if objection is to amount of security*]

The amount of the undertaking furnished by _ _[*plaintiff/defendant*]_ _ **is insufficient to secure performance of the** _ _[*judgment/order*]_ _ **and payment of** _ _[*specify additional damages and costs on appeal respondent can claim if judgment or order is affirmed; see, e.g., Code of Civil Procedure §§ 917.2-917.65*]_ _ **if the** _ _[*judgment/order*]_ _ **is affirmed or the appeal withdrawn or dismissed.**

_ _[*Name*]_ _**,** _ _[*moving party*]_ _**, estimates that an undertaking in the amount of** _ _[*dollar amount*]_ _ **would be sufficient.**

[*Continue*]

This motion is based on all pleadings, papers, and records in this action and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Comment: The notice of motion should be accompanied by a supporting memorandum and by a declaration or declarations specifying the facts on which the opposition is based. For example, if the ground for objecting is that the amount of the security is insufficient, the declaration might state the facts showing the amount to be insufficient, the damage and loss respondent might suffer pending appeal, and the amount that would be sufficient. See, *e.g.,* the declaration in §6.40.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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3. Order

§6.59 a. Effect

Finding of court on sufficiency of security. At the hearing, the court must find either that the security is sufficient or "in what respect the bond is insufficient." CCP §995.960(b)(1).

Appellant must remedy defects of security if found insufficient. If the security is found insufficient, appellant has 5 days in which to remedy the defects. CCP §995.960(b)(1). The court on application may extend the 5 days by an additional 30 days. CCP §§995.050, 1054. The stay remains in effect during this time. CCP §995.960(b)(2).

Respondent may seek dissolution of stay on appellant's failure to remedy defects in security. If appellant fails to cure the defect within the 5 days, or within any court-ordered extension, "all rights obtained by giving the bond immediately cease," and respondent may obtain an ex parte order from the superior court to that effect. CCP §995.960(b)(1). As with any other ex parte application, opposing counsel should be notified when the application will be made. Respondent may then enforce the judgment. CCP §922.

Liabilities of sureties on defective security. If the substituted security is not timely given, the sureties on the defective security remain responsible for liabilities incurred before expiration of the 5-day period to file a sufficient security. CCP §§995.380, 995.960(b)(2). Thus, the statutes provide that if a sufficient bond is not timely given after an objection has been sustained to the original bond, enforcement of the judgment is not stayed, and the sureties on the insufficient bond may still be responsible for appellant's liability as though sufficient security had been given. Under a literal interpretation of the statute, respondent could then immediately enforce the judgment against both appellant and the sureties without waiting for the appeal to be decided. It is unclear whether the legislature intended this result or created it inadvertently when it consolidated all bond and undertaking statutes into one chapter.

Respondent's rights if security found insufficient. If the security is found insufficient, respondent is not entitled to dismissal of the appeal, but only to enforcement of the judgment. *Buchwald v Katz* (1972) 8 C3d 493, 105 CR 368. If appellant is in contempt of the legal orders of the trial court, however, the appeal may be dismissed. *Stone v Bach* (1978) 80 CA3d 442, 444, 145 CR 599 (defendant's refusal to comply with trial court orders viewed as deliberate effort to achieve stay of execution).

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§6.60 b. Form: Order Determining Security Insufficient

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6.60-1 Order determining security insufficient

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER DETERMINING _ _[*SPECIFY*]_ _
SECURITY INSUFFICIENT

The motion of _ _[*plaintiff/defendant*]_ _ **for an order finding insufficient the** _ _[*specify form of security, e.g., undertaking*]_ _ **provided by** _ _[*defendant/plaintiff*]_ _ **to stay enforcement of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**, was regularly heard on** _ _[*date*]_ _**. Appearing as attorneys were** _ _[*names of attorneys with parties represented*]_ _**.**

Satisfactory proof having been made and good cause appearing,

IT IS ORDERED that the _ _[*specify form of security*]_ _ **is insufficient in that** _ _[*specify exact cause of insufficiency*]_ _**.**

IT IS FURTHER ORDERED that _ _[*defendant/plaintiff*]_ _ **file sufficient security within five days after the date of this order; otherwise, this court shall order, on ex parte application by** _ _[*plaintiff/defendant*]_ _**, that the stay of enforcement of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**, be dissolved.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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§6.61 4. Review of Trial Court Order

Appealability of order. An order finding security sufficient or insufficient is itself appealable (CCP §904.1(a)(1)-(2); *W. Jay Saylor, Ltd. v Superior Court* (1933) 131 CA 185, 20 P2d 989), but it may also be reviewable by petition for a writ of prohibition or mandate (CCP §§1085-1086, 1102-1104; *Lyders v Superior Court* (1933) 129 CA 635, 638, 19 P2d 300). The court of appeal or the supreme court may stay proceedings during the appeal, issue a writ of supersedeas, or make any other order to "preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." CCP §923. See §6.68.

Standard of review. Orders regarding the posting of appeal bonds are reviewed under the abuse of discretion standard. *Selma Auto Mall II v Appellate Dep't of Superior Court* (1996) 44 CA4th 1672, 1682, 52 CR2d 599.

Effect of appeal from order finding security insufficient. An appeal from an order disapproving security does not stay enforcement of the underlying judgment or order. *W. Jay Saylor, Ltd. v Superior Court, supra.* Although a literal reading of CCP §916 would result in such a stay, this result would permit appellant to bypass the statutory plan by giving inadequate security and simply appealing from the order finding the security insufficient. See generally CCP §§922, 995.960 (indicating legislative intent). See *Barnes v Chamberlain* (1983) 147 CA3d 762, 766, 195 CR 417. Instead, appellant's counsel should seek a writ of supersedeas or other appropriate order to stay enforcement of the underlying judgment or order. See *Estate of Murphy* (1971) 16 CA3d 564, 94 CR 141; *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 91 CR 181. Another option is for appellant to petition for a writ of mandate or prohibition and request an emergency stay pending resolution of the petition. See *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138.

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§6.62 I. Modification of Security

Parties can move to modify security pending appeal. During the course of the appeal, either party may move the superior court to modify the amount of the security. CCP §§995.930, 996.010, 996.030. A request by respondent to increase the amount of security after the time for filing an objection to the original security can be granted only on a showing of changed circumstances or good cause for failing to object to the original security. CCP §995.930(c). If a hearing was held on the original security and the court has found it sufficient, no future modification can be made without a showing of changed circumstances. CCP §995.960(c).

Surety or appellant can move to release surety. The superior court may order a surety on a bond given in an action or proceeding released, or another surety substituted, on application by noticed motion by either appellant or the surety. See procedure in CCP §§996.110-996.150 for obtaining release and substitution; see also *Lewin v Anselmo* (1997) 56 CA4th 694, 700, 65 CR2d 682 (surety may not unilaterally withdraw from appeal bond after it became effective despite language in bond to contrary). The surety on a bond given other than in an action or proceeding may also escape further liability by canceling or withdrawing the undertaking. CCP §§996.310-996.360.

Release of surety does not relieve surety of all liability. Neither release, substitution, cancellation, nor withdrawal can relieve the surety of all liability under the undertaking. A released surety is still responsible for liabilities incurred *before* the release, cancellation, or withdrawal. CCP §§996.150(a), 996.240(a), 996.360(a). It is unclear whether the original surety's liability on an appeal bond is incurred when the judgment is entered, when the judgment is affirmed, or at some time in between. Arguably, if the judgment is affirmed and appellant does not satisfy it, respondent can sue on the original security, the substitute security, or both. See CCP §996.250. The sureties, however, may have a right of contribution against each other. CCP §996.250(d).

Court's discretion to order additional security. The superior court has broad power to order appellant to furnish new, additional, or supplemental security on the withdrawal of a surety or any other circumstance rendering the original security insufficient. CCP §996.210**.** If additional or supplemental security is ordered, the original bond remains in full force and effect as if the additional or supplemental bond had not been given. CCP §996.250(a).

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§6.63 IV. STAY OF JUDGMENTS AND ORDERS DIRECTING EXECUTION OF INSTRUMENTS

Instruments must be executed and deposited with court. A judgment or an order directing the execution of one or more instruments may be stayed only if the instruments are executed and then deposited with the superior court clerk. The instrument is held in trust by the court pending appeal. CCP §917.3. See *Consumers Salt Co. v Riggins* (1929) 208 C 537, 282 P 954 (surrender of executed stock certificate required by former CCP §944, now CCP §917.3); *Adams v Talbott* (1942) 20 C2d 415, 126 P2d 347 (deed in quiet title action).

Consult court clerk for local practice. Appellant should consult the court clerk to ascertain the practice for deposits of executed instruments in the particular county. In addition to depositing the executed instruments, appellant should deliver written instructions to the clerk on the purpose of the deposit and under what circumstances the documents may be released to respondent.

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V. OBTAINING DISCRETIONARY STAY FROM TRIAL COURT

A. Judgments and Orders Included

§6.64 1. Child Custody; Exclusion From Dwelling

Appellant may obtain stay of child custody order or order temporarily excluding party from dwelling by trial court order only. Appellant must obtain an order from the trial court to stay enforcement, pending appeal, of a judgment or an order that (1) changes or affects the custody of a minor, including visitation, or (2) temporarily excludes a party from the family dwelling or the other party's dwelling. CCP §917.7; *In re Nicholas H.* (2003) 112 CA4th 251, 259, 261, 5 CR3d 261 ("a juvenile court order affecting a matter set forth in Code of Civil Procedure section 917.7 is not stayed by the filing of an appeal.").

Order permitting removal of child from state has automatic 30-day stay. Orders that permit removal of a child from the state are automatically stayed for 7 days after entry of judgment or order by a juvenile court in a dependency hearing or 30 days after entry of the judgment or order from any other court, unless an appellate court orders otherwise, to permit appellant to apply for a discretionary stay from the superior court. CCP §917.7; *In re Natasha A.* (1996) 42 CA4th 28, 39, 49 CR2d 332.

Stay of child custody or exclusion order limited in effect. A discretionary stay under CCP §917.7 stays enforcement of the judgment or order but, unlike judgments and orders stayed under CCP §916, does not stay other proceedings on the judgment or order. Indeed, the superior court has been held to have jurisdiction while the appeal is pending to modify both the terms of the stay and the terms of a custody order. *Mancini v Superior Court* (1964) 230 CA2d 547, 41 CR 213.

Child's best interests determine stay of custody order. In ruling on an application to stay enforcement of an order for child custody, the court should preserve the status quo unless a showing has been made of a threat to the child's welfare. *Adoption of Cox* (1962) 58 C2d 434, 440, 24 CR 864. The issue the court must decide is whether, considering the facts of the case and the likelihood of error in the decision on the merits, the child's best interests will be served by an immediate change or by continuation of custody. *Sanchez v Sanchez* (1960) 178 CA2d 810, 813, 3 CR 501.

Appellate court may order stay on trial court's refusal. If the trial court refuses to stay enforcement of the judgment or order, the appellate court may order a stay. CCP §923. The issue before the appellate court is whether the trial court abused its discretion in refusing the stay. *Mancini v Superior Court* (1964) 230 CA2d 547, 553, 41 CR 213. See §6.71.

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§6.65 2. Other Judgments and Orders

Usurpation of public office; inspection of corporate books by director, stockholder, or member; termination of nuisance. Under CCP §917.8, proceedings on four disparate types of judgments may be stayed only by order of the trial or appellate court:

- When a party to the proceeding has been found guilty of usurping or unlawfully holding public office in California.
- When the judgment or order directs a corporation, or its officers or agents, to give to a person adjudged to be a director, stockholder, or member of the corporation a reasonable opportunity to inspect or make copies of such books, papers, or documents of the corporation as the superior court finds that the director, stockholder, or member is entitled by law to inspect or copy.
- When the judgment or order holds a building or place to be a nuisance, and as part of that judgment or order directs the closing or discontinuance of any specific use of the building or place for any period of time.
- When the judgment or order grants relief in nuisance abatement actions brought by a government agency.

An appellant seeking to stay a judgment or order affected by CCP §917.8 should first apply to the trial court. See discussion of need to exhaust trial court remedies in §6.71.

Unlawful detainer actions. An appeal by a defendant in an unlawful detainer action does not stay proceedings on the judgment. A party, however, may petition the trial court that granted the judgment to stay its effect. CCP §1176(a); *Selma Auto Mall II v Appellate Dep't of Superior Court* (1996) 44 CA4th 1672, 1681, 52 CR2d 599. Under CCP §1176(a), the court has discretion to impose conditions on granting the stay. 44 CA4th at 1682. However, there must be "some reasonable relationship between the conditions imposed and the prevention of injury which would otherwise be suffered by the nonmoving party from an unconditional stay." 44 CA4th at 1686. If the judge who rendered the judgment refuses to stay the judgment pending appeal, the defendant can then file a petition for an extraordinary writ with the appropriate appellate court. CCP §1176(a).

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§6.66 B. Procedure

Noticed motion should be filed. Appellant should file a noticed motion to obtain a discretionary stay of enforcement of a judgment or order. The motion should specify the statute under which the stay is sought and explain why a stay pending appeal is necessary. When stay of an order for child custody is sought, the motion should state all facts supporting appellant's claim that maintaining the status quo is in the child's best interests. See §6.64. For other types of judgments and orders, appellants should state facts showing that irreparable injury will result to appellant unless a stay is granted and that a stay will not harm respondent. See discussion of test for determining when stay is appropriate in the court of appeal in §6.74. The motion should be accompanied by a supporting memorandum and by a declaration supporting all facts discussed in the motion. For form of motion, see §6.67.

Court's order; required security. After the hearing, the trial court may order the judgment or order stayed. No security is required to stay enforcement of the ruling, but the court in its discretion may require security under CCP §917.9. See §6.36.

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§6.67 C. Form: Notice of Motion for Stay of Enforcement

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6.67-1 Notice of motion for stay of enforcement

_ _[*Name, state bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION FOR STAY OF ENFORCEMENT; SUPPORTING MEMORANDUM; DECLARATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of this Court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the Court under** _ _[*insert applicable code section*]_ _ **for an order staying enforcement of the** _ _[*judgment/order*]_ _ **entered on** _ _[*date*]_ _**.** _ _[*Specify effect of judgment or order, e.g., awarding custody of* _ _[*name of child*]_ _ *to* _ _[*name of party*]_ _]_ _**. This motion is made on the grounds that**

[*Either*]

_ _[*State grounds, e.g., the best interests of* _ _[*name of child*]_ _ *will be served by continuing custody with* _ _[*name of party*]_ _ *pending appeal*]_ _**.**

[*or*]

_ _[*Name*]_ _**,** _ _[*defendant/plaintiff*]_ _**, will suffer irreparable injury and** _ _[*name*]_ _**,** _ _[*defendant/plaintiff*]_ _**, will suffer** _ _[*no/little*]_ _ **harm if enforcement of the** _ _[*judgment/order*]_ _ **is stayed pending appeal.**

[*Continue*]

This motion is based on all pleadings, papers, and records in this action and the attached supporting memorandum and declaration of _ _[*name*]_ _ _ _[*and any evidence presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

DECLARATION

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*e.g., defendant/respondent*]_ _ **in this** _ _[*action/proceeding*]_ _**.**

2. This _ _[*action/proceeding*]_ _ **was commenced on** _ _[*date*]_ _**, to** _ _[*describe purpose*]_ _**. On** _ _[*date*]_ _**,** _ _[*a judgment/an order*]_ _ **was entered against me requiring** _ _[*specify effect of judgment or order*]_ _**. Notice of appeal from this** _ _[*judgment/order*]_ _ **was filed on** _ _[*date*]_ _**.**

[*Add if appeal is from an order changing custody of a minor*]

3. The best interests of _ _[*name of child*]_ _ **will be served by continuing custody with me, pending appeal, in that** _ _[*specify facts supporting maintenance of status quo*]_ _**.**

[*Add 4 and 5 if appeal is from another judgment or order that trial court may stay (see §6.58)*]

4. I will suffer irreparable injury if enforcement of the _ _[*judgment/order*]_ _ **is not stayed pending appeal in that** _ _[*specify facts*]_ _**.**

5. _ _[*Name*]_ _**,** _ _[*e.g., plaintiff*]_ _**, will suffer** _ _[*no/little*]_ _ **harm if enforcement of the** _ _[*judgment/order*]_ _ **is stayed in that** _ _[*specify facts*]_ _**.**

[*Continue, for any judgment or order*]

[6]. The interest of _ _[*name*]_ _ _ _[*e.g., plaintiff/petitioner*]_ _ **in performance of the** _ _[*judgment/order*]_ _ **can be protected by** _ _[*suggest alternatives to secure performance, e.g., furnishing security*]_ _**.**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*address*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Comment: This is a sample form for a declaration by a party. Other declarations may be needed to establish essential facts (*e.g.,* the declaration of a psychotherapist in a child custody proceeding).

The terms "petitioner" and "respondent" are used in this form to indicate parties to a child custody proceeding.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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VI. OBTAINING WRIT OF SUPERSEDEAS OR OTHER STAY FROM COURT OF APPEAL

§6.68 A. Court's Authority to Order Stay

Appellate court may stay proceedings. An appellate court can stay trial court proceedings pending appeal, issue a writ of supersedeas, or "make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." CCP §923.

Traditional purpose of supersedeas. "The writ of supersedeas is a purely auxiliary writ, serving the sole function of preserving … appellate jurisdiction pending review of the appeal and a ruling on its merits." *Mills v County of Trinity* (1979) 98 CA3d 859, 861, 159 CR 679. Accordingly, "[a]n appellate court may issue a writ of supersedeas to stay a judgment or order only where an appeal from the judgment or order is pending." *In re Christy L.* (1986) 187 CA3d 753, 759, 232 CR 184.

The traditional writ of supersedeas stays enforcement of a judgment or order pending appeal. *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1967) 255 CA2d 51, 62 CR 819. Historically, supersedeas could be directed only at the process of the court or its officers, not at the mere act of a party. 9 Witkin, California Procedure, *Appeal* §279 (5th ed 2008).

Under modern rule appellate court can issue any order to preserve jurisdiction pending appeal. The broad language of CCP §923 (added in 1968), and the supreme court's opinion in *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 536, 72 CR 790 (see §6.73), have expanded the theory of the appellate court's power to stay proceedings. The modern view is that the appellate court can issue *any* order to preserve its jurisdiction pending appeal. Following *Emeryville,* the rule that a writ of supersedeas will not issue when the judgment is "self executing," *i.e.,* requires no process for enforcement (see 9 Witkin, Procedure, *Appeal* §§294-299), is no longer a significant limitation on the appellate court's power to stay enforcement of judgments and orders.

Requests for stays from appellate court should include requests for writ. Requests to the appellate courts for stays should be framed broadly to include both supersedeas and other stay orders under CCP §923. See discussion in §§6.69-6.73 of situations in which a stay is appropriate. On rare occasions, the courts of appeal have also used writs of mandate to achieve a stay. See, *e.g., Speelman v Superior Court* (1983) 152 CA3d 124, 199 CR 784; *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138.

Effect on underlying action of appellate court's decision on stay. The appellate court does not decide the merits of the action on a petition for a stay, but merely stays enforcement of the judgment or order on appeal. *Estate of Dabney* (1951) 37 C2d 402, 406, 232 P2d 481; *Voorhies v Greene* (1983) 139 CA3d 989, 995, 189 CR 132. Thus, issues expressly or impliedly decided in the stay proceeding ordinarily have no res judicata effect in other phases of the case. *Most Worshipful Sons of Light Grand Lodge Ancient Free & Accepted Masons v Sons of Light Lodge No. 9* (1949) 91 CA2d 582, 205 P2d 722. It is possible, though unlikely, that the appellate court may be willing to convert a petition for a stay into a determination of the merits of the underlying order. See, *e.g., Speelman v Superior Court* (1983) 152 CA3d 124, 128, 199 CR 784.

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B. Situations in Which Stay Is Appropriate

§6.69 1. Trial Court Refusal to Recognize Statutory Stay

When stay is automatic or security has been filed. If the trial court enforces a judgment or an order automatically stayed by an appeal, the appellate court will usually issue a stay. See *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 100 CR2d 884. Appellant's right to a stay in this situation is normally absolute, and the supreme court has held that an appellate court cannot weigh the equities or exercise discretion. *Estate of Dabney* (1951) 37 C2d 402, 232 P2d 481. The same is true if the trial court attempts to enforce the judgment or order when appellant has perfected a stay by filing security. *Smith v Smith* (1927) 201 C 217, 256 P 419.

Possibility of removing automatic stay. Nevertheless, it may be possible for respondent to obtain an order from the appellate court under the CCP §923 "in aid of its jurisdiction" language, which would remove the automatic stay under CCP §916. There is currently no case authority for such an order, but an appellate court may possibly do so if respondent demonstrates that (1) the appeal is unlikely to succeed and (2) "the effectiveness of the judgment" (CCP §923) cannot be preserved if the stay is permitted. A respondent seeking such an order should also request an expedited appeal.

Effect of appellate court's stay. If a statutory stay is in effect, but is being disregarded by respondent or the trial court, the appellate court can stop enforcement proceedings and order the return of money collected. 9 Witkin, California Procedure, *Appeal* §§284-286 (5th ed 2008). When no stay is in effect, the appellate court will probably prevent further enforcement efforts, but will not undo what has been done. *Messenkop v Duffield* (1930) 211 C 222, 225, 294 P 715. Nevertheless, in extraordinary cases an appellate court might be persuaded to issue such an order under CCP §923.

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§6.70 2. Stay of Enforcement When Required Security Cannot Be Posted

On rare occasions, the appellate court may issue a stay of enforcement without security if appellant cannot post security in the amount required to perfect a statutory stay. *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 26, 91 CR 181. A stay may also issue if appellant cannot furnish security in the amount fixed by the trial court, even when that amount was within the trial court's discretion. *Estate of Murphy* (1971) 16 CA3d 564, 94 CR 141.

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§6.71 3. Discretionary Stay Denied by Trial Court

Stay in appellate court after trial court's denial of discretionary stay. A stay may be sought in the appellate court when the trial court denies a motion for a discretionary stay of enforcement. CCP §923; *Sanchez v Sanchez* (1960) 178 CA2d 810, 3 CR 501. For example, if the trial court refuses to stay enforcement of an order changing custody of a child, appellant may ask the court of appeal to issue the stay. See, *e.g., Speelman v Superior Court* (1983) 152 CA3d 124, 199 CR 784.

First, seek stay from trial court. When the trial court has discretion to order a stay, appellant must seek a stay from the trial court before petitioning the court of appeal. *Nuckolls v Bank of Cal.* (1936) 7 C2d 574, 61 P2d 927. See *Progressive Concrete, Inc. v Parker* (2006) 136 CA4th 540, 552, 38 CR3d 939 (trial court may waive appeal bond requirement on showing of indigence).

Standard of review in appellate court. The appellate court reviews the trial court's decision for abuse of discretion. See *Saltonstall v Saltonstall* (1957) 148 CA2d 109, 306 P2d 492. See §§5.23-5.28 on abuse of discretion.

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§6.72 4. Review of Trial Court's Grant of Discretionary Stay

Seek stay to review court's grant of discretionary stay. A trial court order granting a discretionary stay is presumably appealable under CCP §904.1(a)(1)-(2) as a postjudgment order affecting the judgment. See requirements for appealability of postjudgment orders discussed in *Williams v Thomas* (1980) 108 CA3d 81, 84, 166 CR 141 (appeal from order vacating opposition to sureties); see §§3.27-3.30. Although the notice of appeal arguably results in an automatic stay of the effectiveness of a stay order under CCP §916, that result would defeat the intent of the statutes allowing discretionary stays. See, *e.g.,* CCP §§917.9, 918.5, 919. Thus, discretionary stay orders should be stayed pending determination of the validity of the order only by a petition to the court of appeal for a stay. See *Miller v Gross* (1975) 48 CA3d 608, 612, 121 CR 875; §6.59.

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§6.73 5. Stay of Threatened Act When Affirmative Relief Denied

When statutory stay might be ineffective to enjoin respondent's conduct and affirmative order is needed. The statutory stay provisions in CCP §§916-922 contemplate a stay of a trial court order or judgment that grants relief. However, when the trial court has denied relief, typically a temporary restraining order or preliminary injunction, and defendant threatens to perform the act that plaintiff sought to prevent, a statutory stay will not effectively preserve the status quo pending appellate review. Rather, what is needed is an order directed at defendant and respondent, not the trial court enjoining the act in question pending appeal.

Court's authority to enjoin respondent's conduct pending appeal. In *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 538, 72 CR 790, the supreme court held that appellate courts have the inherent power to issue such orders and that the legislature confirmed that power in CCP §923. In addition, the court indicated that an appellate court has power to grant supersedeas whenever denying a stay would deprive appellant of the benefit of a reversal. 69 C2d at 538. Arguably, this language in *Emeryville* indicates the court's intention to expand supersedeas to encompass situations in which it is necessary to enjoin acts of parties and not merely the process of the trial court. See §6.68. In practice, appellate courts usually issue a stay under CCP §923 in this circumstance.

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§6.74 C. Test for Determining When Stay Is Appropriate

Generally no absolute right to stay. Unless the basis for petitioning the court of appeal for a stay is that the trial court has refused to be bound by a statutory stay, appellant has no absolute right to a stay from the appellate court and must persuade that court to grant relief. 9 Witkin, California Procedure, *Appeal* §281 (5th ed 2008).

Conditions to obtaining stay. To obtain a stay, appellant must usually convince the appellate court that:

- A stay is necessary to preserve the issues on appeal (CCP §923); and
- Respondent will not be unduly prejudiced by a stay, but appellant will suffer irreparable injury without a stay.

People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville (1968) 69 C2d 533, 536, 72 CR 790; *Mehr v Superior Court* (1983) 139 CA3d 1044, 189 CR 138; *Mills v County of Trinity* (1979) 98 CA3d 859, 159 CR 679; Chernoff & Watson, *Writ Lore*, 56 Cal SBJ 12, 15 (Jan. 1981).

Address merits of appeal in application for stay. In addition, the court will probably deny a stay if it believes that the appeal lacks substance or is taken solely for delay. Appellant must therefore address the merits of the appeal in the application for a stay.

Exhaust required procedures in trial court. Appellant cannot avoid the statutory procedures for obtaining a stay in the trial court by seeking a stay from the court of appeal. *Guardianship of Morro* (1939) 14 C2d 134, 92 P2d 1012. A stay from the appellate court will not normally issue unless appellant has exhausted other statutory means of obtaining a stay. *Guardianship of Morro, supra; Nuckolls v Bank of Cal.* (1936) 7 C2d 574, 577, 61 P2d 927.

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D. Procedure

§6.75 1. Time for Filing

There is no time limit for filing a petition for a stay, but a petition for an emergency stay should be filed as soon as possible after the need for the stay becomes known. Because appellant is asking the court to take emergency action, the court may doubt the need for that action if appellant has not acted promptly. If a delay has occurred, appellant should explain why the stay was not sought earlier. Any opposition to a petition for a stay must be filed and served within 15 days after the petition is filed, and the court may not issue a stay until the respondent has had the opportunity to file an opposition. Cal Rules of Ct 8.112(b)(1), (3).

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§6.76 2. Request for Temporary Stay

Availability of temporary immediate stay pending appeal. Appellant may request that the court of appeal order an immediate temporary stay pending the grant or denial of a stay on appeal. The request for the temporary stay may be included with the petition for a stay pending appeal, or it may be made separately. See Cal Rules of Ct 8.112(c)(1), 8.116. If the request is made separately, the procedures of Cal Rules of Ct 8.116 should be followed, along with the rules governing motions in the appellate courts. See Cal Rules of Ct 8.40, 8.44, 8.54-8.57. See also chap 11. Usually, however, the request is included in the petition. If the request is included with the petition, its cover must include the large and conspicuous notation "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed. Cal Rules of Ct 8.116(a)(1). The following information must also appear either on the cover or at the beginning of the text of the request: the trial court and department involved, and the name and telephone number of the trial judge whose order the request seeks to stay. Cal Rules of Ct 8.116(b). The reviewing court may decline to consider a request that does not comply with these requirements. Cal Rules of Ct 8.116(c).

Notice and service of request. In addition, the clerk should be advised when the petition is filed that a temporary stay is requested so that the petition will be processed without delay. This can be done by delivering, with the petition and request for a temporary stay, a brief letter explaining the need for the temporary stay. The request for a temporary stay must be served on respondent. Cal Rules of Ct 8.112(c)(2).

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3. The Petition

§6.77 a. General Procedure

Petition for writ of supersedeas. A petition for a writ of supersedeas must consist of (Cal Rules of Ct 8.112(a)):

- A verified petition;
- A memorandum in support of the petition; and
- An explanation of the need for the stay.

If the record on appeal has not yet been filed, then the petition must also include (Cal Rules of Ct 8.112(a)(4)(A), (B)):

- A statement of the case sufficient to show that petitioner will raise substantial issues on appeal, including a fair summary of the material facts and the issues that are likely to be raised on appeal;
- The judgment or order, showing its date of filing;
- The notice of appeal, showing its date of filing;
- A reporter's transcript of any oral statement by the court supporting its rulings related to the issues that are likely to be raised on appeal, or, if a transcript is unavailable, a declaration fairly summarizing any such statements;
- Any application for a stay filed in the trial court, any opposition to that application, and a reporter's transcript of any oral proceedings concerning the stay, or, if a transcript is unavailable, a declaration fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling; and
- Any other document from the trial court proceeding that is necessary for proper consideration of the petition.

NOTE: A reporter's transcript is "unavailable" within the meaning of Cal Rules of Ct 8.112(a)(4)(B) if preparation of the transcript has not yet been completed when a petition for writ of supersedeas is filed. Advisory Committee Comment to Cal Rules of Ct 8.112(a).

The procedure for preparing a petition for a writ of supersedeas is set forth in Cal Rules of Ct 8.112-8.116.

Application for stay. Although Cal Rules of Ct 8.112 mentions only supersedeas, the requirements for a stay under CCP §923 are presumably the same. The court will need a petition, including a verified statement of facts, a supporting memorandum, and exhibits, including the judgment or order that appellant seeks to stay and the notice of appeal. Cal Rules of Ct 8.112.

Combining petition for writ with request for CCP §923 stay. Appellate courts generally prefer to issue stay orders under CCP §923 instead of using a writ of supersedeas. Petitioner may request both and let the court choose what it wishes to call its order. This can be accomplished by combining the two into a single document titled "Petition for Writ of Supersedeas or Other Appropriate Stay Order."

Format of papers. The format of the petition should be based on the requirements set forth in Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the petition, if it has a cover, should be red. Cal Rules of Ct 8.40(b)(1). The petition and supporting memorandum should always be a single document. A "writ" need not be provided, because, as a matter of practice, the court does not issue a formal writ. Instead, the court's order serves as the writ if the petition is granted. The format of the documents supporting the petition must comply with Cal Rules of Ct 8.112(a)(4)(C).

Filing and service. If the petition is filed in the supreme court, file the original and 10 copies of all documents, unless otherwise ordered. Cal Rules of Ct 8.44(a)(2). If the petition is filed in a court of appeal, file the original and four copies of the petition (Cal Rules of Ct 8.44(b)(3)) and *one* set of any separately bound supporting documents accompanying the petition. Cal Rules of Ct 8.44(b)(5). The petition and one set of any supporting documents must be served on each party. Cal Rules of Ct 8.25(a)(1). Proof of appropriate service must be filed along with the petition. Cal Rules of Ct 8.25(a)(2). Although personal service is not required, it is advisable in all cases in which an immediate stay is requested. There is no filing fee.

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§6.78 b. Contents of Petition

What is the petition? The petition is the statement of the claim on which the request for a stay is based. The request for a stay usually begins with a formal, introductory clause (see §6.82), sets forth the facts supporting the request in numbered paragraphs, and concludes with a prayer for relief.

Facts to include in petition. The facts that should be included in the petition are:

- The nature of the action, the order or judgment on appeal, the date of notice of entry of judgment, and the date a notice of appeal was filed;
- The facts showing that other statutory procedures for obtaining a stay have been satisfied or are unavailable;
- The facts relating to threatened enforcement of the order or judgment;
- The facts showing that enforcement would moot the appeal, and the facts showing any other prejudice or irreparable injury to appellant from enforcement; and
- The facts showing lack of prejudice or irreparable injury to respondent if enforcement is stayed.

It is also advisable to include the facts supporting appellant's contention that reversible error occurred.

Facts should support requested relief. The facts alleged should not be mere conclusionary statements, but should be factually explicit and tailored to the particular relief requested in the petition. If, for example, appellant is requesting the appellate court to stay the action of a party pending appeal, the petition should set forth the facts relating to the threatened interruption of the status quo rather than the facts relating to enforcement of the judgment or order. See §6.73. Similarly, if the petition requests that custody of a minor be stayed, it should set forth the facts supporting the claim that preserving custody with appellant is in the child's best interests. See §6.64.

Prayer for relief. The petition should conclude with a prayer for relief in the form of a request for a stay or for other appropriate relief pending final resolution of the appeal. The prayer should also request a temporary stay if one is needed.

Signature and verification. Counsel should sign the petition and must have it verified on personal knowledge. Cal Rules of Ct 8.112(a)(5). See *Star Motor Imports v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721. If no one person can verify all necessary facts, declarations of other people may be included as exhibits and referred to in the petition.

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§6.79 c. Supporting Memorandum

Organization. Petitioner should begin the supporting memorandum with an introductory statement that describes the posture of the case and summarizes the reasons the court should issue the stay and the legal arguments on the merits of the appeal. The body of the memorandum should set out the court's authority for issuing the stay, the standard that must be met, and how the facts of the case meet that standard.

Statement of facts. The most important element in the petition is usually the narrative story of what happened, why a stay is important, and why the judgment or order is wrong. Petitioner must be candid with the court in the factual recitation. Failure to tell the whole story, or to tell it fairly, would be extremely prejudicial to petitioner's cause. Conversely, counsel opposing a petition for a stay should be alert to point out any attempt by petitioner to mislead the court.

JUDICIAL PERSPECTIVE: If the record on appeal is incomplete, petitioner should explain by declaration why the transcript is not available and then summarize the proceedings.

Argument. The memorandum should focus on two points. First, the *practical* effect of granting or denying the petition should be explained. Compiling the authorities on stays is normally much less important, unless appellant is entitled to a statutory stay as a matter of right. Second, petitioner should convince the appellate court that the appeal will probably succeed. Given the scarce judicial resources available, and the length of time necessary to complete an appeal, the court may be reluctant to intervene unless appellant is likely to prevail on the appeal. See *Deepwell Homeowners' Protective Ass'n v City Council* (1965) 239 CA2d 63, 66, 48 CR 321.

Suggest conditions to eliminate prejudice to respondent. Appellant might also suggest that conditions be included in the stay order to reduce or eliminate any prejudice to respondent. For example, appellant might offer to expedite the appeal, to refrain from disposing of assets, or to deposit partial security. The effect of such concessions on the court can be significant. Appellant should always consider requesting an expedited appeal in the memorandum.

Make memorandum concise. An overly long memorandum may prejudice appellant's chances of success. To avoid redundancies, the facts cited in the memorandum can be incorporated by reference into the petition so that the facts are verified.

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§6.80 d. Exhibits

If the record on appeal has not been filed, the petition must include as exhibits the order or judgment, the notice of entry of judgment, the file-stamped notice of appeal, and a reporter's transcript of any oral statement by the court supporting its rulings related to the issues that are likely to be raised on appeal, or, if a transcript is unavailable, a declaration fairly summarizing any such statements. Cal Rules of Ct 8.112(a)(4)(B).

In addition, counsel must include copies of all documents from the superior court file that are needed for the appellate court to properly consider the petition. Cal Rules of Ct 8.112(a)(4)(B). For example, documents should be included that relate to the filing of security or attempted execution on the order or judgment. Any application for a stay filed in the trial court, any opposition to the stay, and a reporter's transcript of any oral proceedings concerning the stay, or, if a transcript is unavailable, a declaration fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling, must also be filed with the petition. Cal Rules of Ct 8.112(a)(4)(B).

NOTE: A reporter's transcript is "unavailable" within the meaning of Cal Rules of Ct 8.112(a)(4)(B) if preparation of the transcript has not yet been completed when a petition for writ of supersedeas is filed. Advisory Committee Comment to Cal Rules of Ct 8.112(a).

The documents must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each, with a table of contents listing each document by its title and its index-tab number or letter. The documents must be index-tabbed by letter or number, and the pages must be consecutively numbered. Cal Rules of Ct 8.112(a)(4)(C).

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§6.81 e. Form: Cover

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6.81-1 Cover

NO. _ _ _ _ _ _ **STAY REQUESTED**

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT,
DIVISION _ _ _

Plaintiff and _ _[*Respondent/ Appellant*]_ _	)	**No.** _ _[*Appellate court case number*]_ _
	)	
v	)	_ _[*Superior court county and action number*]_ _
	)	
Defendant and _ _[*Appellant/ Respondent*]_ _	)	
	)	

PETITION FOR WRIT OF SUPERSEDEAS
OR OTHER APPROPRIATE STAY ORDER;
SUPPORTING MEMORANDUM

Appeal from the Judgment of the Superior Court
of California, County of _ _[*county*]_ _
Honorable _ _[*name*]_ _**, Judge**

_ _[*Name, address, and telephone number of attorney*]_ _
Attorney for _ _[*name of party*]_ _

Copies: If the petition is filed in the supreme court, the original of all documents, plus 10 copies of each for filing. Cal Rules of Ct 8.44(a)(1). If the petition is filed in a court of appeal, the original and four copies of the petition (Cal Rules of Ct 8.44(b)(3)) and *one* set of any separately bound supporting documents accompanying the petition. Cal Rules of Ct 8.44(b)(5). Copies for service: one copy of petition with one set of any supporting documents for each attorney of record and unrepresented party (Cal Rules of Ct 8.25(a)(1)); office and client copies.

Comment: The cover of the petition should have the same caption as the appeal and should be red in color. Cal Rules of Ct 8.40(b)(1). For cover requirements, see §§12.29-12.32.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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Source: Civil Litigation/California Civil Appellate Practice/6 Staying Enforcement During Appeal/§6.82 f. Form: Petition for Writ of Supersedeas

§6.82 f. Form: Petition for Writ of Supersedeas

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6.82-1 Petition for writ of supersedeas

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER; SUPPORTING MEMORANDUM

To the _ _[*Court of Appeal,* _ _[*district number*]_ _ *District, Division* _ _[*division number*]_ _/*Supreme Court of California*]_ _**:**

1. Petitioner and appellant petitions this court to _ _[*describe order requested; for simple stay, state: stay enforcement of the* _ _[*judgment/order*]_ _ *entered in the Superior Court of California, County of* _ _[*name*]_ _*, on* _ _[*date*]_ _*, and all further proceedings thereon, until determination by this court of the pending appeal from the* _ _[*judgment/order*]_ _]_ _**.**

2. The notice of appeal from the _ _[*judgment/order*]_ _ **was filed on** _ _[*date*]_ _**.**

3. The nature of the action is _ _[*describe briefly*]_ _**.**

4. The appeal in this action is based on _ _[*state nature of appeal sufficiently to advise the reviewing court of the question concerned*]_ _**.**

5. This petition for a writ of supersedeas or other stay is made on the ground that _ _[*List facts showing necessity for granting petition*]_ _**.**

WHEREFORE, petitioner and appellant prays that this court _ _[*specify prayer, for simple stay, state: stay enforcement of the* _ _[*judgment/order*]_ _**,** *and all proceedings on the* _ _[*judgment/order*]_ _*, pending the appeal in this action*]_ _**.**

[*Add if a temporary stay pending the granting or denial of the petition is desired*]

Petitioner and appellant further prays that the court grant a temporary stay pending determination of this petition.

Respectfully submitted,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for petitioner and appellant

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.112.

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§6.83 4. Opposition to Petition

Consider filing opposition. Respondent should file opposition if a stay would be objectionable. The writ of supersedeas may not issue until respondent has had an opportunity to file a memorandum and a statement of any material facts in opposition. Cal Rules of Ct 8.112(b)(2)-(3). Unless otherwise ordered, the opposition must be filed within 15 days after filing of the petition and the supporting memorandum. Cal Rules of Ct 8.112(b)(1).

Call clerk's office. On receipt of the petition, counsel should notify the clerk's office that an opposition will be filed. There is no time limit on the court's response, but if an immediate stay is requested, the court may act quickly. Counsel should call the clerk's office to advise that an immediate stay is opposed and to request time to file a response.

Format of opposition. The format of the opposition should be based on the requirements set forth in Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the opposition, if it has a cover, should be red. Cal Rules of Ct 8.40(b)(1).

Filing and service. If the opposition is filed in the supreme court, file the original and 10 copies of all documents. Cal Rules of Ct 8.44(a)(1). If the opposition is filed in a court of appeal, file the original and four copies of the opposition (Cal Rules of Ct 8.44(b)(3)) and one set of any separately bound supporting documents. Cal Rules of Ct 8.44(b)(5). The opposition and one set of any supporting documents must be served on each party. Cal Rules of Ct 8.25(a)(1). Proof of appropriate service must be served along with the opposition. Cal Rules of Ct 8.25(a)(2). Although personal service is not required, it is advisable in all cases in which an immediate stay is requested. There is no filing fee.

Contents of opposition. The opposition should demonstrate, to the extent possible, why each requirement for granting the writ has not been met. The opposition should consist of:

- A verified statement of facts that sets forth the material omissions or misstatements in the petition;
- A memorandum in opposition; and
- Copies of any documents not attached as exhibits by petitioner (or in the record on appeal if filed) that support the arguments.

Factual statements not otherwise supported may be established by declaration.

Facts and argument. Because the court may issue the writ on the verified pleadings, without oral argument, erroneous facts or allegations should be expressly denied in the opposition. See *Mills v County of Trinity* (1979) 98 CA3d 859, 159 CR 679. Respondent should explain in the opposition all facts the court needs to understand concerning why a stay should not be granted, including any loss or hardship if a stay is granted, and why the appeal has no merit.

Consider suggesting conditions to reduce hardship. Respondent should also consider suggesting conditions that might reduce hardship if a stay is granted, *e.g.,* that a bond be posted in a specified amount, that appellant file the opening brief within a specified time, and that the appeal be expedited or that the stay be for a limited duration.

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§6.84 5. Hearing; Decision; Security

Hearing on petition. Except for petitions in child custody cases, a hearing is not required and is not normally held. *Mills v County of Trinity* (1979) 98 CA3d 859, 159 CR 679; Cal Rules of Ct 8.112(d)(2). The court, however, may order a hearing if it so desires, regardless of whether an order to show cause is issued. See *Building Code Action v Energy Resources Conserv. & Dev. Comm'n* (1979) 88 CA3d 913, 922, 152 CR 214.

Conditions of stay. The court may issue a stay on any conditions it deems just. Cal Rules of Ct 8.112(d)(1). Normally, it will require security as a condition for issuance of the stay unless the purpose of the stay is to enforce appellant's right to a statutory stay without security. See 9 Witkin, California Procedure, *Appeal* §§305-307 (5th ed 2008). On the other hand, the appellate court may, in an unusual case, reduce the amount of security otherwise required. *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 91 CR 181. See §6.70. If security is ordered, it should be filed in the court issuing the stay, not the superior court. See *Sandell, Inc. v Bailey* (1961) 193 CA2d 518, 14 CR 347.

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§6.85 E. Review of Grant or Denial of Petition

Finality of decision denying stay. The denial of a stay pending appeal by the court of appeal is final immediately. Cal Rules of Ct 8.264(b)(2)(A). No petition for rehearing may be filed. Cal Rules of Ct 8.268(a)(1).

Finality of decision granting stay. If a stay pending appeal is granted, the order becomes final 30 days after filing. Cal Rules of Ct 8.264(b)(1). Either party may file a petition for rehearing addressing issuance of the stay or conditions imposed; the petition must be filed before the order becomes final. Cal Rules of Ct 8.268(a)(1). Such rehearings are rarely granted.

Supreme court review. After the order of the court of appeal becomes final, either party may seek supreme court review of the order. Cal Rules of Ct 8.500(a)(1). In practice, the supreme court rarely grants review. If a stay was denied by the court of appeal, however, the supreme court may respond to a petition for review by transferring the appeal to itself under Cal Rules of Ct 10.1000, summarily granting a stay, and then retransferring the appeal back to the court of appeal. See §22.51.

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7

Filing the Notice of Appeal

Mitchell E. Abbott

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§7.1 I. INTRODUCTION TO FILING NOTICE OF APPEAL

An appeal begins when an appellant files a timely notice of appeal. Cal Rules of Ct 8.100(a)(1). The notice "starts the clock" for all other appellate procedures and requirements.

Timely filing of the notice of appeal is critically important because it is jurisdictional; once the notice is validly filed, jurisdiction to hear the case is automatically vested in the court of appeal for the appellate district in which the trial court is located, and the trial court loses jurisdiction to act in the case. CCP §916(a); Cal Rules of Ct 8.100(a)(2). There is no relief from untimely filing. See §7.31. On trial court jurisdiction pending appeal, see §§6.3-6.6.

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§7.2 A. Scope of Chapter

This chapter covers the procedure for appealing from a judgment or order of the superior court in an unlimited civil case. It discusses the form and content of the notice of appeal (see §§7.8-7.16) and the crucial issue of timing for the filing of a notice of appeal. See §§7.31-7.54. For discussion of procedures for appealing from civil judgments or orders in limited civil and small claims cases, see chap 10.

NOTE: Counsel should read this chapter in conjunction with chapter 9, which discusses the procedure for designating the record on appeal. Designation of the record on appeal must be done within 10 days after the notice of appeal is filed. Cal Rules of Ct 8.121(a). Counsel should combine the notice of appeal with the notice designating the record to avoid the risk that the notice designating the record will be overlooked or otherwise delayed. See Cal Rules of Ct 8.121(a).

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§7.3 B. Governing Law

The procedures for filing a notice of appeal are set out in Cal Rules of Ct 8.100-8.108. These rules are frequently amended; thus, to gain a thorough understanding of the current procedure, counsel should reread them before beginning each appeal.

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II. IDENTIFYING WHICH JUDGMENT OR ORDER TO APPEAL

§7.4 A. Judgment or Order Must Be Appealable

An appeal may be taken only from an *appealable* judgment or order. CCP §904.1. It is thus important to first ascertain whether the judgment is appealable or whether review is limited to a petition for extraordinary writ.

On whether judgment or order is appealable, see chap 3.

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§7.5 B. Scope of Appeal Defined by Judgment or Order Appealed

The issues that may be raised on appeal are defined by the judgment or order from which the appeal is taken. The appellate court will review only issues presented by the judgment or order from which the appeal is taken. *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 625, 12 CR2d 741. An appeal from part of a judgment will bring up for review only that portion, leaving all other parts of the judgment intact. *Gonzales v R.J. Novick Constr. Co.* (1978) 20 C3d 798, 804, 144 CR 408; *Marriage of Fink* (1976) 54 CA3d 357, 362, 126 CR 626. Similarly, an appeal from the judgment will not allow review of a postjudgment order (such as an award or denial of attorney fees), which is separately appealable. *Polster, Inc. v Swing* (1985) 164 CA3d 427, 436, 210 CR 567.

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§7.6 C. Prejudgment Orders Generally Not Appealable

Most prejudgment orders, including rulings on discovery motions, case procedure, and evidence, are *not* separately appealable. They are reviewed only as part of an appeal from the judgment (CCP §906) or by a petition for extraordinary writ. However, certain prejudgment rulings (such as an order granting or denying a preliminary injunction) are made appealable by statute or case law. See CCP §904.1. An appealable prejudgment order must be appealed within the time limits for appeal from that order or risk loss of the opportunity to review issues raised by that order. CCP §906; *McCarthy v Tally* (1956) 46 C2d 577, 587, 297 P2d 981.

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§7.7 D. Postjudgment Orders Require Separate Notice of Appeal

An appeal from a judgment asks the court to review the judgment and nonappealable prejudgment orders, but the appeal does not ordinarily raise issues that can be reviewed in appeals from other separately appealable rulings. *Fulton v Fulton* (1934) 220 C 726, 32 P2d 634. Thus, an appeal from the judgment in a case will not generally reach a postjudgment order. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 656, 25 CR2d 109. An intention to appeal from such an order must be raised separately, by a specification either in the notice of appeal from the judgment or in a separate notice of appeal. See *Fulton v Fulton, supra*. Failure to do so will waive the right of appeal from the postjudgment order. *Polster, Inc. v Swing* (1985) 164 CA3d 427, 436, 210 CR 567. For example, a postjudgment award of attorney fees is a separately appealable order under CCP §904.2(b). *Colony Hill v Ghamaty* (2006) 143 CA4th 1156, 1171, 50 CR3d 247.

A postjudgment order may be appealable under CCP §904.1(a)(2) if (*Lakin,* 6 C4th at 651) (1) the issues raised are different from those arising from an appeal from the judgment and (2) the order affects the judgment or relates to it by enforcing it or staying its execution. See *Day v Collingwood* (2006) 144 CA4th 1116, 1123, 50 CR3d 903 (postjudgment order denying sanctions motion appealable because motion was collateral proceeding).

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III. FORM AND CONTENT OF NOTICE OF APPEAL

§7.8 A. Required Contents

The notice of appeal is considered "sufficient" if it states in substance that the appellant appeals from a specified judgment or particular part of it. Cal Rules of Ct 8.100(a)(1). The notice of appeal does not need to specify the appellate court to which the appeal is directed; it is automatically directed to the court of appeal for the district in which the trial court is located. Cal Rules of Ct 8.100(a)(2).

For a form of notice of appeal, see §§7.15-7.16.

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§7.9 1. Notice Must Specify Judgment From Which Appeal Is Taken

The notice of appeal must identify the *specific* judgment or order from which the appeal is taken. Because most nonappealable pretrial orders are merged into a judgment, a notice of appeal from "the judgment" preserves the appellant's right to raise all errors occurring both at trial and in most pretrial proceedings. CCP §906.

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§7.10 a. When Judgment or Order Is Separately Appealable

The notice of appeal from the judgment alone will *not* preserve the right to appeal other prejudgment or postjudgment orders that are separately appealable. If the appellant seeks review of more than one appealable judgment or order, the notice of appeal must specify each separately. See §7.9.

JUDICIAL PERSPECTIVE: If in doubt, specify all the orders you intend to attack on appeal.

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§7.11 b. Partial Appeals

A partial appeal brings up for review only the portion designated in the notice of appeal. Severable issues that are not expressly appealed from will not be reviewed. *Glassco v El Sereno Country Club* (1932) 217 C 90, 91, 17 P2d 703 (appeal from portion of judgment denying relief against one defendant held insufficient to appeal "separate and distinct portion of the judgment denying plaintiffs a lien"). However, if the issues are so interwoven that a ruling on the portion of the judgment appealed from would necessarily affect the entire judgment, the issues are not severable and the appeal is more likely to be treated as being from the judgment. See *Culbertson v Cizek* (1964) 225 CA2d 451, 471, 37 CR 548. On effect of reversal on severable judgments, see §§17.32-17.44.

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§7.12 2. Notice Must Be in Writing

A notice of appeal must be in writing. See Cal Rules of Ct 8.100(a)(1). There is no authorization for an oral notice of appeal. The notice must comply with the formal requirements for documents filed in the superior court. See Cal Rules of Ct 2.100-2.119, 2.131, 3.1110(c) (governing size, pagination, and format of papers filed in superior court).

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§7.13 3. Notice Must Be Signed by Appellant or Counsel

A notice of appeal must be signed either by the appellant or appellant's attorney. An attorney who signs a notice of appeal is presumed to have the client's authority to do so. *United States of Mexico v Rask* (1930) 109 CA 497, 500, 293 P 108. Although the attorney need not be the attorney of record (*Seeley v Seymour* (1987) 190 CA3d 844, 853, 237 CR 282), the appeal may be dismissed if the notice is filed by a discharged attorney who files it without authority or if the appellant otherwise objects. *Title Ins. & Trust Co. v California Dev. Co.* (1914) 168 C 397, 400, 143 P 723; *Edlund v Los Altos Builders* (1951) 106 CA2d 350, 357, 235 P2d 28.

PRACTICE TIP: Because filing the notice is jurisdictional, the attorney of record often signs the notice when he or she is not going to be handling the appeal, just to preserve the client's rights. Counsel should have an explicit understanding with the client about what he or she will and will not do after trial. The attorney of record may be obliged to proceed unless he or she is substituted out or permitted to withdraw. If there is any doubt about the attorney's authority to appeal or role in the course of appeal, ask the client to sign the notice personally.

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§7.14 B. Sufficiency of Notice Liberally Construed

A notice of appeal "must be liberally construed." Cal Rules of Court 8.100(a)(2). The courts have invoked this rule to overcome a variety of defects. See the following:

- *Walker v Los Angeles County Metro. Transp. Auth.* (2005) 35 C4th 15, 23 CR3d 490 (supreme court held that court of appeal should have construed appeal from order denying new trial as appeal from judgment, not order).
- *City of Los Angeles v Glair* (2007) 153 CA4th 813, 820, 63 CR3d 280 (court could not consider order denying new trial motion (following *Walker*), because underlying judgment was no longer appealable).
- *D'Avola v Anderson* (1996) 47 CA4th 358, 54 CR2d 689 (notice of appeal found sufficient even though case number on notice of appeal was incorrect; no evidence that respondent was prejudiced by error).
- *Beltram v Appellate Dep't* (1977) 66 CA3d 711, 714, 136 CR 211 (appeal by city considered appeal on behalf of city employee as well, despite failure to designate employee as appealing party).
- *Shonkoff v Dant Inv. Co.* (1968) 258 CA2d 101, 65 CR 463 (notice of appeal expressly identified wrong (and unappealable) order, but court treated it as notice of appeal from judgment).

Courts have cured a defective notice of appeal by construing the designation of the record on appeal to be the notice. *Department of Indus. Relations, Div. of Labor Standards Enforcement v Nielsen Constr. Co.* (1996) 51 CA4th 1016, 1024, 59 CR2d 785. But see *Bosetti v United States Life Ins. Co.* (2009) 175 CA4th 1208, 1224, 96 CR3d 744 (court declined to construe designation of record on appeal as notice of appeal, because designation did not indicate or even suggest intention to appeal dismissal).

PRACTICE TIP: Despite the rule of liberal construction, make sure to carefully craft the notice of appeal to avoid such complications.

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§7.15 C. Form: Notice of Appeal (Superior Court)

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF APPEAL

To the clerk of the superior court of the State of California for the County of _ _[*name*]_ _**:**

PLEASE TAKE NOTICE that _ _[*name of party/plaintiff/defendant*]_ _ **hereby appeals from**

[*Add one of the following alternatives*]

[*Alternative 1: If appeal is from the judgment*]

the judgment entered on or about _ _[*date*]_ _**.**

[*Alternative 2: If appeal is from an appealable order*]

the order _ _[*specify order*]_ _ **entered on or about** _ _[*date*]_ _**.**

[*Alternative 3: If two or more matters are appealed*]

the judgment entered on or about _ _[*date*]_ _**, in favor of** _ _[*name of party*]_ _**, plaintiff, and the order entered on or about** _ _[*date*]_ _**, granting plaintiff a limited new trial on the issue of damages.**

[*Alternative 4: If appeal is from part of the judgment*]

the judgment entered on or about _ _[*date*]_ _**, except the portion determining that** _ _[*specify portion of judgment not appealed from*]_ _**.**

[*Continue*]

Notice of entry of judgment was served by mail by plaintiff on _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _**,** _ _[*plaintiff and appellant/ defendant and appellant*]_ _

Comment: The alternatives shown are suggestions and should be modified as needed to suit the facts of the particular case. When the appeal is taken from only part of a judgment, use special care in drafting the notice of appeal. It may be necessary to quote in full the portion of the judgment from which the appeal is taken. In other cases, a simple specification as in Alternative 4 will suffice.

The notice of appeal is not required to state the date of service of the notice of entry of judgment (which triggers the running of the 60-day period to appeal under Cal Rules of Ct 8.104(a); see §7.32), but counsel should include this information for the court's convenience. The date of service of the notice of entry of judgment is one of the items of information required in the civil case information statement that the appellant must file under Cal Rules of Ct 8.100(g).

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Source: Civil Litigation/California Civil Appellate Practice/7 Filing the Notice of Appeal/§7.16 D. Form: Notice of Appeal/Cross-Appeal (Unlimited Civil Case) (Judicial Council Form APP-002)

§7.16 D. Form: Notice of Appeal/Cross-Appeal (Unlimited Civil Case) (Judicial Council Form APP-002)



APP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
☐ **NOTICE OF APPEAL** ☐ **CROSS-APPEAL** **(UNLIMITED CIVIL CASE)**	CASE NUMBER:

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. NOTICE IS HEREBY GIVEN that *(name)*:
   appeals from the following judgment or order in this case, which was entered on *(date)*:
   - ☐ Judgment after jury trial
   - ☐ Judgment after court trial
   - ☐ Default judgment
   - ☐ Judgment after an order granting a summary judgment motion
   - ☐ Judgment of dismissal under Code of Civil Procedure sections 581d, 583.250, 583.360, or 583.430
   - ☐ Judgment of dismissal after an order sustaining a demurrer
   - ☐ An order after judgment under Code of Civil Procedure section 904.1(a)(2)
   - ☐ An order of judgment under Code of Civil Procedure section 904.1(a)(3)–(13)
   - ☐ Other *(describe and specify code section that authorizes this appeal)*:

2. For cross-appeals only:
   a. Date notice of appeal was filed in original appeal:
   b. Date superior court clerk mailed notice of original appeal:
   c. Court of Appeal case number *(if known)*:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-002 [Rev. January 1, 2007]

NOTICE OF APPEAL/CROSS-APPEAL (UNLIMITED CIVIL CASE)
(Appellate)

Cal. Rules of Court, rule 8.100
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

NOTICE TO PARTIES: A copy of this document must be mailed or personally delivered to the other party or parties to this appeal. A PARTY TO THE APPEAL MAY NOT PERFORM THE MAILING OR DELIVERY HIMSELF OR HERSELF. A person who is at least 18 years old and is not a party to this appeal must complete the information below and mail (by first-class mail, postage prepaid) or personally deliver the front and back of this document. When the front and back of this document have been completed and a copy mailed or personally delivered, the original may then be filed with the court.

PROOF OF SERVICE

☐ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My residence or business address is *(specify):*

3. I mailed or personally delivered a copy of the *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* as follows *(complete either a or b):*

   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.

      (1) I enclosed a copy in an envelope **and**

         (a) ☐ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.

         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      (2) The envelope was addressed and mailed as follows:

         (a) Name of person served:

         (b) Address on envelope:

         (c) Date of mailing:

         (d) Place of mailing *(city and state):*

   b. ☐ **Personal delivery.** I personally delivered a copy as follows:

      (1) Name of person served:

      (2) Address where delivered:

      (3) Date delivered:

      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

Comment: This is an optional Judicial Council form for filing a notice of appeal or cross-appeal under Cal Rules of Ct 8.100. The form includes a proof of service.

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IV. FILING REQUIREMENTS

§7.17 A. Notice Filed With Superior Court Clerk

The original, signed notice of appeal, along with the required filing fee, must be filed with the clerk of the superior court that rendered the judgment, not the court of appeal. Cal Rules of Ct 8.100(a)(1).

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§7.18 1. Clerk's Duty to File Notice

The clerk of the superior court may not refuse to accept the notice of appeal on the ground that, in the clerk's opinion, the order is not appealable. When a notice of appeal is timely presented for filing but is improperly rejected by the court clerk, a subsequently filed notice of appeal will be considered timely. *Lezama-Carino v Miller* (2007) 149 CA4th 55, 59, 56 CR3d 671 (notice of appeal considered timely although filed 2 days late; appellant had timely presented notice to court clerk, who wrongly refused to file it because of pending application for waiver of costs); *Rapp v Golden Eagle Ins. Co.* (1994) 24 CA4th 1167, 1169, 1172, 30 CR2d 126 (clerk had duty to file timely notice of appeal regardless of whether proper filing fee was tendered).

The clerk is under no duty to "file" an obviously untimely notice of appeal. In such a case, the notice should be stamped "Received but not filed." *People v Funches* (1998) 67 CA4th 240, 244, 78 CR2d 882 (notice of appeal filed 12 years after criminal case).

On appealability of judgments and orders, see chap 3. On filing fees, see §§7.22-7.29.

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§7.19 2. Clerk's Receipt of Notice

Merely mailing the notice of appeal to the clerk before the deadline is insufficient unless the notice is actually received and filed by the clerk within the time allowed by the rules. *In re Gary R.* (1976) 56 CA3d 850, 852 n2, 129 CR 26 (notice mailed 1 day before deadline but filed by clerk 3 days late; appeal dismissed); *Nu-Way Assocs. v Keefe* (1971) 15 CA3d 926, 928, 93 CR 614 (mailed 1 day before judgment but filed by clerk 1 day late; appeal dismissed); *Estes v Chimes* (1940) 40 CA2d 41, 42, 104 P2d 74 (mailed 60 days after judgment but filed by clerk 8 days late; appeal dismissed).

PRACTICE TIP: Because clerks' offices occasionally experience severe delays in opening, processing, and filing mail, counsel should personally file the notice of appeal, particularly when the time to file is about to expire.

A late-filed notice may be allowed if it is shown to have been received by the clerk before time expired, but establishing the actual date of receipt by mail may be difficult. See *Pacific S.W. Airlines v Dowty-Rotol, Ltd.* (1983) 144 CA3d 491, 193 CR 25 (notice received 4 days before time expired but filed 29 days after deadline; appeal allowed).

NOTE: The "prison-delivery" rule, which provides that a self-represented prisoner's notice of appeal in criminal cases is considered timely filed if delivered to prison authorities within the filing period, also applies to appeals by self-represented prisoners in civil cases. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595.

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B. Service of Notice of Appeal

§7.20 1. By Appellant

The appellant must serve the notice of appeal on all parties under Cal Rules of Ct 8.25(a) and file proof of service with the clerk of the superior court. Cal Rules of Ct 8.100(a)(1). Failure to serve the notice will not prevent its filing or affect the appeal's validity, but the appellant may be required to remedy the failure on reasonable notice. Cal Rules of Ct 8.100(a)(3).

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§7.21 2. By Court Clerk

The clerk of the superior court must mail notification of the filing of the notice of appeal to the attorney of record for each party or, if a party is unrepresented, to that party's last known address. Cal Rules of Ct 8.100(e)(1). The clerk must also mail notification of the filing of the notice of appeal to the clerk of the reviewing court; however, the clerk's failure to give this notice does not affect the validity of the appeal. Cal Rules of Ct 8.100(e)(6).

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C. Filing Fees

§7.22 1. Amount of Fee

The current fee for filing a notice of appeal in a civil case is $655 and should be in the form of a check, money order, or cash. Govt C §§68926, 68926.1(b); Cal Rules of Ct 8.100(b)(1).

NOTE: A separate filing fee is required for each separate notice of appeal or cross-appeal, although multiple parties may appeal in a single notice.

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2. Exemption or Waiver of Fee

§7.23 a. Exemption for Public Agencies and Officials

The state, counties, cities, and specified public agencies and officials are exempt from paying filing fees, including the fee for a notice of appeal. Govt C §6103. When the public agency prevails in an action, the fee that would have been paid but for the section 6103 exemption is added to the judgment and paid to the clerk (not to the public agency) by the losing party. Govt C §6103.5.

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§7.24 b. Exemption for Juveniles

There is no fee in appeals or writ petitions in juvenile cases or in proceedings to declare a minor free from parental custody or control. Govt C §68926.

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§7.25 c. Exemption for Proceedings Under Lanterman-Petris-Short Act

A filing fee may not be charged in appeals from proceedings under the Lanterman-Petris-Short Act (Welf & I C §§5000-5120), relating to challenges to involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism. Govt C §68926.

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§7.26 d. Fee Waiver

The procedures for obtaining a fee waiver are found in Govt C §§68630-68641 and in Cal Rules of Ct 3.50-3.58, 8.26. An application for an initial fee waiver must be made on the form Request to Waive Court Fees (Judicial Council Form FW-001). Cal Rules of Ct 8.26(a). The appellant should submit the application with the notice of appeal in the superior court that issued the judgment or order being appealed. Cal Rules of Ct 8.26(b)(1).

Granting the application for initial fee waiver in the supreme court or court of appeal automatically includes waiver of the following (Cal Rules of Ct 8.26(e)):

- The filing fee for the notice of appeal;
- The filing fee for an original proceeding;
- The filing fee for a petition for review; and
- The court fee for telephonic oral argument.

If the application is incomplete or the fee has not been paid, the clerk may not refuse to file any paper accompanying the application. Govt C §68634.5(b).

For more discussion of fee waivers, see California Civil Procedure Before Trial, chap 10 (4th ed Cal CEB 2004).

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§7.27 3. Delivery of Fee to Superior Court

The check or money order for the filing fee must be delivered to the superior court clerk with the notice of appeal and should be made payable to the "Clerk of the Court of Appeal." If cash is paid, the clerk must provide a receipt. Cal Rules of Ct 8.100(b)(1). The clerk of the superior court forwards the fee to the clerk of the appellate court. Cal Rules of Ct 8.100(e)(5).

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§7.28 4. Deposit for Preparation of Clerk's Transcript

The notice of appeal must be accompanied by a $100 deposit for preparation of the clerk's transcript, unless the superior court waives the deposit under Cal Rules of Ct 3.50-3.58. This deposit is in addition to the $655 filing fee described in §7.22 (Govt C §§68926, 68926.1(b)); it is forfeited if the appeal is abandoned or dismissed before the record is filed in the reviewing court. Govt C §68926.1(a); Cal Rules of Ct 8.100(b)(2).

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§7.29 5. Dismissal for Failure to Pay Filing Fees

The court clerk must accept the notice of appeal for filing even if the filing fee and transcript deposit, or a fee waiver application or order under Cal Rules of Ct 3.50-3.58, are not presented with the notice of filing. Cal Rules of Ct 8.100(b)(3); *Lezama-Carino v Miller* (2007) 149 CA4th 55, 59, 56 CR3d 671 (court clerk wrongly refused to file notice of appeal because of pending application for waiver of costs); *Rapp v Golden Eagle Ins. Co.* (1994) 24 CA4th 1167, 1169, 1172, 30 CR2d 126 (clerk had duty to file timely first notice of appeal regardless of whether proper filing fee was tendered).

The court of appeal may dismiss the appeal if, within 15 days after the court sends notice of its intention to dismiss, the appellant fails to pay the fee or file an application under Cal Rules of Ct 8.26, if one has not already been filed and denied. Cal Rules of Ct 8.100(c). The reviewing court may vacate a dismissal under Rule 8.100(c) for good cause shown. Cal Rules of Ct 8.100(c)(3).

PRACTICE TIP: The reviewing court is more likely to grant a motion for relief from default judgment for failure to pay fees when counsel assures the reviewing court that fees will be forwarded to the court immediately.

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V. TIMING REQUIREMENTS FOR FILING NOTICE OF APPEAL

§7.30 A. Importance of Timely Filing

Only a timely filed notice of appeal can invoke appellate court jurisdiction. *Van Beurden Ins. Servs., Inc. v Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 56, 61 CR2d 166, citing *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 666, 125 CR 757.

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§7.31 B. No Relief From Late Filing

The court can neither extend the time to file the notice nor hear an appeal that was not initiated by proper and timely notice. Cal Rules of Ct 8.104(b); *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 125 CR 757. Further, the reviewing court may not relieve a party of a default judgment for failing to file a timely notice of appeal. Cal Rules of Ct 8.60(d).

PRACTICE TIP: Because of the irremediable consequences of a tardy filing, counsel should ensure that the notice of appeal is filed within the time required by Cal Rules of Ct 8.104, subject to any extensions that may apply under Cal Rules of Ct 8.108 (*e.g.,* a valid motion for new trial extends the time to file a notice of appeal) or other special time limits as provided by Cal Rules of Ct 8.66 (emergency extensions of time because of public calamity) or CCP §870.

In unusual circumstances, appellate courts may treat a late, purported appeal as a petition for a writ of mandate. *Olson v Cory* (1983) 35 C3d 390, 400, 197 CR 843. See *Drum v Superior Court* (2006) 139 CA4th 845, 43 CR3d 279 (court construed late appeal to be petition for writ of mandate because of uncertainty of law on appealability of sanctions orders at issue).

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C. Computing Time for Filing Appeal

§7.32 1. Basic Rule

Under Cal Rules of Ct 8.104(a), the time for filing a notice of appeal from a judgment or an appealable order, in the absence of an otherwise applicable rule, is the earliest of the following:

- 60 days after the superior court clerk serves the party filing the notice of appeal with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served;
- 60 days after the party filing the notice of appeal serves or is served by a party a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by a proof of service; or
- 180 days after the date of entry of the judgment.

For purposes of this rule, "judgment" also means "appealable order" if the appeal is from an appealable order. Cal Rules of Ct 8.104(f). On appealable orders, see §§3.26-3.47.

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§7.33 2. Date of Service of Notice of Entry of Judgment

The normal 60-day period for filing a notice of appeal begins when notice of entry of judgment is served either by any party or by the court clerk. Cal Rules of Ct 8.104(a)(1)-(2). The date of service is controlling, *not* the date of entry itself. In *Delmonico v Laidlaw Waste Sys.* (1992) 5 CA4th 81, 6 CR2d 599, the court held that the 60-day period was triggered by the service of a notice of entry of judgment that incorrectly stated the date on which judgment had been entered. The court found that, as long as a judgment had been entered before service of the notice of entry, the date of entry was irrelevant and could not have misled the appellant, because the time for appealing runs from the date of service of notice of entry, *not* the date of entry of the judgment.

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§7.34 a. Manner of Service of Notice of Entry of Judgment

To trigger the running of the 60-day appeal period, a party must serve or be served with a "'Notice of Entry' of judgment." Cal Rules of Ct 8.104(a)(2). A file-stamped copy of the judgment itself may be used in place of the notice of entry of judgment to start the time running. Cal Rules of Ct 8.104(a)(1)-(2). See *Alan v American Honda Motor Co.* (2007) 40 C4th 894, 905, 55 CR3d 534 (Rule 8.104(a) is satisfied by file-stamped copy of judgment or appealable order). The time for filing a notice of appeal is *not* extended when service is by mail (CCP §1013(a)) or when service is electronic (CCP §1010.6(a)(6)).

California Rules of Court 8.104(a)(1)-(2) allows service by any method permitted by the Code of Civil Procedure, including electronic service when permitted under CCP §1010.6 and Cal Rules of Ct 2.250-2.260. Cal Rules of Ct 8.104(a)(4).

NOTE: An e-mail notice of where to find a triggering document under Cal Rules of Ct 8.104(a) is not electronic service of the document. *Insyst, Ltd. v Applied Materials, Inc.* (2009) 170 CA4th 1129, 1140, 88 CR3d 808.

PRACTICE TIP: Do not assume that there has been no notice of entry of judgment served merely because no notice has been received. The time for appeal begins to run with *service* of the notice of entry of judgment or of the conformed copy of the judgment, regardless of whether it is actually received by the appellant. See *Glasser v Glasser* (1998) 64 CA4th 1004, 1010, 75 CR2d 621.

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§7.35 b. Service of Notice by Clerk of Court

In any contested action or special proceeding in which a prevailing party is not represented by counsel, the court clerk *must* mail notice of entry of judgment to all parties. CCP §664.5(a)-(b). The clerk *must* also give notice of entry of a judgment of legal separation, a final judgment of dissolution, a judgment of nullity, a judgment establishing parental relationship, and a judgment regarding custody or support. Cal Rules of Ct 5.134.

When serving a notice of entry of judgment or a filed-stamped copy of the judgment under Cal Rules of Ct 8.104(a)(1), the court clerk must serve a single, self-sufficient document satisfying all of the rule's conditions, including showing when the document was served. See *Alan v American Honda Motor Co.* (2007) 40 C4th 894, 905, 55 CR3d 534 (single-document requirement can be satisfied by attaching certificate of mailing to notice of entry of judgment or file-stamped copy of judgment).

Unless the clerk's service of the notice is mandatory, the notice must affirmatively state that it was given "upon order of the court" or "under section 664.5," and a certificate of mailing the notice must be executed and placed in the file. *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, 135 CR2d 654; *Adaimy v Ruhl* (2008) 160 CA4th 583, 588, 72 CR3d 926 (clerk's mailing of notice of entry of judgment to only one of plaintiff's two attorneys was sufficient to start time for filing notice of appeal).

When a matter is taken under submission, a minute order stating that a statement of decision and judgment were signed constitutes notice of entry of judgment for purposes of Cal Rules of Ct 8.104(a). *Hughes v City of Pomona* (1998) 63 CA4th 772, 775, 74 CR2d 344.

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§7.36 c. Service of Notice by Party

When the clerk does not strictly comply with Cal Rules of Ct 8.104(a)(1), parties seeking to start the clock on a potential appeal should serve their own notice of entry of judgment in compliance with Cal Rules of Ct 8.104(a)(2). Appealing parties should file the notice of appeal within 60 days of service of the notice by the clerk or service of the notice by a party, even if there are questions about compliance with the rule.

A party may serve a file-stamped copy of the judgment instead of the notice of entry of judgment. Cal Rules of Ct 8.104(a)(1)-(2); *Estate of Crabtree* (1992) 4 CA4th 1119, 6 CR2d 224.

CAUTION: This can be a trap for the unwary, particularly if the date of service of the file-stamped copy of the judgment is not shown on a proof of service. See *Filipescu v California Hous. Fin. Agency* (1995) 41 CA4th 738, 48 CR2d 736 (time for filing notice of appeal started to run on service of file-stamped copy of judgment rather than when notice of entry of judgment was served).

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§7.37 3. When No Notice of Entry of Judgment Is Mailed or Served

If no notice of entry of judgment is mailed by the clerk or served by a party, a notice of appeal must be filed no later than 180 days after the date the judgment or appealable order is entered. Cal Rules of Ct 8.104(a)(3), (f); *Kimball Ave. v Franco* (2008) 162 CA4th 1224, 1228, 78 CR3d 352 (although plaintiff received no notice of entry of judgment, plaintiff was still required to file notice of appeal 180 days from judgment's entry).

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§7.38 a. Entry Date Sets Outer Limit for All Appeals and Extensions

The date on which a judgment or an appealable order is entered is crucial for computing both the time for filing the notice of appeal (if no notice of entry of judgment is mailed or served) and any extensions of that time. The 180-day period that begins to run on the date of entry of the judgment or order represents the last possible date on which a notice of appeal can be filed (assuming no notice of entry of judgment was mailed or served), with or without any extension under Cal Rules of Ct 8.108. Cal Rules of Ct 8.104(a)(3). Moreover, the extended time for filing a notice of appeal, after a posttrial motion, is fixed by the date of entry of the posttrial order. Cal Rules of Ct 8.108.

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§7.39 b. Entry Date Methods

The date on which a judgment or order is "entered" depends on the method the particular county uses to enter judgments. Cal Rules of Ct 8.104(d).

PRACTICE TIP: Counsel should ascertain the method used to enter judgments in a given county before computing the time to file the notice of appeal.

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§7.40 (1) County Maintains Judgment Book

In counties using a judgment book, the date of entry is the date the individual judgment is entered in the judgment book. Cal Rules of Ct 8.104(d)(1).

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§7.41 (2) County Does Not Maintain Judgment Book

Counties that do not maintain a judgment book may place judgments in the file of actions and either microfilm the judgment or enter the judgment in the register of actions or in the court's electronic data-processing system. CCP §668.5. For example, Orange, Los Angeles, and San Francisco counties, among others, use microfilm systems for recordkeeping.

For judgments recorded by one of the methods authorized in §668.5, the date of entry is "the date of filing the judgment with the clerk." This provision has been interpreted to mean that the date of entry is the date the clerk files the judgment. *County of Los Angeles v Ranger Ins. Co.* (1994) 26 CA4th 61, 31 CR2d 257. The date of "entry" of the judgment or order is not affected by the date of entry in the register of actions or data-processing system nor the date the judgment is microfilmed for the court's records. *Ten Eyck v Industrial Forklifts Co.* (1989) 216 CA3d 540, 543, 265 CR 29.

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§7.42 c. Entry Date When Judgment Is Modified

If the trial court modifies a judgment after entry of the original judgment, the date of entry is the date the modified judgment was entered. See *Neff v Ernst* (1957) 48 C2d 628, 634, 311 P2d 849. If modification merely corrects a simple clerical error, the date of entry remains the original date. *Fallon v Britten* (1890) 84 C 511, 514, 24 P 381; *CC-California Plaza Assoc. v Paller & Goldstein* (1996) 51 CA4th 1042, 59 CR2d 382.

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4. Date of Entry of Orders

§7.43 a. When Order Entered in Permanent Minutes

A notice of appeal from an appealable order must be filed within 60 days after a notice of entry of the ruling has been served. Cal Rules of Ct 8.104(a). The date of entry of an order is the date the order is entered in the permanent minutes, *unless* the minute order expressly directs that a written order be prepared, signed, and filed, in which event the date of entry is the date the signed order is filed. Cal Rules of Ct 8.104(d)(2). See *Hughey v City of Hayward* (1994) 24 CA4th 206, 30 CR2d 678.

If the minute order granting the motion directs a party to prepare and submit a formal order to the court, entry of the order does not occur until the signed formal order is filed, and the 60-day period does not begin to run until notice of entry of that formal order is served. *Barak v Quisenberry Law Firm* (2006) 135 CA4th 654, 37 CR3d 688.

PRACTICE TIP: Counsel should carefully note the date the order is entered in the permanent minutes and ensure that the notice of appeal is filed within 180 days after the entry date or 60 days after the date of mailing the notice of entry of the order, even if a later written order is contemplated under relevant local rules or Cal Rules of Ct 3.1312. Of course, if the minute order itself directs the preparation of the written order, then the time for appeal will not begin until the filing of the signed written order.

JUDICIAL PERSPECTIVE: Many problems can be avoided by routinely checking the court file after dispositive motions were made and obtaining copies of minute orders when they are entered. If a substantial period of time has gone by without an order, it would be appropriate to ask the judge's clerk about it.

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§7.44 b. When Order Not Entered in Minutes

The date of entry of an appealable order that is not entered in the minutes is the filing date of the order signed by the court. Cal Rules of Ct 8.104(d)(3). See *Cuenllas v VRL Int'l, Ltd.* (2001) 92 CA4th 1050, 112 CR2d 383.

CAUTION: Be careful to note that the date of the appealable order, whether or not it has been entered in the minutes, is the date that will start the time period in which the appeal must be filed. See *Laraway v Pasadena Unified Sch. Dist.* (2002) 98 CA4th 579, 120 CR2d 213.

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§7.45 5. Manner of Entry of Orders

Service of a minute order granting a motion may trigger the 60-day period, but only if it is entitled "Notice of Entry." Cal Rules of Ct 8.104(a)(1); *Bi-Coastal Payroll Serv., Inc. v California Ins. Guar. Ass'n* (2009) 174 CA4th 579, 586, 94 CR3d 562 (order that contains words "Notice of Entry of Order" does not suffice to trigger 60-day period).

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§7.46 6. Date of Entry of Decree of Distribution

The date of entry of a decree of distribution in a probate proceeding is the date of its entry in the judgment book or other permanent court record. Cal Rules of Ct 8.104(d)(4).

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D. Prematurely Filed Notices of Appeal

§7.47 1. Notice Filed After Judgment Rendered

A notice of appeal filed after rendition of the judgment (*i.e.,* when the court announces its order either orally or in writing but before its entry) is considered to have been filed immediately after entry of judgment and is valid. Cal Rules of Ct 8.104(e)(1); *Reynolds v Reynolds* (1978) 86 CA3d 732, 733, 150 CR 423; *Housing Auth. v City Council* (1962) 208 CA2d 599, 601, 25 CR 493.

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§7.48 2. Notice Filed Before Judgment Rendered

A notice of appeal filed before rendition of the judgment but after the trial court announces its intended ruling may, in the appellate court's discretion for good cause, be treated as filed immediately after entry of judgment. Cal Rules of Ct 8.104(e)(2).

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§7.49 3. Liberal Treatment of Premature Notices

A prematurely filed notice of appeal is construed liberally in favor of its sufficiency, especially when the opposing party is neither misled nor prejudiced by the premature filing. See, *e.g., Marriage of Jones* (1998) 60 CA4th 685, 689 n2, 70 CR2d 542 (appeal filed several months before formal written order was entered considered filed immediately after entry of written order); *Marriage of Wood* (1983) 141 CA3d 671, 677, 190 CR 469 (appeal taken from minute order before formal order was signed was treated as valid; no prejudice to parties); *Marcotte v Municipal Court* (1976) 64 CA3d 235, 239, 134 CR 314 (notice of appeal filed "a few days" before any appealable judgment or order had been rendered was treated as valid).

NOTE: Ordinarily, counsel should not deliberately file a premature notice of appeal, because the court of appeal has discretion to disregard premature notices. However, in exceptional circumstances (attorney's or appellant's illness or unavailability or court's chronic failure to receive documents purportedly served by opposing counsel), it may be advisable to file a precautionary notice of appeal early to avoid the risk of dismissal for untimely filing.

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§7.50 4. Effect on Trial Court Jurisdiction

A prematurely filed notice of appeal does not divest the trial court of jurisdiction to enforce the judgment or order under CCP §916(a). *Estate of King* (1953) 121 CA2d 765, 773, 264 P2d 586. On the effect of a validly filed notice of appeal on trial court jurisdiction, see §7.1.

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§7.51 5. No Judgment Entered

A prematurely filed appeal cannot be treated as timely filed under Cal Rules of Ct 8.104(e) when no appealable judgment or order has been entered. In this situation, the appellate court never acquires jurisdiction. *Madsen v Turlock Irrig. Dist.* (1943) 56 CA2d 742, 133 P2d 416. However, several appellate courts have recharacterized the underlying order to make it appealable. See, *e.g., Wilson v Household Fin. Corp.* (1982) 131 CA3d 649, 651, 182 CR 590 (order sustaining demurrer without leave was modified to make it appealable order of dismissal); *Stork v State* (1976) 62 CA3d 465, 467, 133 CR 207 (order granting motion for summary judgment was treated as final judgment to preserve appealability). A court of appeal may choose not to salvage a premature appeal if no appealable judgment or order was ever entered. See *County of Alameda v Johnson* (1994) 28 CA4th 259, 261 n1, 33 CR2d 483. See also *Hadley v Superior Court* (1972) 29 CA3d 389, 394, 105 CR 500 (appellate court issued writ of mandate to compel rendition and entry of judgment by trial court).

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§7.52 E. Special Appeal Periods for Certain Cases Relating to Public Agencies

Special (and shorter) time limits for filing a notice of appeal apply to actions brought under Govt C §§53311-53368.3 and to proceedings to validate public agency actions under CCP §§860-870. See *New Davidson Brick Co. v County of Riverside* (1990) 217 CA3d 1146, 266 CR 432 (applying 30-day period for filing notice of appeal under Govt C §53341). See also CCP §870(b) (stating shortened 30-day time limit for filing notice of appeal in validating proceedings); *Planning & Conserv. League v Department of Water Resources* (1998) 17 C4th 264, 70 CR2d 635 (30-day period for appeals from judgments under CCP §870 also applies to appealable orders); *California Commerce Casino v Schwarzenegger* (2007) 146 CA4th 1406, 1418, 53 CR3d 626 (appeal dismissed because notice of appeal was not filed until 47 days after service of notice of entry of judgment in validating action). For the normal time limits for filing a notice of appeal, see Cal Rules of Ct 8.104(a), discussed in §7.32.

NOTE: In deciding whether to apply the shortened appeal period for validation actions, the appellate court may consider the underlying merits of the appeal to determine whether it is in fact an action subject to the validation statutes. See *Kaatz v City of Seaside* (2006) 143 CA4th 13, 49 CR3d 95 (trial court found action was subject to validation statutes, but when defendant moved to dismiss appeal as untimely under shorter period for appeals from judgments under validation statutes, court of appeal determined that underlying action was not validation proceeding and denied motion).

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§7.53 F. Right to Appeal Suspended

If the right to appeal is suspended, the notice of appeal can be filed within the applicable period once the right is restored. See *e.g., Matera v McLeod* (2006) 145 CA4th 44, 58, 51 CR3d 331 (trial court initially granted defendants' motion for relief from default judgment but then reversed itself on reconsideration; court of appeal found that time to appeal did not run during time judgment was vacated but began to run when judgment was reinstated on entry of order denying motion for relief); *Marriage of Micalizio* (1988) 199 CA3d 662, 245 CR 673 (time to appeal first judgment starts from time that second judgment, which amended first judgment, is dismissed as void).

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§7.54 G. Stipulation to Appeal

The parties cannot invoke appellate court jurisdiction by stipulation or otherwise. *Phillips v Phillips* (1953) 41 C2d 869, 874, 264 P2d 926 (premature notice of appeal); *Marriage of Eben-King & King* (2000) 80 CA4th 92, 95 CR2d 113 (Fam C §2122 does not extend time limits for filing notice of appeal).

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VI. EXTENSIONS OF TIME TO FILE NOTICE OF APPEAL

§7.55 A. Chart: Extensions of Time to Appeal Judgment

The following chart lists the rules for extending time to file a notice of appeal beyond the periods specified in Cal Rules of Ct 8.104(a) and for ascertaining whether counsel can file a precautionary notice of appeal before the trial court has ruled on a motion on which the extension is based without divesting the court of jurisdiction to determine the motion.

NOTE: To establish the date when an extension of time to appeal begins to run, a certificate of mailing (by the clerk) or a proof of service (by a party) is required for all documents mailed under Cal Rules of Ct 8.108. Cal Rules of Ct 8.108(g). This requirement underscores the serious consequence stated in Cal Rules of Ct 8.104(b) that a late notice of appeal must be dismissed.

Extensions of Time to Appeal Judgment

Extension Provision	Event Triggering Extension	Extended Time to File	Outside Time Limit	Trial Court Jurisdiction to Decide Motion After Appeal Filed
1. Motion for new trial denied. Cal Rules of Ct 8.108(b)(1). See §§7.61-7.63.	Motion denied by express order or operation of law. Cal Rules of Ct 8.108(b)(1)(B). See §§7.62-7.63. No extension if motion granted. See §§7.65-7.66.	30 days after clerk mails, or party serves, order denying motion or notice of entry of that order. Cal Rules of Ct 8.108(b)(1)(A). See 7.61.	180 days* from entry of judgment. Cal Rules of Ct 8.108(b)(1)(C). See §7.61.	Yes. See §7.64.
2. Motion to vacate judgment. Cal Rules of Ct 8.108(c). See §§7.72-7.84.	Filing of notice of intention or valid motion** to move to vacate judgment within time prescribed by Cal Rules of Ct 8.104 to file notice of appeal. See §7.74.	Earlier of (1) 30 days after clerk mails, or party serves, order denying motion or notice of entry of that order (Cal Rules of Ct 8.108(c)(1)) or (2) 90 days from date first notice of intention filed (Cal Rules of Ct 8.108(c)(2)). See §§7.76-7.80.	180 days* from entry of judgment. Cal Rules of Ct 8.108(c)(3). See §7.76.	No. See §7.76.
3. Motion for JNOV denied. Cal Rules of Ct 8.108(d). See §§7.88-7.97.	Motion denied by express order or operation of law. No extension when motion granted. See §§7.96-7.97.	Earlier of (1) 30 days after clerk mails, or party serves, order denying motion or notice of entry of that order (Cal Rules of Ct 8.108(d)(1)(A)) or (2) 30 days after denial of motion by operation of law (Cal Rules of Ct 8.108(d)(1)(B)).** See §7.91.	180 days* from entry of judgment. Cal Rules of Ct 8.108(d)(1)(C). See §§7.91-7.95.	No clear rule; see §2.49 on split of authority in this area.
4. Motion to reconsider	Filing valid motion† to	Earlier of (1) 30 days after	180 days* from entry of	See §7.85.

denied. Cal Rules of Ct 8.108(e). See §7.85.	reconsider appealable order under CCP §1008(a). See §7.85.	clerk mails, or party serves, order denying motion or notice of entry of that order (Cal Rules of Ct 8.108(e)(1)) or (2) 90 days from date first notice of intention filed (Cal Rules of Ct 8.108(e)(2)). See §7.85.	judgment. Cal Rules of Ct 8.108(e)(3). See §7.85.	
5. Cross-appeal. Cal Rules of Ct 8.108(f). See §7.98.	First appeal in action filed. See §§7.98, 9.8.	20 days after clerk mails first notice of appeal to party. Cal Rules of Ct 8.108(f)(1). See §7.98.	20 days after clerk mails first notice of appeal to party (Cal Rules of Ct 8.108(f)(1)) or 60 days after service of notice of entry of judgment (Cal Rules of Ct 8.104(a)(1)), whichever is later. See §7.98.	N/A

*The 180-day outside time limit applies only when no notice of entry of judgment or file-stamped copy of the judgment is served by either a party or by the court. See Cal Rules of Ct 8.104(a). In most cases, the date noted under the column "Time to File" will apply.

**If the JNOV (judgment notwithstanding verdict) motion is filed with a motion for new trial, analyze extension of time according to rules for extension of time when motion for new trial motion has been filed under Cal Rules of Ct 8.108(b).

†The Advisory Committee Comment to Cal Rules of Ct 8.108 defines a "valid" motion as meaning only that the motion or notice complies with all procedural requirements, not that the motion is substantively meritorious.

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B. Motion for New Trial

§7.56 1. Time for Appeal Extended by Valid Notice of Intention to Move for New Trial

The time for filing a notice of appeal is extended if (Cal Rules of Ct 8.108(b))

- a valid notice of intention to move for a new trial was filed and served, and either
- the court denied the motion; or
- any party has served acceptance of a conditionally ordered additur or remittitur of damages under a court order finding of excessive or inadequate damages.

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2. Statutory Requirements for Valid Notice of Intention to Move for New Trial

§7.57 a. Filing and Service of Motion

Under CCP §659, the party must file a notice of intention to move for a new trial either before entry of judgment or no later than the earlier of the following dates:

- 15 days after the notice of entry of judgment is either mailed by the clerk or served by any party on the party intending to file the motion for new trial; or
- 180 days after entry of judgment.

NOTE: Code of Civil Procedure §1013 does not extend the time for filing a notice of intention to move for a new trial if the notice of entry of judgment is served by mail.

A notice of intention to move for a new trial may be validly filed before judgment is *entered,* but it may not be filed before judgment is *rendered*. A prematurely filed notice of intention to move for a new trial does not extend the time in which to file a notice of appeal. *Ehrler v Ehrler* (1981) 126 CA3d 147, 151, 178 CR 642.

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§7.58 b. Designation of Grounds

The notice of intention must specify the grounds on which the motion is brought. See CCP §657 (listing grounds). See also §2.17. A notice of intention that fails to list any ground is invalid, and the court has no jurisdiction to hear the motion. *McFarland v Kelly* (1963) 220 CA2d 585, 587, 33 CR 754.

PRACTICE TIP: The notice should state that the motion will be based on one or more of the grounds in exact statutory language. Courts tend to liberally construe the designation of grounds in favor of sufficiency. See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§48-50 (5th ed 2008).

For more on the statutory requirements for a valid notice of intention to move for a new trial, see §§2.16-2.20. For a form of notice of intention to move for new trial, see §§2.64-2.65.

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§7.59 c. Reliance on Affidavits or Minutes

The notice of intention must state whether the motion will be made on "affidavits or the minutes of the court or both." CCP §659. The supreme court has held that this requirement is not jurisdictional, because the moving party's reliance on affidavits or court minutes can be inferred from the statement of the grounds for the motion itself. *Nichols v Hast* (1965) 62 C2d 598, 600, 43 CR 641.

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§7.60 d. Service on Adverse Parties

The notice of intention to move for new trial must be served on "each adverse party." CCP §659. This requirement is jurisdictional; failure to serve the adverse party within the statutory time period is fatal to the notice and the motion. *Spruce v Wellman* (1950) 98 CA2d 158, 160, 219 P2d 472.

PRACTICE TIP: In cases with multiple adverse parties, serve the notice of intention on all parties. If any party who might be adversely affected by the motion is not served, the notice is invalid as to that party. Consequently, the time to appeal is not extended as to that party. *Cox v Certified Grocers Ltd.* (1964) 224 CA2d 26, 31, 36 CR 48.

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§7.61 3. Extension When Motion Denied

When a motion for a new trial is denied, the time for filing a notice of appeal is extended for all parties until the earliest of (Cal Rules of Ct 8.108(b)(1))

- 30 days after the clerk mails or a party serves an order denying the motion or a notice of entry of that order;
- 30 days after denial of the motion by operation of law; or
- 180 days after the date of entry of judgment.

Thus, when a motion for a new trial is denied by express order or by operation of law, any party may file a notice of appeal within 30 days after denial.

NOTE: This 30-day extension may be shortened by the overall time limit of 180 days after entry of judgment. The time for filing a notice of appeal expires absolutely 180 days after the date of entry of judgment, regardless of extensions. Cal Rules of Ct 8.104(a)(3), 8.108(b)(1)(C); *Howard v Lufkin* (1988) 206 CA3d 297, 300, 253 CR 422.

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a. Determining Date Motion Denied

§7.62 (1) When Order Entered on Motion

When a motion for a new trial is expressly denied, the time to appeal is extended 30 days from the date the clerk mails, or a party serves, the order denying the motion or the notice of entry of the order denying the motion. Cal Rules of Ct 8.108(b)(1)(A). To establish the date when an extension begins to run, the order or notice denying the motion must show the date it was mailed by the clerk, and a party must include a proof of service with the notice or order when serving other parties. Cal Rules of Ct 8.108(g).

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§7.63 (2) When Motion Denied by Operation of Law

A motion for new trial is denied by operation of law when the court fails to rule on the motion within 60 days after the earlier of either (CCP §660)

- the date on which the clerk mailed the notice of entry of judgment; or
- the date on which any party served the notice of entry of judgment on the moving party.

If the notice of entry is neither mailed nor served when the notice of intention to move for a new trial is filed, then the motion is denied by operation of law 60 days after the first notice of intention to move for a new trial was filed. CCP §660; *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210, 213, 190 CR 295. In this situation, the 30-day extension for filing a notice of appeal runs from the date the motion was considered denied by operation of law.

NOTE: If a petition for bankruptcy is filed while the motion for a new trial is pending, then the automatic stay in bankruptcy may extend the time to file a notice of appeal. See, *e.g., ECC Constr. Inc. v Oak Park Calabasas Homeowners' Ass'n* (2004) 118 CA4th 1031, 1036, 13 CR3d 580.

For a clerk's mailing of the notice of entry of judgment to be effective, it must comply with the requirements of CCP §664.5. See §7.35.

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§7.64 b. No Need to Wait Until Motion Denied to File Notice of Appeal

California Rules of Court 8.108(b) extends the time for filing an appeal in specified circumstances. It does *not* shorten the 180-day period specified in Cal Rules of Ct 8.104(b)(1)(C). See Cal Rules of Ct 8.108(a) (rule operates only to increase time to appeal, not shorten it). See also *Brice v Department of Alcoholic Beverage Control* (1957) 153 CA2d 315, 320, 314 P2d 807 (opinion decided when outer limit for filing notice of appeal was 60 days, not 180). Counsel can file the notice of appeal within the time allowed by Cal Rules of Ct 8.104(a) without regard to whether a notice of intention to move for a new trial has been filed. The notice of appeal may be filed before, at the same time as, or after the motion for a new trial. *Neff v Ernst* (1957) 48 C2d 628, 634, 311 P2d 849. Thus, a party need not wait until a motion for a new trial is denied before filing a notice of appeal. The superior court has jurisdiction to decide a motion for a new trial while an appeal is pending, because the motion is considered to be "collateral to the judgment." *Weisenburg v Molina* (1976) 58 CA3d 478, 485, 129 CR 813. Tactical reasons (*e.g.,* obtaining an immediate automatic stay of a mandatory permanent injunction or of a peremptory writ of mandate) may exist for filing the notice of appeal concurrently with the motion for a new trial.

PRACTICE TIP: Be especially careful when a notice of intention to move for a new trial is filed long after the entry of judgment. Although a motion for a new trial is normally filed within 15 days after the notice of entry of judgment, CCP §659 permits the notice to be filed, in some circumstances, as late as 180 days after entry. If the notice of intention to move for a new trial is filed late in this 180-day period, counsel should file a notice of appeal without waiting for a decision on the motion, to avoid missing the 180-day outer limit deadline to file the notice of appeal.

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§7.65 4. Order Granting New Trial Appealable

An order granting a new trial is directly appealable. CCP §904.1(a). The time for filing the notice of appeal from this order is computed under Cal Rules of Ct 8.104(a) in the same way as the time for appeals from judgments; that is, the time is calculated from the date of service of notice of the order granting the new trial, from the date the superior court clerk serves the notice of the order granting the motion, or, if no order is served, from the date of entry.

PRACTICE TIP: Counsel for the party moving for a new trial should promptly serve notice of entry of the order granting a new trial on the opposing party to start the appeal period running.

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§7.66 a. No Extension for Appellant

The time for filing a notice of appeal from the underlying judgment is extended only if the motion for a new trial is denied (Cal Rules of Ct 8.108(b)(1)) or any party serves an acceptance of a conditionally ordered additur or remittitur of damages under a court order finding of excessive or inadequate damages. Cal Rules of Ct 8.108(b)(2).

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§7.67 b. Protective Cross-Appeal

If an order granting a new trial is appealed, the party who prevailed on the motion for a new trial may wish to consider filing a protective cross-appeal from the original judgment under Cal Rules of Ct 8.108(f) to ensure that the original judgment will be reviewed if the order granting a new trial is reversed on appeal. See *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 106 CR 1 (without protective cross-appeal, original judgment automatically reinstated and final if order for new trial reversed on appeal). On protective cross-appeals, see §§8.7-8.11.

JUDICIAL PERSPECTIVE: In many cases, the trial court fails to comply with procedural requirements, and orders granting a new trial are reversed. Too often, no protective cross-appeal is filed, and the attorney and client are left with no choice—the verdict, no matter how wrong, must stand.

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§7.68 5. Risks to Nonmoving Party in Multiparty Cases

In a multiparty case, if some but not all parties aggrieved by a judgment move for a new trial, the nonmoving parties risk losing the right to appeal if they wait for a decision on the motion for a new trial before filing a notice of appeal, because a motion for a new trial extends the time for all parties to file a notice of appeal *only if the motion is denied*. Cal Rules of Ct 8.108(b)(1). If the motion is granted, the time for filing an appeal is not extended. Cal Rules of Ct 8.104(a), 8.108(b). Thus, if a motion for a new trial is granted for just one party after the time for appealing from the judgment has lapsed, or if the parties receive notice of an order granting a new trial after the appeal period has run, the nonmoving parties will be precluded from appealing the judgment if the order granting the new trial is later reversed on appeal.

PRACTICE TIP: Never allow the period for appeal to lapse by relying on the fact that another party has presented a valid notice of intention to move for a new trial, because there is a risk that the motion might be granted. Each party aggrieved by the judgment should file a separate motion for a new trial or a precautionary notice of appeal while another party's motion for a new trial is pending.

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§7.69 6. Effect of Motion for Partial New Trial

When both sides in a lawsuit are aggrieved by the judgment, *e.g.,* when a plaintiff in a personal injury action is satisfied with the part of the judgment holding the defendant liable but dissatisfied with the damage award, and the defendant is dissatisfied with the liability portion of the judgment, a party can limit a motion for a new trial to the parts of a judgment adverse to that party's interests. CCP §657. When a party moves for a limited new trial, the opposing party must decide whether to file a similar motion or whether, and when, to file a notice of appeal.

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§7.70 a. When Partial New Trial Motion Granted

The party opposing the motion for a limited new trial can either appeal the order granting the motion for a partial new trial (CCP §904.1) or wait and appeal from the judgment entered after the partial new trial. However, if the party decides to wait to appeal the judgment after the new trial, he or she will not be permitted to appeal the order granting the partial new trial (on which the time for appeal will have long since expired). But see *Rose v Melody Lane* (1952) 39 C2d 481, 247 P2d 335 (court, without discussion, entertained appeal both from motion granting partial new trial and from original judgment).

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§7.71 b. When Partial New Trial Motion Denied

If one party files a limited motion for a new trial and the motion is denied, the time for all parties to appeal from the full judgment is extended by the same periods under the same conditions as if a full motion for a new trial had been made and denied. Cal Rules of Ct 8.108(b)(1). The rule makes no distinction between motions for full and partial new trials.

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C. Motion to Vacate Judgment

§7.72 1. Valid Motion Extends Time When Motion Denied

A valid motion to vacate the judgment (or a valid notice of intention to move to vacate the judgment) extends the time in which a notice of appeal may be filed after the motion is denied. Cal Rules of Ct 8.108(c). A valid motion or notice is one that complies with CCP §§663-663a. See §§2.54-2.55.

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§7.73 2. Motion to Vacate Must Be Made Before Appeal

The motion to vacate must be made *before* a notice of appeal is filed. Unlike a motion for a new trial, a motion to vacate judgment is considered a direct attack on the judgment. Once the notice of appeal is filed, the trial court is divested of jurisdiction and cannot hear a motion to vacate. *Copley v Copley* (1981) 126 CA3d 248, 298, 178 CR 842; *Mallick v Superior Court* (1979) 89 CA3d 434, 438, 152 CR 503.

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3. Statutory Requirements for Valid Motion to Vacate

§7.74 a. Filing and Service of Motion

A party must file a motion to vacate the judgment either before entry of judgment *or* within the earliest of (CCP §663a)

- 15 days after the date of mailing the notice of entry of judgment by the clerk;
- 15 days after the date of service by any party of such notice of entry of judgment; or
- 180 days after the date of entry of judgment.

Although Cal Rules of Ct 8.108(c) states that a motion to vacate the judgment must be filed "within the time prescribed by rule 8.104 to appeal from the judgment," counsel should follow the shorter time prescribed in CCP §663a. In addition, a notice of intention to move to vacate judgment must be served on the adverse party. CCP §663a.

NOTE: The provisions of CCP §1013, extending time to act when a document is served by mail, do not apply to extend the time for filing a motion to vacate judgment. CCP §1013(a).

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§7.75 b. Designation of Grounds

A motion to vacate judgment must designate the grounds on which the motion is made. It must also specify the particulars in which the legal basis for the decision is not consistent with or supported by the facts or in which the judgment or decree is not consistent with the special verdict. CCP §663a. A motion that fails to specify a recognized ground for vacation of judgment is invalid and will not extend the time for appeal under Cal Rules of Ct 8.108(c). *Payne v Rader* (2008) 167 CA4th 1569, 1575, 85 CR3d 174 (motion to vacate judgment following demurrer sustained without leave to amend was invalid; demurrer only tests sufficiency of pleadings, and plaintiff was not asking court to enter different judgment); *Lamb v Holy Cross Hosp.* (1978) 83 CA3d 1007, 1010, 148 CR 273 (notice of motion was invalid because it did not set out recognized grounds for vacation of judgment).

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§7.76 4. Computing Extension After Filing Valid Notice of Intention to Move to Vacate Judgment

Under Cal Rules of Ct 8.108(c), a motion to vacate judgment extends the time for filing a notice of appeal from the judgment for *all parties* until the earliest of

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;
- 90 days after filing the first notice of intention to move to vacate or the motion itself; or
- 180 days after entry of judgment.

The provisions of CCP §1013, extending the time to act when documents are served by mail, do not extend the time for filing a notice of appeal. CCP §1013(a). The date of entry is governed by Cal Rules of Ct 8.104(d). See §7.32.

NOTE: California Rules of Court 8.108(c) extends the time for appeal following denial of a motion to vacate judgment but cannot shorten the outer-limit deadline of 180 days to file a notice of appeal found in Cal Rules of Ct 8.104(a)(3). *Maides v Ralphs Grocery Co.* (2000) 77 CA4th 1363, 92 CR2d 542. See Cal Rules of Ct 8.108(a).

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§7.77 a. When Motion Denied

The time for all parties to file a notice of appeal after denial of a motion to vacate judgment is not simply 30 days after entry of the order of denial but the *earliest* of 30 days after the order denying the motion or a notice of entry of that order is mailed; 90 days after filing the first notice of intention to move to vacate or the motion itself; or 180 days after entry of judgment. Cal Rules of Ct 8.108(c).

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§7.78 (1) No Denial by Operation of Law

The trial court has no jurisdictional time limits for deciding a motion to vacate a judgment. The motion cannot be denied by operation of law—any denial must be by express order. Cal Rules of Ct 3.1602. But see *Rolen v Rhine* (1981) 117 CA3d 23, 172 CR 456 (withdrawal of motion to vacate operates as denial as of date motion withdrawn). If an order on a motion to vacate is not entered within the earlier of 180 days after the date on which the original judgment was entered or 90 days after the date on which the notice of intention to move to vacate was filed, then the time to file the notice of appeal expires in accordance with Cal Rules of Ct 8.108(c).

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§7.79 (2) Appealability of Order Denying Motion

An order denying a motion to vacate is itself not ordinarily appealable. *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 871, 151 CR 285. The appeal is properly taken from the underlying judgment, not from the order refusing to vacate it. However, in *Forman v Knapp Press* (1985) 173 CA3d 200, 218 CR 815, the court of appeal noted that the supreme court in *Clemmer* departed from the previously established rule without citing authority and without explicitly disapproving the consistent line of earlier cases. Another court of appeal held that denial of a statutory motion to vacate judgment under CCP §663 was appealable and asserted that the contrary statement in *Clemmer* was dictum. *Howard v Lufkin* (1988) 206 CA3d 297, 302, 253 CR 422. See also *Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389 (order denying motion to vacate default judgment is separately appealable because motion is statutory). Declining to follow these cases that diverged from the holding in *Clemmer*, the court in *City of Los Angeles v Glair* (2007) 153 CA4th 813, 822, 63 CR3d 280, held that the denial of a section 663 motion to vacate a judgment was not separately appealable. The court expressed its hope that the supreme court would provide further guidance and eliminate the confusion on this issue.

PRACTICE TIP: In light of *Clemmer*, the safest policy is to file a timely appeal from the underlying judgment.

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§7.80 b. When Motion Granted

Unlike a motion for a new trial, an extension of time to file a notice of appeal after a notice of intention to move to vacate judgment has been filed is not expressly limited to cases in which the motion to vacate is denied. The event triggering an extension for a motion to vacate the judgment is the *filing* of the notice of intention to move to vacate, not the *denial* of the motion. Cal Rules of Ct 8.108(c).

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§7.81 (1) Prevailing Party's Need for Protective Cross-Appeal

When a motion to vacate judgment is granted, the prevailing party usually has no interest in appealing the judgment, unless it is reinstated after the order vacating it is reversed on appeal. California Rules of Court 8.108(f)(2) provides an extension of time to allow the party who prevailed on the motion to file a protective cross-appeal from the judgment in that instance. See §8.22.

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§7.82 (2) Losing Party May Appeal From New Judgment or Order on Motion

The party who opposes the motion and loses may appeal from the new judgment entered under the order vacating judgment *or* from the order granting the motion. CCP §§663a, 904.1; *Socol v King* (1949) 34 C2d 292, 209 P2d 577.

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§7.83 (3) Multiparty Cases

In multiparty cases, when one party successfully moves to vacate judgment while the other makes no such motion, certain hazards are presented by Cal Rules of Ct 8.108(c). The parties for whom the original judgment remains effective must presumably appeal from the original judgment within the earlier of 90 days after the date on which the notice of intention was filed or 180 days after the date on which original judgment was entered. Cal Rules of Ct 8.108(c). Counsel for parties not participating in the motion to vacate judgment should consider filing such a motion on their own behalf or filing a notice of appeal from the judgment, regardless of the extension of time provisions.

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§7.84 5. Calendaring Time to Appeal When Moving to Vacate Judgment

Because the trial court is divested of jurisdiction to hear a motion to vacate judgment once a notice of appeal has been filed (see §7.30), the participants in the motion cannot file a precautionary notice of appeal to ensure timely filing. The unavailability of the precautionary notice considerably increases the hazards of untimely filing.

It is best to proceed promptly with the motion to vacate judgment to avoid, if possible, the need to rely on the extension provisions of Cal Rules of Ct 8.108(c). If a motion to vacate is filed and the extension provisions come into play, calendar each date as it becomes relevant and expunge dates that no longer apply. Thus, when a notice of intention to vacate judgment is filed by any party, determine the earlier of 180 days after entry of the original judgment (Cal Rules of Ct 8.108(c)(3)) or 90 days after filing the notice of intention to vacate (Cal Rules of Ct 8.108(c)(2)), and enter the earlier date on the calendar. If the order is denied before the date then entered on the calendar, determine the earlier of the calendared date or the date 30 days after the clerk mails, or a party serves, an order denying the motion or a notice of entry of that order (Cal Rules of Ct 8.108(c)(1)). Enter the earlier of the two on the calendar and expunge any inapplicable dates.

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D. Motion for Reconsideration

§7.85 1. Basic Rule

If any party serves and files a valid motion for reconsideration of an appealable order under CCP §1008(a), the time to appeal from that order is extended for all parties until the earliest of (Cal Rules of Ct 8.108(e))

- 30 days after mailing by the court clerk, or service by a party, of an order denying the motion or notice of entry of that order;
- 90 days after the first motion to reconsider is filed; or
- 180 days after the entry of judgment of the appealable order.

See *Branner v Regents of Univ. of Cal.* (2009) 175 CA4th 1043, 96 CR3d 690 (time to appeal not extended by invalid motion to reconsider underlying order).

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§7.86 2. Limitations on Extension of Time to Appeal

California Rules of Court 8.108(e) applies only when a party moves for reconsideration; it does not extend the time to appeal when the court reconsiders an order on its own motion. See Advisory Committee Comment to Cal Rules of Ct 8.108(e). Also, the rule does not take any position on whether particular judgments are subject to motions to reconsider. If counsel wrongly determines that a judgment is subject to a motion to reconsider and thus misses the standard deadlines to appeal, all right to appeal may be lost.

WARNING: A motion for reconsideration does not extend the time to file an appeal when the trial court has signed the judgment while the motion for reconsideration is pending or before the time to file the motion has expired. The entry of judgment divests the trial court of jurisdiction to rule on a reconsideration motion; consequently, the filing of the motion has no effect on the time limits for appeal. *Safeco Ins. Co. v Architectural Facades Unlimited* (2005) 134 CA4th 1477, 1481, 36 CR3d 754.

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§7.87 3. No Position Whether Motion Itself Appealable

California Rules of Court 8.108(e) takes no position on whether an order denying a motion for reconsideration is itself appealable. *City of Los Angeles v Glair* (2007) 153 CA4th 813, 823 n8, 63 CR3d 280 (noting that prevailing view holds that denial of motion for reconsideration is unappealable).

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E. Motion for Judgment Notwithstanding Verdict (JNOV)

§7.88 1. Valid Motion Extends Time When Motion Denied

If a party serves and files a valid motion for JNOV and the motion is denied, any party can appeal the original judgment until the earliest of (Cal Rules of Ct 8.108(d))

- 30 days after the superior court mails, or a party serves, an order denying the motion or a notice of entry of that order;
- 30 days after denial of the motion by operation of law; or
- 180 days after judgment.

An order granting a motion for JNOV does not alter the time for filing a notice of appeal under Cal Rules of Ct 8.104(a).

PRACTICE TIP: California Rules of Court 8.108(d) makes it extremely hazardous for a party to file a motion for JNOV without moving for new trial. Usually, a precautionary notice of appeal cannot be filed without divesting the trial court of jurisdiction to decide the motion for JNOV. *Weisenburg v Molina* (1976) 58 CA3d 478, 485, 129 CR 813. But see *Foggy v Ralph F. Clark & Assocs*. (1987) 192 CA3d 1204, 238 CR 130 (filing of notice of appeal does *not* divest trial court of jurisdiction to decide JNOV motion). However, if the moving party waits for a decision on the motion for JNOV, the time to appeal may lapse. The best course is to file concurrent, timely motions for new trial and JNOV. On concurrent motions, see §§7.91-7.92.

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2. Statutory Requirements for JNOV

§7.89 a. Filing and Service of JNOV

A motion for JNOV *must* be made within the time allowed under CCP §659 for filing a notice of intention to move for new trial. CCP §629. See §7.57.

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§7.90 b. Grounds for JNOV

A JNOV must be granted whenever a motion for directed verdict should have been granted if a previous motion had been made. CCP §629. A motion for directed verdict is a nonstatutory proceeding. Because it can be granted only when there is no substantial evidence that would support a verdict in favor of the plaintiff if such a verdict were given, a motion for directed verdict is "in the nature of a demurrer to the evidence." The same test applies to a motion for JNOV. See §§2.39-2.51. See also 7 Witkin, California Procedure, *Trial* §§436-443 (5th ed 2008); California Trial Practice: Civil Procedure During Trial §§25.5-25.9 (3d ed Cal CEB 1995).

For a form of the motion for JNOV, see §2.68.

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3. Effect of Rulings on Concurrent Motions for JNOV and New Trial

§7.91 a. Extension of Time to File Appeal

A motion for JNOV may, but need not be, joined with a motion for new trial. If both motions are made and *denied,* the time for appealing the original judgment is extended according to the rules for extension of time following denial of a motion for a new trial or motion for JNOV filed separately; that is, the time to file the notice of appeal of the original judgment is extended for all parties until the earliest of (Cal Rules of Ct 8.108(b)(1), (d))

- 30 days after the superior court mails, or a party serves, an order denying the motion or a notice of entry of that order;
- 30 days after denial of the motion by operation of law; or
- 180 days after judgment.

If the motion for a new trial is *granted*, the time is not extended.

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§7.92 b. Concurrent Rulings

The court must rule on the concurrently filed motions at the same time and within the time allowed under CCP §660 for ruling on a motion for a new trial (*i.e.,* within 60 days after service of the notice of intention to move for a new trial, or within 60 days after service of the notice of entry of judgment, whichever is later). CCP §629. If no ruling is made within the allowed time, the motions are denied by operation of law. CCP §629.

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c. Appealability of Court's Decision

§7.93 (1) When Both Motions Denied

If the court denies the motions for both a new trial and JNOV, the aggrieved party may appeal from the judgment, which is thus left undisturbed, and from denial of JNOV, which is made appealable by CCP §904.1(a)(4). If the appellate court finds that the trial court should have granted JNOV, it may simply order judgment to be so entered. CCP §629.

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§7.94 (2) When New Trial Granted but JNOV Denied

If the court grants a new trial but denies JNOV, the order denying the JNOV motion may be appealed separately. CCP §§629, 904.1(a)(4).

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§7.95 (3) When Both New Trial and JNOV Granted

If the court grants both a new trial and JNOV, the order granting the new trial is effective only if, on appeal, the JNOV is reversed and the order granting a new trial is either affirmed or not appealed. CCP §629. The appeal is not from the order granting JNOV but from the judgment entered under the order.

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4. Effect of Ruling on Motion for JNOV

§7.96 a. When Motion for JNOV Granted

If the court grants the motion for JNOV, the time for the parties to appeal from the original judgment is irrelevant. Any aggrieved party may appeal from the new judgment entered under the order granting JNOV. If this judgment is reversed on appeal, the original judgment is reinstated unless the court of appeal orders otherwise. See *Lippert v AVCO Community Developers* (1976) 60 CA3d 775, 131 CR 730.

NOTE: The prevailing party on a motion for JNOV is ordinarily satisfied with the result and has no reason to appeal from it. But if the JNOV is reversed on appeal, that party becomes aggrieved by the reinstated judgment. One court has held that in this situation the time for filing the notice of appeal from the reinstated judgment runs from the date on which the appellate court issues the remittitur. *Lippert v AVCO Community Developers, supra*.

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§7.97 b. When Motion for JNOV Denied

The time for appealing from the order denying a motion for JNOV filed alone is not extended. Cal Rules of Ct 8.108(d)(2). The order denying JNOV is itself appealable and subject to the same basic 60-day rule of Cal Rules of Ct 8.104. CCP §904.1(a)(4). Thus, if a party files only a motion for JNOV and permits the time to appeal from the original judgment to lapse while awaiting a ruling on the motion, the only appeal that will lie is an appeal from the order of denial of the motion for JNOV. This is significant because an appeal from denial of a JNOV motion (like an appeal from denial of a motion for directed verdict) is narrower in scope than an appeal from the judgment itself. See California Trial Practice: Civil Procedure During Trial §§25.19-25.21 (3d ed Cal CEB 1995).

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F. Cross-Appeal

§7.98 1. Extension of Time to Allow Initial Cross-Appeal

A notice of appeal, timely filed by any party to an action, gives every other party an additional 20 days within which to file a cross-appeal from the same judgment or order. Cal Rules of Ct 8.108(f)(1). The 20-day period begins when the superior court clerk mails notification of the first appeal. This extension is effective only once, after the filing of the first notice of appeal and notification by the clerk. Subsequent notices of appeal or cross-appeal do not trigger additional extensions.

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§7.99 2. Extension Does Not Apply to Collateral Independent Judgment or Order of Time to Allow Initial Cross-Appeal

California Rules of Court 8.108(f)(1) extends the time for filing a cross-appeal only from the same order or judgment in the first appeal. Thus, a timely appeal from a collateral order or an independent order or judgment will not extend the time for filing an appeal from a related order or judgment. *Commercial & Farmers Nat'l Bank v Edwards* (1979) 91 CA3d 699, 703, 154 CR 345 (appeal from posttrial order denying attorney fees did not extend time to file cross-appeal from original judgment).

As with other extension provisions of Cal Rules of Ct 8.108, this rule only extends the time within which a notice of cross-appeal may be filed. It does not extend other deadlines associated with the cross-appeal. On filing cross-appeals, see chap 8.

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G. Pending Cost-Award Proceedings

§7.100 1. No Extension of Time for Appeal From Underlying Judgment

An unresolved cost award can be a trap for the unwary concerning the filing of a notice of appeal from an underlying judgment. The pendency of postjudgment proceedings involving a cost award does not extend the time for filing a notice of appeal from the underlying judgment.

A cost award made after the entry of judgment is separately appealable, even if the underlying judgment is not appealed. *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 285 CR 856.

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§7.101 2. Effect of Notice of Appeal From Underlying Judgment on Cost Award

Although an appeal from a cost award will not raise issues related to the underlying judgment, a timely appeal from the underlying judgment might be considered sufficient to constitute an appeal from both the original judgment and the award of costs, even though a postjudgment cost award is separately appealable under CCP §904.1(a)(1)-(2). This issue has been addressed in several decisions with various results.

In *Grant v List & Lathrop* (1992) 2 CA4th 993, 3 CR2d 654, the notice of appeal from the underlying judgment challenged the appropriateness of awarding costs or attorney fees, but a second notice of appeal from the ensuing award of those costs and fees was not filed. The court of appeal found that because the judgment made an award of attorney fees but left the amount blank, and because the responding party was on notice that the appellant disputed the award of costs and fees, review of the later award of those costs and fees should be considered within the scope of the issues reviewable on appeal from the original judgment. The court stated that when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amount of the award.

A different result was reached in *Polster, Inc. v Swing* (1985) 164 CA3d 427, 436, 210 CR 567, in which the court refused to review a postjudgment award of attorney fees when no separate appeal was taken and when the original judgment made no mention of attorney fees.

Grant v List & Lathrop, supra, was distinguished in *Soldate v Fidelity Nat'l Fin., Inc.* (1998) 62 CA4th 1069, 72 CR2d 404. Although agreeing with the reasoning of *List,* the court of appeal in *Soldate* noted that the appellants in *List* were appealing from an attorney fee award *against* them. In such a situation, the notice of appeal was sufficient to put the respondents on notice that the appellants were contesting the award of attorney fees, even though the specific amount of fees was not yet determined by the trial court. However, when the attorney fee award is *favorable* to the appellant but the judgment does not yet specify the amount of fees, the appellant must file a separate notice of appeal on the fee award after the amount is determined; otherwise, the respondent is not on notice that the appellant is aggrieved with the amount of attorney fees actually awarded by the trial court.

A timely appeal from the underlying judgment was found not to be sufficient to constitute an appeal from both the original judgment and the award of costs in *Hill v Ghamaty* (2006) 143 CA4th 1156, 1172, 50 CR3d 247. In *Hill,* the court refused to extend the reasoning in *List* to a case in which the judgment stated that an attorney fee award "shall be determined by post-judgment application" and the defendant filed a notice of appeal from the judgment before the court ruled on the plaintiff's attorney fees motion. Because the judgment did not expressly award attorney fees but instead left the issues of entitlement and amount of fees for later proceedings, the court held that the notice of appeal cannot be construed to include the postjudgment order on fees.

The court in *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329, also refused to extend the reasoning in *List* to the appellant's failure to appeal a postjudgment award of expert witness fees made under CCP §998. Under that section, the right to fees is not determined until *after* the judgment, and the award is discretionary. As a result, the court in *Fish* found that the order on expert fees was not merely incidental to the judgment and was not necessarily raised by a notice of appeal from the judgment. The postjudgment award of expert fees must be separately challenged by a second notice of appeal.

PRACTICE TIP: When dealing with the postjudgment award or denial of costs or fees, the safest approach is to file a second notice of appeal.

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VII. CIVIL CASE INFORMATION STATEMENT

§7.102 A. Filing Requirements

The appellant must serve and file a Civil Case Information Statement (Judicial Council Form APP-004) in the appellate court. Cal Rules of Ct 8.100(g)(2). The use of the form is mandatory. See §7.105 for a copy of the form.

Before the clerk's record is prepared, the appellate court uses the Civil Case Information Statement to identify issues relating to appealability and timeliness of the appeal. The court also uses it to assist in scheduling time for preparation of the record, to facilitate appropriate assignments, and to identify cases that deserve calendar preference. See, *e.g.,* 1st App Dist IOPP §13.

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§7.103 1. Deadline for Filing Statement

The completed Civil Case Information Statement must be filed within 10 days after the clerk mails the form and a notice advising the appellant to file the statement. Cal Rules of Ct 8.100(g)(2). The form must also be filed by a cross-appellant. See Cal Rules of Ct 8.100(f). The appellant or cross-appellant should serve a copy of the completed form on all parties. Cal Rules of Ct 8.100(g)(2).

A copy of the judgment or order being appealed, indicating the date it was entered, must be attached to the statement. Cal Rules of Ct 8.100(g)(2), 8.104(c). The appellant may also attach a copy of the notice of entry of judgment or order to the statement.

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§7.104 2. Failure to File

If the appellant fails to file the case statement within the 10-day time period, then the appellate clerk will notify the appellant by mail that the statement must be filed within 15 days of the date of the notice. Failure to comply will result in the imposition of monetary sanctions or dismissal of the appeal. Cal Rules of Ct 8.100(g)(3).

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Source: Civil Litigation/California Civil Appellate Practice/7 Filing the Notice of Appeal/§7.105 B. Form: Civil Case Information Statement (Judicial Council Form APP-004)

§7.105 B. Form: Civil Case Information Statement (Judicial Council Form APP-004)

Print

TO BE FILED IN THE COURT OF APPEAL **APP-004**

CIVIL CASE INFORMATION STATEMENT COURT OF APPEAL, _____ APPELLATE DISTRICT, DIVISION _____	Court of Appeal Case Number *(if known)*:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	***FOR COURT USE ONLY***
APPELLANT: RESPONDENT:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
JUDGES *(all who participated in case)*:	Superior Court Case Number:

NOTE TO APPELLANT: You must file this form with the clerk of the Court of Appeal within 10 days after the clerk mails you a notice that this form must be filed. You must attach to this form (1) a copy of the judgment or order being appealed that shows the date it was entered (see Cal. Rules of Court, rule 8.104 for definition of "entered") and (2) proof of service of this form on all parties to the appeal. (CAUTION: An appeal in a limited civil case (Code Civ. Proc., § 85) may be taken ONLY to the appellate division of the superior court (Code Civ. Proc., § 904.2), or to the superior court (Code. Civ. Proc., § 116.710 [small claims cases]).

PART I – APPEAL INFORMATION

A. APPEALABILITY

1. Appeal is from:
   - ☐ Judgment after jury trial
   - ☐ Judgment after court trial
   - ☐ Default judgment
   - ☐ Judgment after an order granting a summary judgment motion
   - ☐ Judgment of dismissal under Code Civ. Proc., §§ 581d, 583.250, 583.360, or 583.430
   - ☐ Judgment of dismissal after an order sustaining a demurrer
   - ☐ An order after judgment under Code Civ. Proc., § 904.1(a)(2)
   - ☐ An order or judgment under Code Civ. Proc., § 904.1(a)(3)–(13)
   - ☐ Other *(describe and specify code section that authorizes this appeal)*:
2. Does the judgment appealed from dispose of all causes of action, including all cross-actions between the parties?
   ☐ Yes ☐ No If no, please explain why the judgment is appealable:

B. TIMELINESS OF APPEAL *(Provide all applicable dates.)*

1. Date of entry of judgment or order appealed from: _____/_____/_____
2. Date that notice of entry of judgment or a copy of the judgment was mailed by the clerk or served by a party under California Rules of Court, rule 8.104: _____/_____/_____
3. Was a motion for new trial, judgment notwithstanding the verdict, reconsideration, or to vacate the judgment made and denied?
   ☐ Yes ☐ No If yes, please specify the type of motion:

   Date motion filed: _____/_____/_____ Date denied: _____/_____/_____ Date denial served: _____/_____/_____
4. Date notice of ☐ appeal *or* ☐ cross-appeal filed: _____/_____/_____

C. BANKRUPTCY OR OTHER STAY

Is there a related bankruptcy case or a court-ordered stay that affects this appeal? ☐ Yes ☐ No *(If yes, please attach a copy of the bankruptcy petition [without attachments] and any stay order.)*

Form Adopted for Mandatory Use
Judicial Council of California
APP-004 [Rev. July 1, 2007]

CIVIL CASE INFORMATION STATEMENT
(Appellate)

Print

APP-004

APPELLATE CASE TITLE:	SUPERIOR COURT CASE NUMBER:

D. APPELLATE CASE HISTORY *(Provide additional information, if necessary, on attachment I.D.)*
Is there now, or has there previously been, any appeal, writ, or other proceeding related to this case pending in any California appellate court? ☐ Yes ☐ No If yes, insert name of appellate court:
Appellate court case no.: Title of case:
Name of trial court: Trial court case no.:

E. SERVICE REQUIREMENTS
Is service of documents in this matter, including a brief or a petition, required on the Attorney General or other nonparty public officer or agency under California Rules of Court, rule 8.29 or a statute? Yes ☐ No ☐ *If yes, please indicate the rule or statute that applies.*

- ☐ Rule 8.29
- ☐ Bus. & Prof. Code, § 17209 (Unfair Competition Act)
- ☐ Bus. & Prof. Code, § 17536.5 (False advertising)
- ☐ Civ. Code, § 51.1 (Unruh, Ralph, or Bane Civil Rights Acts; antiboycott cause of action; sexual harassment in business or professional relations; civil rights action by district attorney)
- ☐ Civ. Code, § 55.2 (Disabled access to public conveyances, accommodations, and housing)
- ☐ Gov. Code, § 4461 (Disabled access to public buildings)
- ☐ Gov. Code, § 12656(a) (False Claims Act)
- ☐ Health & Saf. Code, § 19954.5 (Accessible seating and accommodations)
- ☐ Health & Saf. Code, § 19959.5 (Disabled access to privately funded public accommodations)
- ☐ Other *(please specify statute):*

NOTE: The rule and statutory provisions listed above require service of a copy of a party's brief or petition and brief on the Attorney General or other public officer or agency. Other statutes requiring service on the Attorney General or other public officers or agencies may also apply. (See, e.g., Code Civ. Proc., § 1355; Gov. Code, § 946.6(d); Pub. Resources Code, § 21167.7.)

PART II – NATURE OF ACTION

A. Nature of action *(check all that apply):*

1. ☐ Conservatorship
2. ☐ Contract
3. ☐ Eminent domain
4. ☐ Equitable action a. ☐ Declaratory relief b. ☐ Other *(describe):*
5. ☐ Family law
6. ☐ Guardianship
7. ☐ Probate
8. ☐ Real property rights a. ☐ Title of real property b. ☐ Other *(describe):*
9. ☐ Tort
   - a. ☐ Medical malpractice
   - b. ☐ Product liability
   - c. ☐ Other personal injury
   - d. ☐ Personal property
   - e. ☐ Other tort *(describe):*
10. ☐ Trust proceedings
11. ☐ Writ proceedings in superior court
    - a. ☐ Mandate (Code Civ. Proc., § 1085)
    - b. ☐ Administrative mandate (Code Civ. Proc., § 1094.5)
    - c. ☐ Prohibition (Code Civ. Proc., § 1102)
    - d. ☐ Other *(describe):*
12. ☐ Other action *(describe):*

B. ☐ This appeal is entitled to calendar preference/priority on appeal *(cite authority):*

PART III – PARTY AND ATTORNEY INFORMATION

Please attach to this form a list of all the parties and all their attorneys of record who will participate in the appeal. For the parties, include the following information: the party's name and his or her designation in the trial court proceeding (plaintiff, defendant, etc.). For the attorneys, include the following information: name, State Bar number, mailing address, telephone number, fax number, and e-mail address.

Date:

This statement is prepared and submitted by:

▶ _____
(SIGNATURE OF ATTORNEY OR UNREPRESENTED PARTY)

Comment: The appellant must serve and file copies of this form with the court. Use of the form is mandatory. Failure to file this statement may result in monetary sanctions or dismissal of the appeal. See §7.104.

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8

Filing Cross-Appeals

James R. Goff
Peter Pierce

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I. INTRODUCTION

§8.1 A. Cross-Appeal Defined

Application of the term "cross-appeal" is determined by which party files a notice of appeal first. The first appeal filed in a case is called the "appeal," and subsequent appeals by any party are "cross-appeals." See Cal Rules of Ct 8.108(f); *Life v County of Los Angeles* (1990) 218 CA3d 1287, 1297, 267 CR 557. A cross-appeal must be taken from the same judgment or order that was challenged on the initial appeal. *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 976, 33 CR2d 812. See §8.12.

Appeals from orders or decisions that might have been taken are not cross-appeals. Under CCP §906, a reviewing court is not authorized to review any decision or order from which an appeal might have been taken (but was not). *Berge v International Harvester Co.* (1983) 142 CA3d 152, 158 n1, 190 CR 815. "A decision or order from which an appeal might have been taken" is one that a party must separately appeal from; otherwise, the party will lose the right to appeal from that decision or order. Appeals from these decisions or orders are referred to as appeals, not as cross-appeals. See also §§8.13-8.14.

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§8.2 B. Procedural Guidelines

The procedure for filing a notice of cross-appeal is set by the California Rules of Court. The primary authority for cross-appeals is Cal Rules of Ct 8.108(f). Otherwise, the procedural rules for cross-appeals are essentially the same as for first appeals, which are discussed in chap 7. For an extensive discussion of the specific procedure for filing a cross-appeal, see §§8.22-8.36.

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II. WHEN CROSS-APPEAL IS APPROPRIATE

§8.3 A. Necessity for Cross-Appeal to Change Judgment (Independent Cross-Appeal)

A respondent who intends to argue that the appellate court should change the judgment or order or that the case should be sent back to the trial court for further proceedings must file a notice of cross-appeal. In other words, a respondent who seeks affirmative relief must cross-appeal. *Puritan Leasing Co. v August* (1976) 16 C3d 451, 463, 128 CR 175 (unless party files cross-appeal on particular issue in dispute, that party may be barred from relitigating issue on retrial). This type of cross-appeal is often referred to as an "independent" cross-appeal as opposed to a "protective" cross-appeal. *Life v County of Los Angeles* (1990) 218 CA3d 1287, 1298, 267 CR 557.

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§8.4 1. Respondent's Argument Not Sufficient

A judgment or an order cannot be changed as a result of the arguments in a respondent's brief, because the goal of that brief is to preserve the judgment being attacked by appellant. *California State Employees' Ass'n v State Personnel Bd.* (1986) 178 CA3d 372, 382 n7, 223 CR 826. If respondent simply wants to raise arguments in support of the judgment that were not raised in the trial court, cross-appeal is neither necessary nor appropriate. The court of appeal will affirm if the trial court judgment is correct on any theory. When the trial court's result is correct but its reasoning wrong, new arguments should be raised in respondent's brief and not by cross-appeal. See §§5.12-5.15 (trial court result correct), §13.22 (arguing new theories on appeal).

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§8.5 2. Problem With Preserving Partial Issues

A problem usually arises for respondents who try to defend an appeal by raising an issue outside the scope of the initial appeal. For example, in *Puritan Leasing Co. v August* (1976) 16 C3d 451, 128 CR 175, the appellant appealed the amount of damages awarded under a leasing agreement, and the respondent countered with an argument that the agreement was supported by inadequate consideration. The court held that the issue of consideration was necessarily resolved against respondent in the trial court and that that part of the judgment was not brought before the court on the appeal from the award of damages. Later, in *Puritan Leasing Co. v Superior Court* (1977) 76 CA3d 140, 149, 142 CR 676, the court of appeal issued a writ of mandate directing the trial court not to hear an issue finalized by the failure to file a cross-appeal in the first instance. See also *Rogers v Silverman* (1989) 216 CA3d 1114, 1127, 265 CR 286 (failure to cross-appeal from dismissal barred review).

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§8.6 3. Issues That Would Not Compel Initial Appeal

A problem can also arise when a respondent attempts to gain full relief on appeal by raising a side issue that does not justify a direct appeal. See, *e.g., Cooperman v Unemployment Ins. Appeals Bd.* (1975) 49 CA3d 1, 11, 122 CR 127 (part of judgment denying respondent attorney fees must be raised by cross-appeal); *Richards v Flower* (1961) 193 CA2d 233, 238, 14 CR 228 (part of judgment denying damages must be raised by direct or cross-appeal). The guiding rule is that a respondent who seeks affirmative relief must cross-appeal.

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§8.7 B. Protective Cross-Appeal

A protective cross-appeal protects a party's right to appeal from the original judgment when the judgment is attacked by a posttrial motion. A party aggrieved by a judgment who prevails on a posttrial motion will usually want to appeal from the original judgment if the posttrial order is overturned on appeal. The time, however, for appealing from entry of the judgment will undoubtedly have lapsed. California Rules of Court 8.108(f) permits the filing of a protective cross-appeal, which preserves the party's right to appeal from the judgment on its reinstatement and provides an expedient method for reviewing the entire case. The protective cross-appeal is appropriate in the situations discussed in §§8.8-8.11.

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§8.8 1. When New Trial Motion Granted

If a party aggrieved by the judgment successfully moves for new trial and the party losing the motion appeals the order granting the new trial, then, if the appeal is successful and the order for new trial is reversed, the original judgment will stand if there is no cross-appeal. On the importance of filing a protective cross-appeal, see, *e.g., Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 898, 215 CR 679 (bank failed to file protective cross-appeal regarding order granting new trial; judgment against bank held final after reversal of trial court's order).

JUDICIAL PERSPECTIVE: Because trial court judges too often fail to dot every "i" and cross every "t" when granting a motion for new trial, a protective cross-appeal is critical. We see too many cases in which the order granting new trial must be reversed, and because no cross-appeal was filed, the verdict (however wrong it may be) must stand. This is the stuff of which malpractice actions are made.

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§8.9 2. When Motion to Vacate Judgment Granted

If a party aggrieved by the judgment successfully moves to vacate it and the party losing the motion appeals from the new judgment entered, then, if the appeal is successful and there is no cross-appeal from the original judgment, that judgment is reinstated. *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 978, 33 CR2d 812.

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3. Motion for Judgment Notwithstanding Verdict

§8.10 a. When Motion for JNOV Denied

Under Cal Rules of Ct 8.108(f), a party who has been denied a judgment notwithstanding the verdict may take a protective cross-appeal from the order of denial if another party appeals from an order granting a new trial or vacating the judgment. *Berge v International Harvester Co.* (1983) 142 CA3d 152, 158, 190 CR 815 (failure to cross-appeal from denial of motion for JNOV barred appellate court from reviewing liability); see *Richter v Aetna Life Ins. & Annuity Co.* (2002) 96 CA4th 1143, 117 CR2d 737 (timely filing of notice under former Cal Rules of Ct 3(e)(2) (now Cal Rules of Ct 8.108(f)); protective cross-appeal after order vacating judgment). Usually, the appeal from the order of denial is combined with the protective appeal from the judgment.

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§8.11 b. When Motion for JNOV Granted

A party may take a protective cross-appeal from the judgment when a motion for JNOV is granted. Cal Rules of Ct 8.108(f)(2). In the 2007 Advisory Committee Comment to the appellate rules, the committee noted that Rule 8.108(f) was amended specifically to address an unintentional omission in the former rule on cross-appeals when a motion for JNOV is granted.

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III. WHEN CROSS-APPEAL IS INAPPROPRIATE

§8.12 A. When Multiple Appeals Are Not Cross-Appeals

A cross-appeal must be taken from the same judgment or order challenged on the initial appeal, which means that the cross-appeal must be restricted to the subject matter of the initial appeal. Otherwise, there could be two or more direct appeals from the same judgment or order. Moreover, the purported "cross-appeal" risks being merely a void appeal because of an untimely notice of appeal. *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 976, 33 CR2d 812 (untimely appeal may not be considered timely cross-appeal when initial appeal challenged posttrial award of costs to plaintiff and subsequent appeal challenged judgment); *Commercial & Farmers Nat'l Bank v Edwards* (1979) 91 CA3d 699, 703, 154 CR 345 (cross-appeal not proper when initial appeal challenged posttrial denial of attorney fees and subsequent appeal challenged judgment). See §8.14. Any appeals from separate judgments or orders are direct appeals.

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§8.13 B. Severable Judgments and Orders

An appeal from a collateral or severable judgment or order is an independent appeal, and the notice of appeal must be filed in compliance with the rules for an initial appeal. *City of Los Angeles v Aalbers* (1977) 67 CA3d 80, 82, 136 CR 396 (order setting costs is separately appealable and must be filed within time to appeal under former Cal Rules of Ct 2(a) (now Cal Rules of Ct 8.104(a)), not former Cal Rules of Ct 3(c) (now Cal Rules of Ct 8.108(d)); *Fish v Guevara* (1993) 12 CA4th 142, 147, 15 CR2d 329 (denial of expert witness fees separately appealable and not part of appeal from judgment.); *Robinson v City of Yucaipa* (1994) 28 CA4th 1506, 1517, 34 CR 291 (attorney fees that are not included as part of judgment must be appealed separately). See also *Chong v Fremont Indem. Co.* (1988) 202 CA3d 1097, 1102, 249 CR 264 (appeal of discovery sanction not a cross-appeal to appeal from judgment).

NOTE: A separate appeal is not *required* to challenge an award of attorney fees if the judgment expressly makes an award and the notice of appeal challenges the appropriateness of that award. *Grant v List & Lathrop* (1992) 2 CA4th 993, 997, 3 CR2d 654. But see *Hill v Ghamaty* (2006) 143 CA4th 1156, 1172, 50 CR3d 247 (separate notice of appeal required when judgment does not expressly award attorney fees).

For discussion of collateral or severable judgments or orders, see §3.24.

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§8.14 C. No Extension of Time to File Appeal From Severable Judgments or Orders

If the respondent allows the time for filing an independent appeal to lapse, while assuming that a severable ruling can be appealed within the time for filing a notice of cross-appeal, the right to challenge the ruling on appeal will be lost. In *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 976, 33 CR2d 812, a motion to vacate the judgment was denied on September 25, 1992. On November 6, 1992, the trial court entered an order for costs for the plaintiff. On December 14, 1992, the defendant filed a notice of appeal from the award of costs. On December 17, 1992, plaintiff appealed from the judgment. The court of appeal rejected plaintiff's contention that his appeal was timely as a cross-appeal. The reviewing court held that the appeal from the judgment was severable from the appeal of the costs award and that plaintiff's appeal was not timely, *i.e.,* not within 30 days after denial of the motion to vacate.

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IV. CONSIDERATIONS IN BRINGING CROSS-APPEAL

§8.15 A. Costs Involved in Cross-Appeal

A party must consider the costs and attorney fees involved in briefing the new issues borne by its counsel but must also consider the risk that, if unsuccessful on the cross-appeal, the other party's fees may have to be paid. See CC §1717; CCP §1033.5(c). Moreover, each separately represented appellant must share equally the cost of preparing the record unless they agree otherwise or costs are otherwise allocated by the superior court. Cal Rules of Ct 8.147(a)(2). An equal division of the costs of the record may be onerous to the cross-appellant and, at the same time, relieve appellant of some of the financial burden of the appeal.

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§8.16 B. Costs May Not Be Major Factor When Protective Cross-Appeal Is Involved

In a protective cross-appeal, cost is unlikely to be a major factor. A protective cross-appeal is essential to protect a party's rights to seek reversal of the judgment if the posttrial motion affecting the judgment is reversed on appeal. The cost of the protective cross-appeal is less than that of other cross-appeals because the party who brings a protective cross-appeal will already have briefed many of the issues in connection with the posttrial motion. Finally, having won reversal in the trial court on the posttrial motion, the party has some indication that the cross-appeal is meritorious. One cost that might be considered, however, is the cost for an additional record.

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§8.17 C. Legal Merits of Arguments Raised by Cross-Appeal

It is as improper to bring a frivolous cross-appeal as it is to bring a frivolous appeal. *Marriage of Flaherty* (1982) 31 C3d 637, 646, 183 CR 508; *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 979 n7, 33 CR2d 812. There are risks arising from poor arguments beyond the obvious ones of costs or sanctions.

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§8.18 1. Sanctions for Frivolous Cross-Appeal

A party may incur sanctions for filing a frivolous cross-appeal. The sanctions, including the award or denial of costs, may be assessed against a party or the party's attorneys for bringing a frivolous appeal or appealing solely for the purpose of delay. CCP §907; Cal Rules of Ct 8.276(a)(1). For further discussion of sanctions on appeal, see chap 20.

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§8.19 2. Risks of Poorly Crafted Legal Arguments

Marginal legal arguments, though perhaps not frivolous, can also adversely affect a party's position when raised on cross-appeal. One objective of an appellate attorney is to persuade the appellate court that the client's position is reasonable and legally sound. If the arguments raised on cross-appeal are weak, the cross-appeal could backfire by causing the appellate court to discount the arguments raised by the same party in response to the main appeal.

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§8.20 3. Benefits of Strong Cross-Appeal

In contrast, when the issues raised by the cross-appeal are strong, the cross-appeal may have other benefits. A sound cross-appeal can enhance a party's position in settlement negotiations on appeal. Additionally, a strong cross-appeal may enhance respondent's credibility with the court and thereby help overcome weaknesses in the response to the main appeal. Finally, a strong cross-appeal can be strategically valuable to respondent because it permits respondent to file the last brief in the case. See §8.42 for discussion of order of briefing. The final word can be valuable, especially on a protective cross-appeal that involves many of the same issues as the main appeal.

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V. PROSECUTING THE CROSS-APPEAL

§8.21 A. Similarity to Initial Appeal

The chief difference in the procedure for bringing a direct appeal from that of bringing a cross-appeal is in the timing for filing the notice of appeal. Other differences are essentially practical ones to accommodate concurrent appeals in the same proceeding. The procedures for filing the notice of appeal discussed in chap 7 should be followed except as they are modified in this chapter.

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B. Time for Filing

§8.22 1. Depends on Filing of First Appeal

General rule. The Rule of Court under which the first appeal was filed can affect the amount of time in which the cross-appeal can be filed. Specifically, Cal Rules of Ct 8.108(f) provides that notice of a cross-appeal can be filed 20 days after the clerk's notification of the first appeal.

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Source: Civil Litigation/California Civil Appellate Practice/8 Filing Cross-Appeals/§8.23 2. Benefits of Filing Time for Cross-Appeal

§8.23 2. Benefits of Filing Time for Cross-Appeal

The time periods in which a party may file a cross-appeal, described in §8.22, have two primary effects:

- They permit a party who is ambivalent about appealing to wait to make a final decision until after the opposing party appeals.
- They permit a party who has obtained an order for a new trial or an order vacating the judgment or a JNOV to appeal the judgment as a protection against the possibility that the posttrial order is later reversed on appeal.

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§8.24 3. Timely Filing Is Jurisdictional Requirement

As with initial appeals, timely filing of a notice of cross-appeal is jurisdictional. A cross-appeal filed even a day late will be dismissed. *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1680, 34 CR2d 244.

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§8.25 4. Initial Appeal Must Also Be Timely to Avoid Jurisdictional Bar

The 20-day extension of time for filing a notice of cross-appeal applies only if the first notice of appeal was timely filed. Cal Rules of Ct 8.108(f). When the initial appeal is untimely, both the initial appeal and the cross-appeal are barred. *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1680 n7, 34 CR2d 244.

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§8.26 5. Initial Appeal Can Be Invalid But Not Untimely

Although a notice of appeal must be timely, it need not otherwise be valid to extend the time for filing a cross-appeal. *Life v County of Los Angeles* (1990) 218 CA3d 1287, 1295, 267 CR 557. In *Life,* the appeal of plaintiff's former attorney was dismissed for lack of standing, but the attorney's timely filed notice nonetheless acted to extend plaintiff's time to cross-appeal.

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§8.27 6. Calendaring

The nuances of the rules governing cross-appeals require careful scrutiny and calendaring of dates. These steps are important, both to protect the client from losing its appeal rights and to protect the attorney from liability arising from missing or misinterpreting a critical date or the scope of an order.

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§8.28 a. Ascertain Whether Initial Appeal Was Timely

The implications of posttrial pleadings must be carefully analyzed. Counsel must not only determine whether the order or judgment was appealable (see chap 3) but must also ascertain whether the appellant acted within the time set by the applicable rules for that initial appeal (see chap 7). A particularly difficult area is an appeal from denial of a motion for reconsideration. For example, in *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1681, 34 CR2d 244, the reviewing court noted the split of authority on appealability of denial for reconsideration but found that, under either line of authority, the appeal was untimely. If the order is appealable and was timely filed, counsel should calculate a reasonable time for filing the cross-appeal within the parameters established by the applicable rules. See discussion in §§8.22, 8.25. See also §7.32.

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§8.29 b. Decide What Issues to Cross-Appeal

Determining the appropriate time in which to cross-appeal an issue also depends on *what* is being appealed.

Waiting to cross-appeal may be too late. For example, in *Chong v Fremont Indem. Co.* (1988) 202 CA3d 1097, 1102, 249 CR 264, the court held that a party cannot wait until an appeal is taken from the determination of the main issues of an action to cross-appeal a previous award of attorney fees as a discovery sanction, when the time for appealing the award of sanctions has run. See §8.14.

Scope of cross-appeal may be too narrow. In *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 624, 12 CR2d 741, the notice of cross-appeal stated that the party intended to appeal from the judgment on the tenth cause of action of the cross-complaint. The court of appeal held that, despite rules of liberal construction, notice could not give the court jurisdiction to review the judgment on the eighth cause of action of the cross-complaint.

Consider filing notice of appeal or multiple cross-appeals. If circumstances justify an initial appeal, file a notice of appeal or a notice of cross-appeal within the time period allowed for bringing an initial appeal in order to avoid the pitfalls created by a late-filed notice in the initial appeal. It is easier for counsel to file separate appeals than to be told by the reviewing court that the appeal did not cover the issue.

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C. Drafting Notice of Cross-Appeal

§8.30 1. Contents

A cross-appellant must specify the portions of the judgment or orders of the trial court that it intends to appeal. Careful consideration must be given to the issues discussed above in §8.29 in determining whether this is an appeal from the same judgment or order. See §§8.1, 8.13. Be certain to include all issues that can be the basis for a cross-appeal and, if appealing from multiple issues, draft each to delineate that separate issues are involved to avoid the situation of the reviewing court construing the multiple appeals as a single appeal.

Counsel should recognize that courts of appeal construe notices of cross-appeal more strictly than notices of appeal when their own jurisdiction is affected. See *Fundamental Inv. Growth Shelter Realty Fund I-1973 v Gradow* (1994) 28 CA4th 966, 979, 33 CR2d 812; *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 12 CR2d 741. But see *Life v County of Los Angeles* (1990) 218 CA3d 1287, 1298 n8, 267 CR 557. Consult local appellate and superior court rules on specific requirements. See form in §8.31.

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Source: Civil Litigation/California Civil Appellate Practice/8 Filing Cross-Appeals/§8.31 2. Form: Notice of Cross-Appeal

§8.31 2. Form: Notice of Cross-Appeal

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

8.31-1 Notice of cross-appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of superior court*]

[*Title of case*]

NOTICE OF CROSS-APPEAL

Appeal having been taken by _ _[*name*]_ _**,** _ _[*plaintiff/defendant*]_ _**, from the**

[*Option 1: If the cross-appeal is taken after a timely notice of appeal from the judgment or order*]

_ _[*judgment/order*]_ _**,** _ _[*plaintiff/defendant*]_ _ **cross-appeals from the** _ _[*judgment/order*]_ _**.**

[*Option 2: If the cross-appeal is taken after a motion for new trial was granted against an opponent who appealed from the order granting the motion*]

order granting _ _[*plaintiff's/defendant's*]_ _ **motion for a new trial,** _ _[*plaintiff/defendant*]_ _ **cross-appeals from the judgment.**

[*Option 3: If the cross-appeal is taken after a motion to vacate judgment has been granted against an opponent who has appealed from the order granting the motion*]

order granting _ _[*plaintiff's/defendant's*]_ _ **motion to vacate the judgment,** _ _[*plaintiff/defendant*]_ _ **cross-appeals from the judgment.**

[*Option 4: If the cross-appeal is taken after a judgment notwithstanding the verdict has been entered*]

judgment notwithstanding the verdict, _ _[*plaintiff/defendant*]_ _ **cross-appeals from the judgment.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _**, cross-appellant**

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: See §7.15 for alternative wording when there are two or more appealable matters and cross-appellant wishes to appeal from fewer than all of them, when there are two or more appealable matters and cross-appellant wishes to appeal from all of them, or when cross-appellant wishes to appeal from a part of a judgment. If appealing from multiple issues, draft each appeal to delineate the separate issues involved to avoid the possibility that the reviewing court construe the multiple appeals as a single appeal.

Because appellant's notice of appeal from the order usually sets forth the name of the court to which the appeal is

being taken, the cross-appeal notice may properly omit this designation.

The clerk must mail notice of a cross-appeal in the same manner as notice of an appeal. Cal Rules of Ct 8.100(e)-(f).

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§8.32 D. Filing Fee

Currently, each cross-appellant or group of cross-appellants must pay a $655 filing fee for any notice of appeal in a civil case appealed to a court of appeal unless payment is excused under one of the exceptions discussed in §§7.23-7.26. Cal Rules of Ct 8.100(b)(1). Payment must be in the form of cash or a check or a money order payable to the Clerk of the Court of Appeal. Cal Rules of Ct 8.100(b)(1). See §7.27.

PRACTICE TIP: The reviewing court is more likely to grant a motion for relief from default judgment for failure to pay fees when counsel assures the reviewing court that fees will be forwarded to the court immediately.

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§8.33 1. Calendaring Notice and Fees' Due Dates

It is imperative that counsel calendar the dates when the notice must be filed and when the fees must be paid.

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§8.34 2. Dismissal When Fees Not Paid

If for any unexcused reason the fee for the appeal is not paid, the clerk of the court of appeal will notify the appealing party that, unless the party pays the fee or provides an adequate excuse for the failure to pay the fees within 15 days after the mailing of the clerk's notification, the appeal may be dismissed. Cal Rules of Ct 8.100(c).

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E. Additional Fees

§8.35 1. Clerk's Transcript

Each cross-appellant or group of cross-appellants filing an appeal must also pay $100 to the clerk of the originating court to be "credited against the amount chargeable for the preparation of the clerk's transcript or any other appeal processing or notification." Govt C §68926.1; Cal Rules of Ct 8.100(b)(2).

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§8.36 2. Reporter's Transcript

Within 10 days after filing the notice of cross-appeal, a cross-appellant must deposit with the clerk of the trial court any of the following: (1) the amount specified in a written estimate from the court reporter, (2) $650 for a day or fraction of a day over 3 hours and $325 for a fraction of a day less than 3 hours, or (3) a written waiver from the reporter or a copy of the party's application to the Transcript Reimbursement Fund. Cal Rules of Ct 8.130(b).

The clerk cannot accept for filing the "Notice to Prepare Clerk's and Reporter's Transcript on Appeal" unless the notice is accompanied by one of the following: the deposit, a copy of a Transcript Reimbursement Fund application filed under Cal Rules of Ct 8.130(c)(1) (see §9.23), a waiver of deposit by the court reporter, or a certified copy of the designated transcript. Cal Rules of Ct 8.130(b)(3), (d)(2).

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§8.37 F. Designation of Record

When a notice of cross-appeal is filed, the superior court prepares a single trial record containing the portions requested (or "designated") by both appellant and cross-appellant. The procedures for designating and filing the record on cross-appeal are the same as those for filing the first appeal unless all appellants and cross-appellants elect to proceed on a settled or an agreed statement. Cal Rules of Ct 8.147(a).

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§8.38 1. Opportunity to Complete Record on Appeal

The designation of the record for the initial appeal usually includes most of the records needed for a cross-appeal. However, counsel for the cross-appellant should closely examine the initial designation to make sure that everything is included for the cross-appeal. The sequence for designating the record on cross-appeal gives cross-appellant's counsel the opportunity to reexamine the record and add anything omitted from the original designation.

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§8.39 2. Fees Paid

The initial expense of preparing a joint record is shared equally by all separately represented appellants and cross-appellants unless the superior court orders otherwise. Cal Rules of Ct 8.147(a). When an equal division of cost would be unfair, the superior court can hear motions to reallocate the costs more fairly. However, failure to deposit the fees required for the record may expose cross-appellant to having its designation of record rejected and ultimately to dismissal of its cross-appeal. See Cal Rules of Ct 8.100(d), 8.130(d), 8.140.

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§8.40 3. Record Prepared

By taking a cross-appeal, a party assumes joint responsibility to ensure that the record is timely prepared and certified to the court of appeal. This step may require counsel to carefully monitor the clerk and reporter to make sure that pressure is maintained to complete their work. A request for an Order to Show Cause is not out of the question as a way to maintain pursuit of the appeal.

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§8.41 G. Briefs

The arguments on cross-appeal must be raised in a separate section of each party's brief rather than in a separate brief. Cal Rules of Ct 8.216(b)(1). As cross-appellant, respondent must argue its point(s) on cross-appeal in a separate section of the respondent's brief. As cross-respondent, appellant must respond to the cross-appeal in a separate section of the appellant's reply brief. Cal Rules of Ct 8.216(b)(2). However, a combined brief may include a single summary of the significant facts. Cal Rules of Ct 8.216(b)(2). On appellant's reply brief, see §§12.123-12.133. Respondent may submit a final reply as cross-appellant in a closing brief confined to the issues raised by the cross-appeal. Cal Rules of Ct 8.216(b)(3).

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§8.42 1. Calendaring Filing Dates

In a cross-appeal, the parties must propose, jointly if possible or separately if the parties are unable to agree, a briefing sequence to the reviewing court within 20 days after the second notice of appeal is filed. Cal Rules of Ct 8.216(a)(1). The court must then order a briefing schedule and sequence consistent with Cal Rules of Ct 8.212(a). Cal Rules of Ct 8.216(a)(2).

When the combined procedure described in §8.41 is followed, appellant's reply brief on the original appeal, containing the response as cross-respondent, must be served and filed within 30 days after respondent's combined brief is filed. Respondent's reply brief, limited to the issues raised in the cross-appeal, must be served and filed within 20 days after the appellant's combined reply brief is filed. Cal Rules of Ct 8.216(a). Each of these periods may be extended by stipulation for no more than 60 days and thereafter by court order for good cause shown. Cal Rules of Ct 8.216(a)(3), 8.212(b). It is imperative that these dates be calendared because they vary from the normal briefing schedule for an appeal.

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§8.43 2. Filing Briefs

The procedure for filing briefs on a cross-appeal are the same as those for the normal appeal and should be reviewed in chapters 12-13, addressing the filing of briefs on appeal.

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§8.44 3. Contents

The preparation of the briefs in a cross-appeal is similar to the preparation of any appellate brief. The appellant's opening brief is discussed in chap 12, which should be reviewed. Similarly, the appellant, as cross-respondent, may want to review the discussion in chap 13 on preparing the respondent's brief.

Counsel should be aware that submitting a frivolous appeal or issue on appeal can result in sanctions. See §8.18. Care must be taken to identify and present issues of merit to the reviewing court.

The importance of identifying the relevant issues cannot be overstated. In *Life v County of Los Angeles* (1990) 218 CA3d 1287, 1298, 267 CR 557, the court of appeal denied a motion to dismiss a cross-appeal as moot. The reviewing court had held the initial appeal void. Counsel for cross-appellant submitted a declaration in opposition to the motion to dismiss, suggesting that the cross-appeal was a protective cross-appeal contingent on the initial appeal. The appellate court looked to the briefs on the cross-appeal and rejected mootness, because counsel, contrary to his declaration, had raised issues attacking the judgment, indicating that the cross-appeal was in fact an independent appeal.

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H. Oral Argument

§8.45 1. Sequence of Presentation

Although there are no special rules for presenting oral argument in a cross-appeal, counsel may, subject to the court's approval, arrange among themselves for a special sequence in the argument. See Cal Rules of Ct 8.256(c)(2). Such an arrangement should be communicated to the appellate court clerk before argument. At the time of oral argument, counsel should request the court's permission to proceed with the special sequence.

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§8.46 2. Brevity in Argument

Argument on a cross-appeal is similar to the argument made on an initial appeal. For an extensive discussion of oral argument, see chap 16.

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§8.47 a. Protective Cross-Appeal

There is no need to engage in prolonged argument just because a cross-appeal is involved. When a protective cross-appeal is argued, an indication from the reviewing court that it intends to resolve the initial appeal in favor of cross-appellant indicates that no further argument is necessary, and it may annoy the court if it is offered. A better procedure in this situation might be to advise the court that counsel submits all issues raised by the cross-appeal without argument unless the court has a particular question for counsel. If it appears that the court does not intend to rule on the initial appeal in favor of the cross-appellant, then cross-appellant is in the position of an appellant and must argue in favor of the cross-appeal.

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§8.48 b. Independent Cross-Appeal

When an independent cross-appeal is argued, it is the same as any appeal and must be pressed ardently by counsel. Do not forget that probably only one member of the appellate panel knows the case as well as counsel does. If that panel member seems unconvinced, remember that there are two other members on the panel who may be susceptible to being convinced that cross-appellant's arguments are meritorious.

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§8.49 I. Order of Deciding Appeal and Cross-Appeal

The order in which the appellate court decides the appeal and cross-appeal depends on the implications of the issues appealed from and not on the label of the appeal. Generally, if the decision on one appeal would render the other moot, the court will consider that one first.

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§8.50 1. Protective Cross-Appeal

Generally, in a protective cross-appeal, the court first considers the appeal from the posttrial motions. If it finds that the order for new trial or to vacate judgment should be affirmed, it dismisses, as moot, the cross-appeal from the now-defunct judgment. *Kubowitz v Canon* (1961) 194 CA2d 378, 385, 14 CR 824; *Freeman v LaMorte* (1957) 148 CA2d 670, 675, 307 P2d 734. If affirmance of the posttrial order would not moot the cross-appeal, however, the cross-appeal should be considered first. *Don v Cruz* (1982) 131 CA3d 695, 699, 182 CR 581.

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§8.51 2. Independent Cross-Appeal

When both the appeal and cross-appeal directly attack the judgment, the court first reviews any appeal that challenges the existence of liability. If the court finds a party not liable, remaining appeals may be dismissed as moot. *Don v Cruz* (1982) 131 CA3d 695, 699, 182 CR 581; *Lisec v United Air Lines* (1978) 85 CA3d 969, 971 n2, 149 CR 847.

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9

Designating the Record

Mitchell E. Abbott

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I. INTRODUCTION TO DESIGNATING RECORD

§9.1 A. What Constitutes Record on Appeal

In most cases, the record on appeal consists of two items:

(1) A record of *oral proceedings* in the trial court (*e.g.,* argument on pretrial motions, trial testimony) (Cal Rules of Ct 8.120(b)); and

(2) A record of *written documents* filed or lodged with the trial court (*e.g.,* pleadings, pretrial motions) (Cal Rules of Ct 8.120(a)).

NOTE: Exhibits admitted in evidence, refused, or lodged are automatically "deemed part of the record," although a party can request their inclusion in the clerk's transcript. Cal Rules of Ct 8.122(a)(3).

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§9.2 B. Importance of Presenting Adequate Record

The appellant must present an adequate record to the court of appeal. *Calhoun v Hildebrandt* (1964) 230 CA2d 70, 72, 40 CR 690; *Utz v Aureguy* (1952) 109 CA2d 803, 241 P2d 639. An inadequate record will bar consideration of omitted issues because the appellate court will not ordinarily consider any facts not included in the record on appeal. For example, if the appellant's attorney fails to designate the proceedings relating to a motion in limine, the attorney may have no evidentiary basis for attacking the trial court's ruling on the motion. Similarly, if an attorney overlooks a declaration offered in proceedings for summary judgment, the appellate court will not consider, on appeal from the summary judgment, evidence in the declaration without an order augmenting the record on appeal. See *Ballard v Uribe* (1986) 41 C3d 564, 574, 224 CR 664 (court refused to consider merits of cross-appeal because record was inadequate); *Westlye v Look Sports, Inc.* (1993) 17 CA4th 1715, 22 CR2d 781 (court disregarded all asserted facts not presented to trial court during motion for summary judgment).

When the failure to procure the filing of an essential part of the record on appeal is not the appellant's fault, the court of appeal may remand to allow preparation of a complete record. See *Buckhart v San Francisco Residential Rent Bd.* (1988) 197 CA3d 1032, 243 CR 298 (on appeal from CCP §1094.5 administrative mandamus proceeding, matter remanded with instructions to prepare complete record).

PRACTICE TIP: To ensure that all information necessary to argue the appeal is included in the record, attorneys for all parties should review the grounds for appeal and decide which proceedings and evidence are relevant to the arguments the parties will make on appeal. Counsel should carefully review the trial attorney's files and notes of court proceedings, the civil register maintained by the superior court clerk, and the court files.

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C. Manner of Presenting Record

1. Record of Oral Proceedings

§9.3 a. Reporter's Transcript

The most common method for presenting the oral proceedings in the trial court is a reporter's transcript, that is, the verbatim record of oral proceedings made by the court reporter. Cal Rules of Ct 8.130. See §§9.24-9.32.

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§9.4 b. Agreed Statement

Oral proceedings in the trial court can be presented in the form of an agreed statement, that is, a narrative statement stipulated to by the parties that describes the basis of the appeal and the facts necessary to its determination. Cal Rules of Ct 8.134. An agreed statement can also be used to present the record of written documents (*e.g.,* in lieu of a clerk's transcript). On agreed statements, see §§9.52-9.57.

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§9.5 c. Settled Statement

Oral proceedings in the trial court can be presented in the form of a settled statement, although this procedure can only be used in limited circumstances. Cal Rules of Ct 8.137(a)(2). Like an agreed statement, a settled statement consists of a "condensed narrative" of oral proceedings material to the determination of the issues on appeal. But it differs from an agreed statement in that it is not stipulated to by the parties; rather, it is the result of a process by which the appellant submits a proposed statement, the respondent submits amendments, and the trial judge approves (or "settles") the statement. Cal Rules of Ct 8.137(b). This procedure can also be used to present the record of written documents (*e.g.,* in lieu of a clerk's transcript).

On settled statements, see §§9.58-9.66.

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2. Record of Written Documents

§9.6 a. Clerk's Transcript

The most common method of presenting the record of written documents is a clerk's transcript, that is, a bound and indexed compilation of papers filed or lodged with the superior court clerk. Cal Rules of Ct 8.122(a)-(b). As its name implies, a clerk's transcript is prepared by the superior court clerk, not the parties. On clerk's transcripts, see §§9.67-9.80.

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§9.7 b. Appendix

An appendix resembles a clerk's transcript in that it is a bound and indexed compilation of various papers filed or lodged in the trial court, but it is prepared by the parties, not the superior court clerk. When this procedure is used, the parties are "encouraged" to stipulate to a joint appendix. Cal Rules of Ct 8.124(a)(3).

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§9.8 c. Agreed Statement

An agreed statement is a narrative statement stipulated to by the parties that describes the basis of the appeal and the facts necessary to its determination. Although often used only in lieu of a reporter's transcript, an agreed statement can also be used as the record of the written documents (*e.g.,* in lieu of a clerk's transcript) when the statement is accompanied by the documents required to be included in a clerk's transcript (as well any additional documents designated by the parties). Cal Rules of Ct 8.134(a)(2). On agreed statements, see §§9.52-9.57.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.9 d. Settled Statement

§9.9 d. Settled Statement

The record of written documents can be presented in the form of a settled statement when the statement includes the documents required to be included in a clerk's transcript as well as additional documents designated by the parties. Cal Rules of Ct 8.137(b)(3). When this procedure is used, it also includes the record of oral proceedings. On settled statements, see §§9.58-9.66.

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§9.10 e. Superior Court File

In the first, third, and fourth appellate districts, the parties may stipulate to use the original superior court file in lieu of a clerk's transcript. Cal Rules of Ct 8.128(a)(1). See §9.106.

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§9.11 f. Judgment Roll

A judgment roll consists of copies of specified parts of the clerk's transcript as described in CCP §670(b). On judgment roll, see §§9.115-9.117.

NOTE: The term "judgment roll appeal" has become synonymous with an appeal designating the clerk's transcript alone (Cal Rules of Ct 8.122), without a reporter's transcript (Cal Rules of Ct 8.130). See, *e.g., Rubin v Los Angeles Fed. Sav. & Loan Ass'n* (1984) 159 CA3d 292, 296, 205 CR 455 (appealed case designating mandatory contents of clerk's transcript treated as "judgment roll" appeal).

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D. Selecting Appropriate Form of Record

§9.12 1. General Considerations

The appellant has the primary responsibility for selecting (or "designating") the form of the record that will be prepared and submitted to the court of appeal. The primary considerations in selecting the form of record are as follows:

- The theory of the appeal and the location of the asserted error in the record (see §9.13);
- The difference in the scope of issues available in an appeal on a clerk's transcript or judgment roll compared with an appeal on a reporter's partial or complete transcript (see §§9.24-9.117);
- Whether the chosen form of record subjects a party to the presumption under Cal Rules of Ct 8.163;
- Whether the record may be modified or replaced by another form or enlarged or subjected to counterdesignations by the opponent;
- The time required to prepare varying forms of the record on appeal (see §9.14); and
- Cost (see §9.15).

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§9.13 2. Theory of Appeal or Defense

The most critical factor in selecting the record on appeal is the theory of the appeal or the defense. If an appeal is based or defended on evidence or arguments in the oral proceedings at trial, the reporter's transcript (see §§9.24-9.32) or a substitution for it in the form of an agreed statement (see §§9.52-9.57) or a settled statement (see §§9.58-9.66) is required. However, if the theory of the appeal concerns a matter of law appearing on the face of the judgment roll, a judgment roll appeal under CCP §670(b) (see §§9.115-9.117) may be sufficient.

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§9.14 3. Time Required to Prepare Record

The effectiveness of appellate review often depends on how quickly that review takes place. Selection of the form of the record may have a significant impact on the time it takes to prepare the record. For example, an election to use a joint appendix (usually prepared by appellant's counsel) may sharply reduce the time that would otherwise be required for the superior court clerk to prepare a conventional clerk's transcript. See §9.93.

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§9.15 4. Cost of Preparing Record

An appeal on the judgment roll or on the entire clerk's transcript alone (Cal Rules of Ct 8.122; see §§9.67-9.80, 9.115-9.117) or by an agreed statement (Cal Rules of Ct 8.134; see §§9.52-9.57) is relatively inexpensive. Most practitioners believe, however, that the risks of proceeding on an abbreviated record outweigh the economic benefit; thus, these forms are seldom used in appeals from superior court judgments. Another economical form of record, the settled statement, is used even more rarely, essentially limited to appellants proceeding in forma pauperis. Cal Rules of Ct 8.137(a).

It is also relatively inexpensive to appeal on a partial reporter's transcript, either by stipulation or designation, under Cal Rules of Ct 8.130(a), 8.121(b)(1)(C). See §9.28. In such an election, the appellant must state in the notice designating the record on appeal the points to be raised on the appeal and is limited to those points, absent special permission by the reviewing court. Cal Rules of Ct 8.130(a)(2). In addition, parties may stipulate to the transcription of only part of a witness's testimony (Cal Rules of Ct 8.130(e)(2)) or to an agreed or settled statement containing all of the oral proceedings (in which case the agreed or settled statement will substitute for the reporter's transcript) or part of the proceedings (in which case the agreed or settled statement will augment the reporter's transcript). Cal Rules of Ct 8.130(g). On partial reporter's transcript, see §§9.28-9.30.

NOTE: The respondent may defeat the choice of a partial transcript by counterdesignating additions to the transcript. Cal Rules of Ct 8.130(a)(3). An appellate court can assess penalties, including withholding or imposing costs, against offending attorneys or parties for the inclusion of matters not reasonably material to the determination of the appeal. See *Garcia v Lucido* (1961) 191 CA2d 303, 308, 12 CR 601, disapproved on other grounds in *Nichols v Hast* (1965) 62 C2d 598, 601, 43 CR 641 (excessive counterdesignation by cross-appellant; joint and several assessment of costs of appeal against attorney and client). See also Cal Rules of Ct 8.276(a)(2), 8.278(a)(5).

On fees and fee waivers for preparation of record, see §§9.34-9.40 (reporter's transcript), §§9.76-9.78 (clerk's transcript), and §9.82 (appendix).

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II. PROCEDURES FOR DESIGNATING RECORD

§9.16 A. Filing Notice Designating Record on Appeal

The appellant is responsible for selecting (or "designating") the form of the record that will be prepared and submitted to the court of appeal. The appellant fulfills this responsibility by filing a notice designating the record on appeal, a document whose primary purpose is to give notice of which type of record the appellant has chosen to use. Cal Rules of Ct 8.121(a), (b)(1). This one document includes the appellant's choice of the form of both the oral proceedings *and* the written documents.

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§9.17 1. Required Contents

The notice designating the record on appeal must specify the following (Cal Rules of Ct 8.121(b)):

- The date the notice of appeal was filed.
- The form of the record of the *written documents* that the appellant has chosen to use. If the appellant has chosen to use a clerk's transcript, the notice must also designate the documents to be included as required by Cal Rules of Ct 8.122(b)(1).
- Whether the appellant intends to use a record of any *oral proceedings* and, if so, which form of that record the appellant has chosen to use. If the appellant has chosen to use a reporter's transcript, the notice must also designate the proceedings to be included as required by Cal Rules of Ct 8.130.
- Whether the appellant wants to raise an issue on appeal that would require consideration of an administrative record that was admitted in evidence, refused, or lodged, in which case the notice must request that the administrative record be transmitted to the court of appeal under Cal Rules of Ct 8.123.

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§9.18 2. Where to File

The notice designating the record is filed in the *superior court,* not the court of appeal. Cal Rules of Ct 8.121(a). Once the notice is filed, it is the superior court clerk's responsibility to "promptly" send a copy of the notice to the appellate court. Cal Rules of Ct 8.121(c).

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§9.19 3. Time for Filing

The appellant must serve and file the notice designating the record on appeal within 10 days after filing the notice of appeal. Cal Rules of Ct 8.121(a). For an overview of deadlines for filing notices designating the record, see chart in §9.144.

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§9.20 a. Extensions of Time

The time for performing any act in preparing the record on appeal may be extended by the court of appeal, on motion and a showing of good cause. Cal Rules of Ct 8.60(b). On applications for extension of time and the factors the court considers in ruling on applications, see Cal Rules of Ct 8.63. See also Cal Rules of Ct 8.50 (governing general service and filing rules for applications, including those to extend time).

Applications to extend time must be made to the court of appeal. Cal Rules of Ct 8.60(b), (e). The superior court is specifically forbidden from granting an extension to prepare the appellate record. Cal Rules of Ct 8.60(e). See also Cal Rules of Ct 8.130(f)(1) (only reviewing court can extend time for filing reporter's transcript).

NOTE: Although parties may stipulate to an extension of time "for filing records," they must also request an order from the court. See Cal Rules of Ct 8.60(b).

For more discussion and a form on application to extend time for preparation of the record, see §§11.17-11.18.

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§9.21 b. Effect of Failure to Timely File Notice

After the deadline for filing the notice designating the record on appeal has passed, the superior court clerk's office must "promptly" notify the appellant that he or she has 15 days after the date of the mailing of the notice in which to file the designation, or the appeal will be dismissed. Cal Rules of Ct 8.140(a)(1). Relief after dismissal is by a motion for relief from default to the appellate court. See Cal Rules of Ct 8.60(d).

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§9.22 c. Relief From Default

When the time to file the notice designating the record on appeal has expired and the appeal is dismissed or the court of appeal has ordered the appeal to proceed on the appellant's record, relief from default may be sought on a factual showing of mistake, surprise, inadvertence, or excusable neglect, and, if successful, the appellant or respondent will be allowed additional time in which to designate the record. CCP §473; Cal Rules of Ct 8.60(b), (d).

For a form of motion for relief from default, see §11.62.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.23 4. Combined With Notice of Appeal

§9.23 4. Combined With Notice of Appeal

The notice designating the record can be combined with the notice of appeal. Cal Rules of Ct 8.121(a). Doing so is a good way of avoiding the risk of untimely filing of the notice designating the record. In addition, this combined procedure is a useful, disciplined exercise that forces the appellant's attorney to consider the appeal as a whole, requiring counsel to look beyond a single egregious error by the trial judge and reflect on the pleadings, the procedural history of the case, and the evidence (*i.e.,* the merits of the case as the appellate court will see it).

JUDICIAL PERSPECTIVE: When completing the notice designating the record on appeal is taking a long time, do not delay filing the notice of appeal so that the two can be filed together. The filing of the notice of appeal is jurisdictional; do not miss that deadline!

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B. Specific Designation Procedures

1. Reporter's Transcript

§9.24 a. Specify Proceedings in Notice Designating Record

If the appellant elects to include oral proceedings in the record on appeal by using a reporter's transcript, (1) that election must be indicated in the notice designating the record on appeal, and (2) the notice must specify *by date* those proceedings the appellant wants included in the transcript. Cal Rules of Ct 8.121(b)(1)(C), 8.130(a)(1). The appellant may also specify proceedings to be *excluded* from the reporter's transcript, *e.g.,* if they are irrelevant to the issues on appeal. Cal Rules of Ct 8.130(a)(1).

NOTE: Remember that the notice designating the record on appeal must be filed within 10 days after filing the notice of appeal. Cal Rules of Ct 8.121(a). See §9.19.

The reporter's transcript may include only deposition testimony that was read and reported in open court. Cal Rules of Ct 8.130(e). Deposition testimony that was read in open court but not reported or not read but lodged with the superior court may be included in the clerk's transcript. Cal Rules of Ct 8.122(a)(1), 8.130(e)(3).

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§9.25 (1) Use of Daily Transcripts

California Rules of Court 8.144(d) explicitly authorizes the use of daily transcripts on appeal but requires that all pages be renumbered consecutively and that the appropriate covers and indexes be added. When appellant's counsel files a notice to prepare daily transcripts, and after they have been prepared, the reporter will probably request counsel for all parties to return their copies of the transcripts so that they can be renumbered and indexed for use on appeal.

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§9.26 (a) Advantages

Although the provisions of Cal Rules of Ct 8.130 requiring the prepayment of the estimated costs of transcription were intended to speed up the process of preparing the reporter's transcript, it may still be advisable in some cases to order daily transcripts at the time of the trial. The primary benefit on appeal is that the delay in waiting for the reporter's transcript is virtually eliminated. When daily transcripts have been prepared and paid for during a trial, the cost estimate on appeal is generally perfunctory and issued without delay. Daily transcripts are also useful for the attorney to review the transcripts for errors while the testimony is still fresh in his or her mind.

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§9.27 (b) Disadvantages

The chief drawback to daily transcripts is their exorbitant cost, which is generally not recoverable as a cost of trial unless daily transcripts were ordered by the court. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 548, 32 CR 856. Although the reviewing court has the power to "award or deny costs as it deems proper," presumably including allowing the daily transcription costs to be recovered as costs on appeal by the prevailing party, the same rule authorizes the withholding of costs not considered proper. Cal Rules of Ct 8.278(a)(5). Counsel should not assume that the additional charge of preparing daily transcripts as the trial proceeds will be recoverable as a cost on appeal.

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§9.28 (2) Partial Reporter's Transcript

If reversible error is concentrated in just one part of the trial record, the appellant may designate that only limited portions of the superior court oral proceedings be transcribed and included in the reporter's transcript (*i.e.,* something less than all of the oral proceedings).

NOTE: If the appellant designates only a portion of a *witness's* testimony, the reporter must transcribe the witness's entire testimony, unless the parties stipulate otherwise. Cal Rules of Ct 8.130(e)(2).

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§9.29 (a) Risks

A partial transcript is often risky for the appellant. For example, if a supreme court decision completely reverses the law on a subject germane to the case while the appeal is pending, appellant's counsel may be unable to take advantage of the change unless that ground was specified in the notice designating the partial transcript. A similar problem occurs when another lawyer is brought into the case to assist with the appeal and, viewing the case afresh, discovers additional grounds for reversal. These opportunities may be precluded when specific grounds are raised in the notice designating the partial transcript.

PRACTICE TIP: The risks in designating a partial reporter's transcript are rarely justified by the benefits (see §9.30). In addition, the respondent can undo the appellant's designation of a partial transcript by counterdesignating everything the appellant has omitted (Cal Rules of Ct 8.130(a)(3)), although the respondent risks sanctions for frivolous inclusion in the record of matters not reasonably related to the appeal. See *Garcia v Lucido* (1961) 191 CA2d 303, 308, 12 CR 601, disapproved on other grounds in *Nichols v Hast* (1965) 62 C2d 598, 601, 43 CR 641. See also Cal Rules of Ct 8.276(a)(2).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.30 (b) Benefits

§9.30 (b) Benefits

The advantages of using a partial transcript in an appropriate case include the following:

- Speedier preparation of the record and, consequently, speedier resolution of the appeal;
- Simplification and reduction of issues on appeal;
- Concentration on critical issues and exclusion of peripheral ones;
- Savings in attorney time in handling the appeal; and
- Cost savings in preparing the record.

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§9.31 (3) When Less Than All Testimony Designated

When less than all of the testimony is designated, the notice designating the record must "state the points to be raised on appeal," and the appeal will be limited to these points unless, on motion, the appellate court allows otherwise. Cal Rules of Ct 8.130(a)(2).

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§9.32 (4) Unreported Items

The reporter's transcript will not include unreported oral proceedings (*e.g.,* discussions at the bench or in chambers). If consideration of unreported oral proceedings is necessary to the appeal, counsel should consider moving to correct and augment the record by using an agreed or settled statement of the unreported proceedings. *Lipka v Lipka* (1963) 60 C2d 472, 480, 35 CR 71.

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§9.33 b. Special Service Requirements

A copy of any notice designating the record on appeal in which the appellant elects to use a reporter's transcript must be served on each reporter whose identity is known to the appellant. Cal Rules of Ct 8.130(a)(5).

PRACTICE TIP: The appellant should formally serve the reporter in the same manner as service is made on the respondent.

The court clerk must promptly notify the reporter that the notice has been filed and that the deposit has been made by mailing the notice to the reporter. The notice must show the date it was mailed. Cal Rules of Ct 8.130(d)(1).

NOTE: In lieu of a request that the court reporter prepare a transcript, the appellant or respondent may substitute a certified transcript of the proceedings specified in the notice designating the proceedings. If counsel provides the transcript, the notice serves only as a record of the proceedings designated. In this instance, the notice is not communicated to the reporter. Cal Rules of Ct 8.130(b)(3).

For a form of notice to prepare reporter's transcript, see §9.132.

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§9.34 c. Deposit Must Accompany Notice Designating Record

A deposit representing the "approximate cost" of preparing the transcript must accompany the filing of the notice designating the record on appeal. Cal Rules of Ct 8.130(b)(1). The amount of the deposit is based on either of the following (Cal Rules of Ct 8.130(b)(1)(A)-(B)):

- The reporter's written estimate, obtained in advance from the reporter; or
- An amount calculated at $325 per fraction of the day's proceedings that did not exceed 3 hours, or $650 per day or fraction that exceeded 3 hours. (For example, if a trial lasts for 1 full day and 2 hours the next day, the amount of the deposit required for the reporter's transcript is $975. If the trial lasts for 1 full day and 4 hours the next day, the deposit is $1300.)

PRACTICE TIP: Following Cal Rules of Ct 8.130(b)(1)(B), the notice designating the reporter's transcript should set out the estimated cost and state whether the proceedings were full-day or half-day proceedings. For this reason, the notice should contain all the relevant facts, dates, and names of reporters. See *e.g.,* 2d App Dist R 3(a)(1) (expressly requiring this information). If the parties agree to a partial transcript, the appellant should specify the portions to be transcribed when filing the notice. Cal Rules of Ct 8.130(a)(1)-(2). On partial transcripts, see §§9.28-9.30. For a form of notice to prepare partial reporter's transcript, see §9.134.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.35 (1) Clerk's Duties Following Deposit

§9.35 (1) Clerk's Duties Following Deposit

Once the proper deposit has been received, the clerk must "promptly" mail notice of the designation and deposit to the reporter, showing the date it was mailed. Cal Rules of Ct 8.130(d)(1).

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§9.36 (2) Inadequate Deposit

If the reporter believes the deposit is inadequate, the reporter may file with the clerk and mail to the designating party an estimate of the transcript's total cost, showing the additional deposit required. The party must deposit the additional sum within 10 days after the reporter mails the estimate. Cal Rules of Ct 8.130(b)(2).

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§9.37 (3) Failure to Include Deposit

If a party does not deposit the estimated fee or a valid substitute, the court clerk will file the notice designating the record *but* will also "promptly" issue a notice of default under Cal Rules of Ct 8.140. Cal Rules of Ct 8.130(d)(2). Counsel's failure can then be excused only by order of the court of appeal, on motion and for good cause shown. Cal Rules of Ct 8.60(d). On relief from default, see §9.22.

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(4) Alternatives to Submitting Deposit

§9.38 (a) Certified Transcript

The appellant or respondent may substitute in lieu of the deposit a certified transcript of the designated oral proceedings. If a transcript is substituted, the notice serves only as a record of the proceedings designated; it imposes no duty on the reporter. Cal Rules of Ct 8.130(b)(3).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.39 (b) Fee Waiver for Low-Income Litigants

§9.39 (b) Fee Waiver for Low-Income Litigants

The procedure for moving the court for an order allowing the filing of a notice to prepare a reporter's transcript without a deposit of the estimated fee is set out in Cal Rules of Ct 8.130(c). The appellant makes an application to the Transcript Reimbursement Fund under Bus & P C §§8030.2-8030.8 and, at the same time, serves and files a copy of the application with the notice designating the record on appeal that specifies the proceedings to be transcribed. Cal Rules of Ct 8.130(c). The application is a permissible substitute for the required deposit of the reporter's fee and prevents issuance of a notice of default for failure to pay the deposit. Cal Rules of Ct 8.130(b)(3), (d)(2).

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§9.40 (c) Reporter's Waiver

The reporter may waive the deposit. If this happens, the notice designating the record must be accompanied by the reporter's *written* waiver. In cases in which there were multiple reporters, the notice must include written waivers from each reporter. The reporter may also waive the deposit for only a portion of the designated proceedings. Cal Rules of Ct 8.130(b)(3).

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§9.41 d. Respondent's Notice of Additional Designations (Counterdesignation)

When the appellant's notice designating the record on appeal is received, the respondent should ensure that everything needed to defend the judgment is included (assuming that the appellant's notice designates something less than *all* of the oral proceedings). For example, respondent's counsel may wish to designate transcripts of certain pretrial hearings or proceedings in chambers to clarify the trial proceedings.

To designate additional proceedings, the respondent must serve on the appellant and file with the clerk of the superior court a notice designating those additional proceedings that the respondent wants included in the reporter's transcript (sometimes called the respondent's "counterdesignation"). Cal Rules of Ct 8.130(a)(3).

NOTE: If the appellant elects *not* to use a reporter's transcript (a judgment roll appeal), the respondent cannot require a reporter's transcript to be prepared. However, under Cal Rules of Ct 8.155, the reviewing court may, on the respondent's request or its own motion, augment the record whenever necessary to prevent a miscarriage of justice. Cal Rules of Ct 8.130(a)(4). On augmenting the record, see §§9.120-9.123.

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§9.42 (1) Contents

The respondent should designate additional oral proceedings *by date*. See Cal Rules of Ct 8.130(a)(1).

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§9.43 (2) Time for Filing

The respondent's notice of counterdesignation must be served and filed in the superior court within 10 days after service of the appellant's notice designating the reporter's transcript. Cal Rules of Ct 8.130(a)(3). See §9.45. If the respondent misses the deadline for counterdesignating additional proceedings, he or she may ask the court to augment the record to prevent a miscarriage of justice. Cal Rules of Ct 8.155. On extensions of time and relief from default, see §§9.20-9.22.

JUDICIAL PERSPECTIVE: Counsel is not encouraged to rely on augmentation.

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§9.44 (3) Deposit

On filing the counterdesignation, the respondent must deposit the estimated cost of the additional material to be transcribed, computed as provided in Cal Rules of Ct 8.130(b)(1).

PRACTICE TIP: Presumably, the respondent may, in lieu of paying the deposit, submit a certified copy of the transcript, a waiver of deposit signed by the court reporter, a copy of a Transcript Reimbursement Fund application filed under Cal Rules of Ct 8.130(c)(1), or an order relieving the respondent of the obligation of making a deposit, as provided in Cal Rules of Ct 8.130(b)(3).

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§9.45 (4) Service

The respondent's notice of additional designations must be served not only on all parties but also on each reporter whose identity is known. Cal Rules of Ct 8.130(a)(5).

Because the appellant's notice designating the record on appeal is usually served by mail, the respondent frequently has very few days within which to prepare and file a counterdesignation. Although it appears that CCP §1013(a) (extending the time for responding when service is by mail) should apply when the appellant's notice designating the record on appeal is served by mail, because Cal Rules of Ct 8.60(a) states that the Code of Civil Procedure governs computation of time for appellate actions, there is no reported decision so holding. Accordingly, respondent's counsel should try to file the counterdesignation within 10 days after the date on which the appellant's notice is served.

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§9.46 e. Time Limit for Reporter to Prepare Transcript

The court reporter is supposed to complete the transcript within 30 days after receiving notification from the court clerk that the notice to prepare the transcript has been received. Cal Rules of Ct 8.130(f)(1). However, transcript preparation may drag on for months. In one notorious case, in which the reporter had not completed the reporter's transcript 13 months after receiving the appellant's deposit, the court of appeal ordered the reporter declared incompetent to serve as a court reporter until all pending transcripts on appeal were completed. *Malick v Contra Costa County Flood Control & Water Conserv. Dist.* (1982) 131 CA3d 50, 53, 182 CR 386.

PRACTICE TIP: Appellant's counsel should be aware of older cases in which appeals were dismissed because the appellant failed to procure the filing of the record on appeal even though the fault apparently lay with the reporter. *Myers v Johnson* (1949) 89 CA2d 800, 803, 201 P2d 884; *Caldwell v Harvey* (1948) 85 CA2d 104, 107, 192 P2d 62. Although the cases seem at variance with Cal Rules of Ct 8.140(a)-(c), which provides that an appeal will be dismissed only if the failure to procure the filing of the record is the fault of the appellant and not of any court officer or other party, counsel should nevertheless take the precaution of writing letters to the reporter to build a record demonstrating counsel's diligence. Only the reviewing court can extend the time to prepare the reporter's transcript. Cal Rules of Ct 8.130(f)(1), 8.60.

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f. When Transcript Unavailable

§9.47 (1) Remedies When Notes Not Transcribed

If the reporter refuses, is unable, or fails to transcribe all or any portion of the oral proceedings designated by the parties, the clerk must mail notice to the parties specifying the portions of the oral proceedings that the reporter refuses, is unable, or has failed to transcribe. The party designating that portion of the proceedings then has two options (Cal Rules of Ct 8.130(g)(1)):

(1) Within 10 days of the date of mailing the notice, a party may file an *agreed* statement or a stipulation that the parties are attempting to agree on a statement under Cal Rules of Ct 8.134. If a party files a stipulation, then within 30 days of the filing, the party must either file the agreed statement, move to use a settled statement under Cal Rules of Ct 8.137, or proceed without the statement.

(2) The appellant may move for leave to file a *settled* statement of the omitted proceedings. This motion *must* be filed within 10 days after the superior court clerk has mailed the notice to the parties. If the superior court grants the motion, the proposed statement of oral proceedings must be served, filed, and settled in the same manner as settled statements under Cal Rules of Ct 8.137. See §§9.58-9.66 for procedure on settled statements under Rule 8.137.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.48 (2) Remedies When Notes Lost

§9.48 (2) Remedies When Notes Lost

The following are the only permissible remedies when the reporter's notes of a portion of the trial are lost:

- A stipulation to the missing testimony;
- An agreed statement;
- A settled statement; or
- A completely new trial.

A trial court may not order a partial retrial so that certain testimony can be retaken and retranscribed to complete the reporter's transcript on appeal. *Weinstein v E.F. Hutton & Co.* (1990) 220 CA3d 364, 269 CR 443.

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§9.49 g. Certification, Filing, and Disposition of Reporter's Transcript

After preparing the reporter's transcript, the reporter must file the certified copy of the original transcript and one copy with the clerk of the superior court. Cal Rules of Ct 8.130(f)(1). The clerk then transmits any original transcripts, or agreed or settled statements, to the reviewing court. Cal Rules of Ct 8.150(a)(1). When these are received, the record is filed. The clerk of the reviewing court must then immediately mail notice to the parties, stating the date the record was filed. Cal Rules of Ct 8.150(a)(1). The superior court clerk sends the copy of the transcript, usually by mail, to the designating party. Cal Rules of Ct 8.150(a)(1).

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§9.50 h. Correction of Reporter's Transcript

If any material part of the record is incorrect or lacks proper certification, the reviewing court, on a party's motion, on stipulation, or on its own motion, may direct that the record be corrected or certified. Cal Rules of Ct 8.155(c)(1). For a form, see §9.141.

The reviewing court may direct the superior court to settle any differences between the parties on alleged omissions or errors in the transcript. Cal Rules of Ct 8.155(c)(2). The clerk of the reviewing court must mail the parties notice of the receipt and filing of any matter under an order for augmentation or correction or under an order directing the trial court to resolve disputed questions. Cal Rules of Ct 8.155(d).

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§9.51 i. Sharing Transcript

Within 20 days after the record is filed in the reviewing court, a party that has not purchased its own copy may request in writing that another party lend it that party's copy of the record. The other party must then lend its copy of the record when it serves its brief. Cal Rules of Ct 8.153(a). The borrowing party must return the copy of the record when it serves its brief or when the time to file its brief has expired. Cal Rules of Ct 8.153(b). The borrowing party must bear the costs of sending the record. Cal Rules of Ct 8.153(c).

PRACTICE TIP: As a practical matter, it is extremely difficult to circulate the appellant's one transcript copy among several attorneys when multiple respondents are represented separately or when there are cross-appeals. Respondents' counsel usually find it necessary to have their own copies of the transcript on appeal.

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§9.52 2. Agreed Statement

An agreed statement is a statement stipulated to by the parties that describes the basis of the appeal as well as the relevant evidence and testimony necessary to its determination. Cal Rules of Ct 8.134(a)(1). It can be used either as the record of the oral proceedings only (in which case it would be accompanied by the clerk's transcript as the record of the written documents) or as both the record of the oral proceedings *and* the written documents, in which case it *must* include copies of the items required to be included in the clerk's transcript (see Cal Rules of Ct 8.122(b)) as well as any additional documents designated by the parties (see Cal Rules of Ct 8.122(b)(3)-(4)). Cal Rules of Ct 8.134(a)(1)-(2). On clerk's transcript, see §§9.67-9.80; on using agreed statement in lieu of clerk's transcript, see §§9.52-9.57.

NOTE: Because the agreed statement requires the agreement of the parties and is an abbreviated form of the record, it is rarely used in appeals from the superior court.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.53 a. Required Contents

§9.53 a. Required Contents

An agreed statement must explain the following (Cal Rules of Ct 8.134(a)(1)):

- The nature of the controversy;
- The basis on which it is claimed that the reviewing court has jurisdiction;
- How the trial court decided the points to be raised on appeal; and
- The facts needed to decide the appeal.

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§9.54 b. Required Signatures

Although Cal Rules of Ct 8.134(a)(1) states that the agreed statement must be signed by the "parties," the signatures of the attorneys of record for the parties are presumably sufficient. See Cal Rules of C 8.10(a)(2) (term "party" includes party's attorney of record).

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§9.55 c. Filing Agreed Statement or Stipulation; Timing

Along with the notice designating the record on appeal under Cal Rules of Ct 8.121, the appellant must file with the superior court either the agreed statement itself or a stipulation stating that the parties are attempting to agree on a statement. Cal Rules of Ct 8.134(b)(1). The agreed statement or stipulation must be filed within 10 days after filing the notice of appeal. Cal Rules of Ct 8.121(a). For a form of stipulation, see §9.135. On filing the notice designating the record on appeal, see §§9.16-9.23.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.56 (1) Stipulation Filed; Parties Agree on Statement

§9.56 (1) Stipulation Filed; Parties Agree on Statement

If the appellant previously filed a stipulation and the parties have been able to agree on a statement, the appellant must file the agreed statement within 40 days after filing the notice of appeal. Cal Rules of Ct 8.134(b)(2).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.57 (2) Stipulation Filed; Parties Cannot Agree on Statement

§9.57 (2) Stipulation Filed; Parties Cannot Agree on Statement

If the parties cannot agree on the terms of an agreed statement, the appellant must file and serve a notice designating some other type of record on appeal within 50 days after filing the notice of appeal. Cal Rules of Ct 8.134(b)(3).

NOTE: This extension of time occurs only if the preliminary stipulation is filed within 10 days after filing the notice of appeal.

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§9.58 3. Settled Statement

The record of both the written documents *and* the oral proceedings may be presented by a settled statement, that is, a condensed statement in narrative form of the portions of the oral proceedings considered material to decide the appeal. Although a settled statement is ordinarily used in lieu of the reporter's transcript only, it may also be used in lieu of the clerk's transcript, in which case the narrative *must* be accompanied by those documents required to be included in the clerk's transcript (see Cal Rules of Ct 8.122(b)(1)) and *may* be accompanied by any additional documents designated by the parties (see Cal Rules of Ct 8.122(b)(3)-(4)). Cal Rules of Ct 8.137(b)(3).

JUDICIAL PERSPECTIVE: Settled statements are rarely filed in appeals from the superior court.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.59 a. Available Only in Limited Circumstances

§9.59 a. Available Only in Limited Circumstances

The settled statement procedure can be used only when there is a showing of any one of the following (Cal Rules of Ct 8.137(a)(2)):

- A substantial cost savings would result and no significant burden on the court or opposing parties will result;
- The designated oral proceedings were not reported or cannot be transcribed; or
- The appellant cannot afford a reporter's transcript and funds are not available from the Transcript Reimbursement Fund. (A party proceeding in the trial court in forma pauperis is considered to be without adequate funds for a transcript.)

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§9.60 b. Filing Motion to Use Settled Statement

The appellant intending to use a settled statement must file in the superior court a motion to proceed on a settled statement. This motion must be accompanied by the notice designating the record on appeal, and it must be filed within 10 days after the notice of appeal is filed. Cal Rules of Ct 8.121(a), 8.137(a)(1). The motion must make a showing under one of the three reasons specified in §9.59. For a form of motion to use a settled statement, see §9.136.

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(1) Motion Granted

§9.61 (a) Filing Proposed Condensed Narrative

Within 30 days after the superior court clerk mails or a party serves an order granting the appellant's motion to use a settled statement, the appellant must serve and file in the superior court a proposed condensed narrative of those portions of the oral proceedings that the appellant "believes necessary for the appeal." Cal Rules of Ct 8.137(b)(1).

PRACTICE TIP: Portions of the evidence may be set out by question and answer, subject to the court's approval in settling the statement. Cal Rules of Ct 8.137(b)(1). See *Tint v Sanborn* (1989) 211 CA3d 1225, 259 CR 902 (ambiguous or unintelligible settled statement in lieu of transcript will be interpreted against party who created uncertainty).

An appellant seeking to use a settled statement in lieu of *both* a reporter's and a clerk's transcript must accompany the condensed narrative with copies of all items required by Cal Rules of Ct 8.122(b)(1), showing the time limits required by Cal Rules of Ct 8.122(b)(2). Cal Rules of Ct 8.137(b)(3). But even when the settled statement is intended only to replace the reporter's transcript, it may be accompanied by any documents includable in the clerk's transcript under Cal Rules of Ct 8.122(b)(3)-(4). Cal Rules of Ct 8.137(b)(5).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.62 (b) If Narrative Covers Only Part of Testimony

§9.62 (b) If Narrative Covers Only Part of Testimony

If the proposed condensed narrative statement covers only a portion of the testimony, the appellant must state the points to be raised on the appeal. The appeal will then be limited to those points, unless the reviewing court allows otherwise. Cal Rules of Ct 8.137(b)(2).

NOTE: The supreme court has held that a settled statement cannot be used "to create proceedings, make records, or litigate issues which [the parties] neglected to pursue earlier." *People v Tuilaepa* (1992) 4 C4th 569, 585, 15 CR2d 382. See *Committee to Defend Reproductive Rights v A Free Pregnancy Ctr.* (1991) 229 CA3d 633, 637, 280 CR 329 (criticizing deficient settled statement).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.63 (c) Respondent's Proposed Amendments

§9.63 (c) Respondent's Proposed Amendments

Within 20 days after service of the appellant's proposed condensed statement, the respondent may serve and file amendments. Cal Rules of Ct 8.137(b)(4).

NOTE: Although the respondent is explicitly authorized to file only "amendments" to the appellant's proposed condensed statement, this rule also appears to allow the respondent to file objections to the appellant's proposed statement or to state reasons why amendments are needed.

When the settled statement is in lieu of a reporter's transcript, the respondent may incorporate into his or her amendments any documents includable in the clerk's transcript under Cal Rules of Ct 8.122(b)(3)-(4). Cal Rules of Ct 8.137(b)(5).

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§9.64 (d) Hearing and Decision

Once the respondent files proposed amendments, or on expiration of the time to do so, whichever occurs first, the superior court clerk must set a time, no more than 10 days thereafter, for the judge who tried the case to "settle" the statement. The clerk is required to give all parties at least 5 days' notice of the time set for the hearing on the settlement of the proposed statement. Cal Rules of Ct 8.137(c)(1).

PRACTICE TIP: The trial lawyers should attend the hearing, which is usually more like an informal settlement conference, because the judge at the hearing settles the statement—*i.e.,* resolves disputes between the appellant and respondent over the manner in which the condensed narrative statement summarizes the witnesses' testimony—and directs appellant's counsel to "engross" the settled statement. Cal Rules of Ct 8.137(c)(2).

On the hearing date, the trial judge must settle the statement and fix the time for the appellant to prepare, serve, and file it. Cal Rules of Ct 8.137(c)(2). If the respondent does not file and serve objections to the settled statement within 5 days after it is served and filed, it is presumed properly prepared in accordance with the judge's order, and the clerk presents it to the judge for certification. Cal Rules of Ct 8.137(c)(2)-(3). If the parties stipulate that the statement as originally served or prepared is correct, the stipulation has the same effect as the judge's certification. Cal Rules of Ct 8.137(c)(4).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.65 (e) Format of Settled Statement

§9.65 (e) Format of Settled Statement

The rules do not specify the format of the settled statement, but Cal Rules of Ct 8.144 is usually followed. Under Rule 8.144, the settled statement should be organized, indexed, and bound in the same manner, as far as is practicable, as other forms of record on appeal.

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§9.66 (2) Motion Denied

If the court denies the motion, the appellant must file a new notice designating the record on appeal under Cal Rules of Ct 8.121 within 10 days after the superior court clerk mails or a party serves the order of denial. Cal Rules of Ct 8.137(a)(3).

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§9.67 4. Clerk's Transcript

The clerk's transcript contains papers or records filed or lodged with the superior court clerk as well as trial exhibits admitted into evidence, refused, or lodged. Cal Rules of Ct 8.122(a)-(b). Certain items must be included as part of the transcript (see §9.68), and others are included only on designation of the party or parties (see §9.69).

PRACTICE TIP: When speed in completing the record on appeal is desired, an appellant's or joint appendix in lieu of the clerk's transcript under Cal Rules of Ct 8.124 will serve the same function as the clerk's transcript. See §9.93.

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§9.68 a. Mandatory Documents

Copies of the following documents *must* be included in the clerk's transcript whether or not they are separately designated in the notices of the parties (Cal Rules of Ct 8.122(b)(1)):

- Notice of appeal;
- Judgment appealed from and any notice of its entry;
- Any notice of intention to move for new trial, for vacation of judgment, for judgment notwithstanding the verdict (JNOV), or for reconsideration of an appealed order (with supporting and opposing memorandums and attachments) and the ruling on the motion and notice of its entry;
- Any order appealed from and notice of its entry;
- Notices or stipulations to prepare clerk's or reporter's transcript or to proceed by settled statement or agreed statement; and
- The register of actions, if any.

These mandatory documents in the clerk's transcript are also known as the "judgment roll." On appeal based on the judgment roll alone, see §§9.115-9.117.

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§9.69 b. Additional Designated Items

The following items *may* be included in the clerk's transcript if they are designated by one of the parties (Cal Rules of Ct 8.122(b)(3)):

- Other identified papers, records, or affidavits filed or lodged with the clerk, including the court's minutes and any written rulings or orders of the court;
- Jury instructions submitted by a party and the cover pages required by Cal Rules of Ct 2.1055(b)(2) indicating the party requesting them, and any written jury instructions given by the court; and
- Trial exhibits, whether admitted in evidence, rejected, or lodged, as long as a party has specifically directed the exhibits to be copied in the transcript. See Cal Rules of Ct 8.122(a)(3).

NOTE: If a party does not direct the clerk to copy an exhibit for inclusion in the clerk's transcript, the exhibit is nevertheless "deemed part of the record" (Cal Rules of Ct 8.122(a)(3)), and the original exhibit may be forwarded to the appellate court at the time of the hearing, on request by any party. See Cal Rules of Ct 8.224.

Originals of depositions may *not* be designated for inclusion in the clerk's transcript except on stipulation of the parties or by order of the court of appeal. Cal Rules of Ct 8.122(b)(4)(A).

A transcript of an electronic recording offered in evidence, or any other recording transcript provided to the jury, is marked for identification and becomes part of the clerk's transcript in the event of an appeal. Cal Rules of Ct 2.1040(a).

PRACTICE TIP: Be sure that the trial court clerk keeps a copy of any transcript provided to the jury and that the clerk's copy indicates what portion was actually shown to or heard by the jurors and what parts were edited out.

NOTE: Appellate courts have been reluctant to view videotapes admitted in evidence at a trial. See *e.g., Moustakas v Dashevsky* (1994) 25 CA4th 752, 30 CR2d 753 (court of appeal ruled that videotape (as opposed to certified transcript of audio portion of videotape) was not properly part of record on appeal; appellate court's evaluation of record may not include its own impressions of sights and sounds of the courtroom unless and until legislature or supreme court says so).

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c. Procedures for Designation

§9.70 (1) Designating Documents

In the notice designating the record on appeal, the appellant designates the documents to be included in the clerk's transcript. Cal Rules of Ct 8.121(b)(1)(B), 8.122(b).

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§9.71 (a) Manner of Designating Documents

Each document to be included in the clerk's transcript must be individually identified by its exact title and filing date or, if the filing date is not readily available, the date it was signed. Cal Rules of Ct 8.122(a)(1). Do not designate "all pleadings and papers on file in this action," because it is improper to do so if the appellate court will not need them all to consider the case. *Thomas v Thomas* (1944) 66 CA2d 818, 821, 153 P2d 389.

Minute orders can be collectively described, *e.g.,* "all minute orders" or "all minute orders entered between" specific dates. The same is true for jury instructions, *e.g.,* "all written instructions given, refused, or withdrawn." Cal Rules of Ct 8.122(a)(1).

PRACTICE TIP: The clerk will ordinarily copy only documents that are *specifically* identified. For example, all documents filed in connection with a motion pertinent to the appeal should be separately identified, including the original notice, brief, declarations, opposition brief, opposition declarations, reply papers, and the minute order disposing of the motion.

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§9.72 (b) Lost Documents

Sometimes documents are lost or misfiled in the superior court clerk's office, thus rendering them unavailable for inclusion in the clerk's transcript. The superior court has the power to replace its records when they have been lost or destroyed. See Cal Rules of Ct 8.155. In some counties, the clerk will notify counsel of missing documents before the record is filed and request copies of the documents from the attorney's files. The statutory procedure for reconstruction of destroyed documents might also be available. See CCP §1953.03. If counsel does not have copies, the clerk will insert a notice in the transcript that designated documents were not included because they could not be found.

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§9.73 (2) Time for Filing

The appellant must file and serve the notice designating the record on appeal within 10 days after the date of filing the notice of appeal; the notice must specify that the appellant elects to use a clerk's transcript. Cal Rules of Ct 8.121(a)-(b).

PRACTICE TIP: It is often preferable to combine the notice designating the record on appeal with the notice of appeal. See Cal Rules of Ct 8.121(a). See also §9.23.

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§9.74 d. Respondent's Notice Designating Additional Documents

Within 10 days after service of the appellant's notice designating the record on appeal and specifying the papers and records to be included in the clerk's transcript, the respondent may serve and file a notice designating additional papers or records to be included. Cal Rules of Ct 8.122(a)(2).

For an overview of deadlines for filing notices designating the record, see chart in §9.144.

PRACTICE TIP: When the appellant's designation contains an erroneous or imprecise description of a document important to the respondent, the respondent should list it in the notice by its exact title and filing date to avoid confusion or risk of exclusion.

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e. Cost of Transcript

§9.75 (1) Clerk Notifies Parties of Estimated Cost

The superior court clerk will send the appellant a notice of the estimated cost to prepare an original and one copy of the clerk's transcript within 30 days after either the respondent files a designation of additional documents or the time to do so expires, whichever occurs first. Cal Rules of Ct 8.122(c)(1)(A). The clerk will also send to each party a notice of the estimated cost to prepare a copy of the transcript for that party. Cal Rules of Ct 8.122(c)(1)(B).

NOTE: The cost of including additional papers at the respondent's request is initially borne by the appellant. However, the cost of the clerk's transcript is a cost on appeal recoverable by the prevailing party. Cal Rules of Ct 8.278(d)(1)(B). See §§9.75-9.78.

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§9.76 (2) Deposit of Cost

The appellant should deposit the estimated cost of preparing the clerk's transcript with the superior court clerk within 10 days after receiving the estimate. In lieu of depositing the estimated cost, the appellant can submit an application for, or an order granting, a waiver of the cost under Cal Rules of Ct 3.50-3.58. Cal Rules of Ct 8.122(c)(3).

NOTE: When the notice of appeal is filed, the appellant must also file a nonrefundable $100 deposit with the clerk. Govt C §68926.1; Cal Rules of Ct 8.100(b)(2). This deposit will be credited against the cost of the clerk's transcript.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.77 (a) Appellant Fails to Deposit Cost

§9.77 (a) Appellant Fails to Deposit Cost

If the appellant fails to pay the estimated cost, or fails to apply for a waiver under Cal Rules of Ct 3.50-3.58, the superior court clerk will notify the appellant that he or she has 15 days after the date of the mailing of the notice in which to pay the estimated cost or file a fee waiver application (if one has not already been filed). Cal Rules of Ct 8.100(d)(1). Failure to meet these requirements may result in dismissal of the appeal. Cal Rules of Ct 8.100(d)(2)-(3). On relief from dismissal, see Cal Rules of Ct 8.60(d).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.78 (b) Appeal Abandoned or Dismissed

§9.78 (b) Appeal Abandoned or Dismissed

If the appeal is abandoned or dismissed before the transcript is complete, the clerk must refund to the appellant any portion of the deposit of estimated costs that exceeds the actual cost of the portion of the record prepared thus far. Cal Rules of Ct 8.122(d)(2).

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§9.79 f. Timing for Clerk to Prepare Transcript; Filing

The trial court clerk must prepare the clerk's transcript within 30 days after the appellant has deposited the estimated cost of the transcript. Cal Rules of Ct 8.122(d)(1)(A).

PRACTICE TIP: In practice, clerks frequently exceed this time limit, often by many months. As with the reporter's transcript, preparation of the clerk's transcript can create a serious bottleneck in the appellate process. The appellant should be diligent in investigating any delay and, if necessary, send letters to the appropriate section of the superior court clerk's office to insist on timely preparation of the clerk's transcript. This problem can be avoided if counsel elects to prepare an appendix in lieu of the clerk's transcript under Cal Rules of Ct 8.124 (see §9.81) or if the attorneys stipulate to use the superior court file under Cal Rules of Ct 8.128 (see §9.106).

When the clerk's transcript is completed, the clerk of the superior court forwards it to the reviewing court for filing and to the appellant and any other party who has paid for a copy. Cal Rules of Ct 8.150(a)(1). The clerk of the reviewing court then mails notice to the parties, stating the date the record was filed. Cal Rules of Ct 8.150(a)(2). (The date of filing the record triggers the running of time to file the appellant's opening brief. Cal Rules of Ct 8.212(a)(1).)

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§9.80 g. Use and Disposition of Copies of Clerk's Transcript

The procedure for use and disposition of the copy of the clerk's transcript after the original has been forwarded to the appellate court clerk is the same as for the copy of the reporter's transcript: It is sent to the appellant. Cal Rules of Ct 8.150.

PRACTICE TIP: The respondent's attorney may order a copy of the clerk's transcript and will ordinarily find the convenience of having an office copy well worth the usually modest cost.

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§9.81 5. Appendix

As with the clerk's transcript, the appendix consists of photocopies of all pleadings and papers designated by the parties, continuously paginated, with alphabetical and chronological indexes at the beginning. Cal Rules of Ct 8.124(b), (d). The difference between the appendix and the clerk's transcript is that the attorneys, not the clerk, prepare the appendix.

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§9.82 a. Advantages and Disadvantages

The primary advantages of using an appendix in lieu of a clerk's transcript are as follows:

- Vastly increased speed of completion of the record;
- Increased control over the accuracy of the record;
- Legibility of the record; and
- Somewhat reduced costs.

The disadvantage of preparing an appendix is that it is often difficult to obtain clean copies of documents from trial counsel because they tend to write on them in ink during trial. Appellate counsel may find it very time consuming to obtain a complete set of clean copies. It is thus not unusual to have to ask the court clerk to copy a large number of documents from the court's file.

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b. Procedure for Electing to Use Appendix

§9.83 (1) Appellant Must Specify Election in Notice Designating Record on Appeal

If the appellant elects to use an appendix in lieu of a clerk's transcript, that election must be specified in the notice designating the record on appeal, which must be filed and served within 10 days after the notice of appeal is filed. Cal Rules of Ct 8.121(a)(1), 8.124(a)(1)(A).

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§9.84 (2) Respondent May Elect to Use Appendix

Within the same time that the appellant must file the notice designating the record on appeal (*i.e.,* 10 days after the notice of appeal is filed), and if the appellant's fee for a clerk's transcript has not been waived, the respondent can file and serve a notice electing to use an appendix, in which case the parties must use this procedure *even if* the appellant has elected to use another procedure (*e.g.,* a clerk's transcript). Cal Rules of Ct 8.124(a)(1)(B); Advisory Committee Comment to Cal Rules of Ct 8.124(a).

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§9.85 (3) Objection to Election of Appendix

Within 10 days after service of the notice of election to prepare an appendix in lieu of the clerk's transcript, any party may file a noticed motion in the superior court objecting to the use of this procedure. The superior court may grant the motion and order that the procedure not be used. Cal Rules of Ct 8.124(a)(1). If the motion is denied, the objecting party has the option of filing his or her own appendix. Cal Rules of Ct 8.124(a)(3), (b)(4), (e)(3).

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§9.86 (4) Clerk Sends Register of Actions

After a party has elected to use an appendix, the superior court then "promptly" sends a copy of the register of actions, if any, to counsel and any unrepresented parties. Cal Rules of Ct 8.124(a)(2). See form in §9.142.

NOTE: In the second appellate district, a "Mandatory Docketing Statement" is mailed to the appellant within a few days after the filing of a notice of appeal. If the appellant has designated a clerk's transcript to be prepared, the Mandatory Docketing Statement allows the appellant to elect instead to proceed with an appendix in lieu of the clerk's transcript. When filed, the Mandatory Docketing Statement will operate to void earlier designations of the clerk's transcript. This procedure does *not* extend the time for the notice designating the record in the first instance; it merely allows an appellant who designates a clerk's transcript to change his or her mind and elect to proceed by appendix in lieu of the clerk's transcript.

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c. Contents

§9.87 (1) Mandatory Documents

An appendix prepared by the appellant or jointly by the parties must contain the following (Cal Rules of Ct 8.124(b)(1)):

- All documents required to be included in a clerk's transcript under Cal Rules of Ct 8.122(b)(1), showing the dates required by Cal Rules of Ct 8.122(b)(2);
- Any other documents from the court's file listed in Cal Rules of Ct 8.122(b)(3) that are essential "for proper consideration of the issues," including all documents that the appellant should reasonably assume will be relied on by the respondent;
- The notice of election to prepare an appendix in lieu of the clerk's transcript (*i.e.,* the notice designating the record on appeal); and
- With a joint appendix, the stipulation designating its contents.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.88 (2) Documents That Must Not Be Included

§9.88 (2) Documents That Must Not Be Included

An appendix must not include any of the following documents (Cal Rules of Ct 8.124(b)(2)):

- Any documents filed in the superior court that are not necessary "for proper consideration of the issues";
- Transcripts of oral proceedings that are includable in a reporter's transcript; or
- The record of an administrative proceeding that was admitted into evidence, refused, or lodged in the trial court.

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§9.89 (3) Documents Incorporated by Reference

The appendix must not incorporate by reference any documents except the record on appeal in another case then pending before the same reviewing court or the record on a prior appeal in the same case. Cal Rules of Ct 8.124(b)(3)(D). In the body of the appendix and at the end of the index, the other appeal must be identified by case name and number. Parts of the record to be incorporated by reference must be identified by volume, page number, and either document title or date of any oral proceedings to be incorporated. Cal Rules of Ct 8.124(b)(2)(A).

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§9.90 (4) Exhibits

Exhibits, whether admitted in evidence, refused, or lodged, are considered a part of the record, regardless of whether they are reproduced in the appendix. Cal Rules of Ct 8.124(b)(3). On transmission of exhibits not reproduced in the appendix, see §9.129.

When a party wants to include in the appendix a copy of an exhibit that is in the possession of another party, the requesting party must first ask the party who has the exhibit to provide a copy or lend it for copying. All parties should reasonably cooperate with such requests. Cal Rules of Ct 8.124(c)(1). If an informal agreement cannot be reached, then the requesting party may serve and file in the reviewing court a notice asking the party possessing the exhibit to deliver it to the requesting party or to the reviewing court. The possessing party must comply with the request within 10 days after the notice is served. Cal Rules of Ct 8.124(c)(2).

If the party possessing the exhibit sends it to the requesting party, that party must copy and return it to the possessing party within 10 days after receiving it. Cal Rules of Ct 8.124(c)(3). If the party possessing the exhibit sends it to the reviewing court, that party must also send a copy of the requesting party's notice and immediately notify the requesting party that it has sent the exhibit to the reviewing court. Cal Rules of Ct 8.124(c)(4). The requesting party can then presumably obtain a copy of the exhibit from the reviewing court.

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§9.91 d. Inadequate or Incomplete Appendix

If the appellant's appendix is so inadequate that justice cannot be done without requiring additional documents, the appellate court may impose monetary sanctions on the appellant or may strike the appellant's opening brief. Cal Rules of Ct 8.124(g). See *Nguyen v Proton Technol. Corp.* (1999) 69 CA4th 140, 145 n7, 81 CR2d 392. Similarly, a litigant or an attorney who includes matters not reasonably material to decide the issues on appeal may be ordered to pay an award to the other party or to pay any costs the court considers appropriate. Cal Rules of Ct 8.124(g), 8.278(a)(5). If the appellant's appendix contains material not part of the record and the opening brief makes arguments relying on this material, the court might not dismiss the appeal but will disregard the improper material and statements. *Pulver v Avco Fin. Servs.* (1986) 182 CA3d 622, 227 CR 491.

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§9.92 e. Representation of Accuracy

Filing an appendix constitutes a representation by the attorney filing it that the appendix consists of true and correct copies of the papers in the superior court file. Willful or grossly negligent filing of an appendix containing nonconforming copies may subject the party or counsel to monetary or other sanctions. Cal Rules of Ct 8.124(g). See *Warfield v Peninsula Golf & Country Club* (1989) 214 CA3d 646, 652 n3, 262 CR 890; *Marriage of Green* (1984) 159 CA3d 1163, 1164, 206 CR 286.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.93 f. Joint Appendix 'Encouraged'

§9.93 f. Joint Appendix "Encouraged"

When all parties agree that the contents of the appendix are accurate and include all documents necessary for proper consideration of the issues on appeal, it is called a joint appendix. The parties are "encouraged" to stipulate to a joint appendix. Cal Rules of Ct 8.124(a)(3).

PRACTICE TIP: The reviewing court and its staff prefer to deal with one appendix containing all the documents rather than two or more separate appendixes. For practical as well as strategic reasons, the parties should agree on a joint appendix.

The deadline for the parties to come to an agreement on a joint appendix is the date on which the appellant's brief is due, because a joint appendix must be served and filed by that date. Cal Rules of Ct 8.124(e)(2).

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g. Separate Appendixes

§9.94 (1) Respondent's Appendix

When the appellant has filed an "Appellant's Appendix," the respondent may file a "Respondent's Appendix" containing any documents omitted from the appellant's appendix necessary for resolution of the issues on appeal. Cal Rules of Ct 8.124(b)(4).

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§9.95 (2) Appellant's Reply Appendix

The appellant may serve an "Appellant's Reply Appendix" incorporating any additional documents as may be necessary for purposes of the arguments raised in the appellant's reply brief. Cal Rules of Ct 8.124(b)(5).

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§9.96 h. Format

Generally, an appendix must comply with the requirements of Cal Rules of Ct 8.144(a)-(c) for a clerk's transcript. Cal Rules of Ct 8.124(d)(1). See §§9.67-9.69.

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§9.97 (1) Conforming Copies Not Required

Complete, legible copies of documents must be used, although a conformed copy of each document with the clerk's filing stamp showing the date of filing is no longer required. However, each document necessary to determine the timeliness of the appeal must show the date. Cal Rules of Ct 8.124(b)(1)(A). California Rules of Court 8.124(g) further provides that a party filing an appendix represents under penalty of sanctions that document copies are accurate.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.98 (2) Cover Requirements

§9.98 (2) Cover Requirements

The appendix cover must set forth the same information (*i.e.,* case title, court, name of trial judge, county, and attorney's name, address, and State Bar number) as required on briefs and must be prominently titled "APPELLANT'S APPENDIX," "JOINT APPENDIX," "RESPONDENT'S APPENDIX," or "APPELLANT'S REPLY APPENDIX." Cal Rules of Ct 8.124(d)(2), 8.204(b)(10).

The colors of appendix covers are as follows (Cal Rules of Ct 8.40(b)(1)):

- Appellant's appendix—green
- Respondent's appendix—yellow
- Appellant's reply appendix—tan
- Joint appendix—white

The use of recycled paper for the cover is encouraged. Cal Rules of Ct 8.124(d)(1), 8.144(c)(2).

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§9.99 (3) Paper and Binding Requirements

As with a clerk's transcript, the appendix must be on white or unbleached, recycled, 8½-by-11-inch paper, of at least 20-pound weight, and photocopied by a process that produces clear and permanent copies equally legible to printing. Only one side of each page may be used, and the inside margins must be at least 1¼ inches from the binding. The appendix must be bound on the left side and paginated consecutively. Cal Rules of Ct 8.124(d)(1), 8.144(a). The volumes may not exceed 300 pages each. Cal Rules of Ct 8.124(d)(1), 8.144(c)(1). All copies must be reproduced on recycled paper. Cal Rules of Ct 8.124(d)(1), 8.144(a)(1)(A).

NOTE: The appendix must not be bound together with a brief. Cal Rules of Ct 8.124(d)(3).

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§9.100 (4) Index Requirements

The beginning of the first volume must contain both an alphabetical and a chronological index of the documents included, showing the page number on which the first page of each document can be found. Cal Rules of Ct 8.124(d)(1), 8.144(b)(1).

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i. Filing

§9.101 (1) When to File

The following deadlines apply:

- A joint appendix or an appellant's appendix must be served and filed with the appellant's brief. Cal Rules of Ct 8.124(e)(2).
- A respondent's appendix, if any, must then be served and filed with the respondent's brief. Cal Rules of Ct 8.124(e)(3).
- An appellant's reply appendix, if any, must be served and filed with the appellant's reply brief. Cal Rules of Ct 8.124(e)(4).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.102 (2) Where to File

§9.102 (2) Where to File

Appendixes are filed in the reviewing court. Cal Rules of Ct 8.124(e)(1)(B).

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j. Cost of Preparation

§9.103 (1) Joint Appendix

The cost of preparing a joint appendix is borne by one of the following (Cal Rules of Ct 8.124(f)(2)):

- By appellant;
- Equally by the appealing parties when several parties appeal from the same judgment; or
- Otherwise as the parties may agree.

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§9.104 (2) Separate Appendixes

When the appellant's appendix and the respondent's appendix are prepared separately, each party bears the initial cost of preparing its own appendix. Cal Rules of Ct 8.124(f)(1).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.105 (3) Cost Recoverable on Appeal

§9.105 (3) Cost Recoverable on Appeal

Unless otherwise ordered by the appellate court, the actual expense of preparing the original and a copy of the appendix is recoverable by the prevailing party. Cal Rules of Ct 8.278(a)(1), (d)(1)(B).

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6. Superior Court File

§9.106 a. Allowed by Stipulation in First, Third, and Fourth Districts

In civil cases, parties to appeals in the first, third, and fourth appellate districts are authorized and encouraged to stipulate to the use of the original superior court file in lieu of a clerk's transcript. See 1st App Dist R 8; 3d App Dist R 2; 4th App Dist R 3.

NOTE: This procedure is available only on the parties' stipulation; it cannot be invoked by one party over the other's objection. Cal Rules of Ct 8.128(a)(1).

PRACTICE TIP: The use of the original superior court file in lieu of a clerk's transcript results in large savings of time and money. The superior court file can be paginated and forwarded to the appellate court in a matter of days, compared with the many months it takes to prepare the clerk's transcript.

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§9.107 b. Appellant May Also Designate Reporter's Transcript

In addition to stipulating to use the superior court file as the record of the written documents, the appellant may designate a reporter's transcript as the record of the oral proceedings. See §§9.24-9.32.

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§9.108 c. Briefs Must Include References to Record

Parties stipulating to the use of the original superior court file in lieu of a clerk's transcript must still support each factual statement in their briefs with an appropriate and specific reference to the record. Cal Rules of Ct 8.204(a)(1)(C). See *Bernard v Hartford Fire Ins. Co*. (1991) 226 CA3d 1203, 277 CR 401 (parties using superior court file must paginate their own files in accordance with clerk's chronological index and support their arguments with exact page citations to superior court file).

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d. Procedure

§9.109 (1) Filing Stipulation With Notice Designating Record on Appeal

A stipulation to use the original superior court file in lieu of the clerk's transcript must be filed in superior court with the appellant's notice designating the record on appeal, which must be filed in the superior court within 10 days after the notice of appeal is filed. Cal Rules of Ct 8.121(a)(1), 8.128(a)(2).

PRACTICE TIP: If the stipulation cannot be filed within 10 days, the appellant should take appropriate steps to preserve his or her rights, either by filing a notice to prepare a clerk's transcript or a notice of election to prepare an appendix in lieu of the clerk's transcript.

Consult the court clerk on whether a court form is required for the stipulation. See 1st App Dist R 8 (stipulation must be substantially in particular form).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.110 (2) Service on Reviewing Court

§9.110 (2) Service on Reviewing Court

A copy of the stipulation to use the superior court file in lieu of the clerk's transcript must be served on the clerk of the court of appeal. Cal Rules of Ct 8.128(a)(2).

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e. Costs

§9.111 (1) Clerk Mails Estimate

No later than 10 days after a stipulation is filed, the superior court clerk must make an estimate of the cost for preparing the file and sending copies to all attorneys of record and any unrepresented parties. Cal Rules of Ct 8.128(b)(1).

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§9.112 (2) Appellant Must Pay Deposit Cost Within 10 Days

Appellant must deposit, or file an application for or an order granting a waiver of, the cost within 10 days after receiving notice of the estimated costs. Cal Rules of Ct 8.128(b)(1).

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§9.113 f. Clerk Arranges Contents

Within 10 days after receiving payment of the estimated cost, or the court files an order waiving the cost, the superior court clerk must do the following (Cal Rules of Ct 8.128(b)(2)):

- Arrange the entire file in chronological order;
- Number the pages in the original file; and
- Attach both a chronological index and a list of all attorneys of record, the parties they represent, and any unrepresented parties.

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§9.114 g. Clerk Sends Index to Parties; Files With Appellate Court

After arranging the file, the superior court clerk must send copies of the index to the attorneys of record, or to parties appearing without counsel, to permit them to paginate their office files to correspond to the superior court file. Cal Rules of Ct 8.128(b)(3).

The prepared superior court file is then filed with the court of appeal with the reporter's transcript, if one has been requested; otherwise, it is filed immediately. Cal Rules of Ct 8.128(b)(4).

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7. Judgment Roll

§9.115 a. Contents

The "judgment roll" in a contested case consists of the following documents (CCP §670(b)):

- The pleadings;
- All orders striking out any pleading in whole or in part;
- A copy of the jury verdict;
- A copy of the court's statement of decision or a referee's findings;
- Any order made on demurrer or relating to a change of party;
- A copy of the judgment; and
- If there are multiple defendants and a default judgment has been entered against one or more defendants, the summons, the proof of service of the summons, and, if service was by publication, the affidavit of publication of the summons and the order directing its publication.

On the judgment roll in a case in which judgment is entered by default against a defendant, see CCP §670(a); for contents of the judgment roll in probate proceedings, see Prob C §1050.

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§9.116 b. Use of Judgment Roll as Record on Appeal

When the appellant designates only the papers and records constituting the judgment roll (or the papers and records constituting the clerk's transcript) and does not designate a reporter's transcript, the judgment roll and the pretrial order, if any, constitute the record on appeal. If the theory of the appeal concerns a matter of law appearing on the face of the judgment roll, a judgment roll appeal may be sufficient. Indeed, the judgment roll may sometimes be preferable because it prevents references to evidentiary matters that may have developed during the trial.

NOTE: In a judgment roll appeal in which the appellant does not designate a reporter's transcript, the respondent cannot require the preparation of a reporter's transcript. Cal Rules of Ct 8.130(a)(4). The respondent may, however, counterdesignate additional portions of the clerk's transcript not included in the judgment roll. Cal Rules of Ct 8.122(a)(2), (b)(3). In addition, the reviewing court may, on the respondent's or its own motion, order augmentation of the record to prevent a miscarriage of justice. Cal Rules of Ct 8.155(a).

PRACTICE TIP: Exercise care in electing a judgment roll; the judgment will be affirmed if prejudicial error does not appear on the face of the judgment roll. *Dumas v Stark* (1961) 56 C2d 673, 674, 16 CR 368; *In re Marriage of Hall* (2000) 81 CA4th 313, 316, 96 CR2d 772. Once elected, the record on a judgment roll appeal cannot be expanded except by permission of the appellate court. Cal Rules of Ct 8.155(a).

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§9.117 c. Procedure

The procedural steps for designating the judgment roll as the record on appeal are the same as those for designating the clerk's transcript. See Cal Rules of Ct 8.122; see also §§9.70-9.73.

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§9.118 C. Multiple Appeals

Special problems arise when several parties appeal from the same judgment or there is a cross-appeal under Cal Rules of Ct 8.108(e). The wasted effort that would result from preparing a separate, complete record for each appeal or cross-appeal is avoided by Cal Rules of Ct 8.147, which requires preparation of a single record on appeal. Unless otherwise ordered, the initial expense of preparing the record is to be shared equally by all appellants. Cal Rules of Ct 8.147(a)(2).

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§9.119 D. Reference to Prior Appeal

When the parties are using a clerk's transcript or a reporter's transcript, a party may incorporate by reference all or parts of a record in a prior appeal in the same case by specifying those parts in a separate section at the end of its designation of the record. The prior appeal must be identified by case name and number. Parts of the record to be incorporated by reference must be identified by volume, page number, and either document title or date of oral proceedings to be incorporated. Cal Rules of Ct 8.147(b)(1).

The parts of a clerk's transcript or other written documents from the prior appeal will not be copied for inclusion in the clerk's transcript on the subsequent appeal unless the party specifies the parts to be copied in its designation of the record in the same manner required for incorporation by reference and pays the copying cost. Cal Rules of Ct 8.147(b)(2).

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III. MOTIONS AFFECTING RECORD

A. Augmenting Record

§9.120 1. Additional Documents and Oral Proceedings

"Augmenting the record" means to add to the appellate record documents or oral proceedings (either in the form of a certified transcript, agreed statement, or settled statement) not previously designated by the parties. Cal Rules of Ct 8.155(a)(1).

NOTE: Augmentation of the record is limited to the evidence and documents that were submitted to the trial court, as distinguished from the receipt of new evidence that is outside the trial court record. See *DeYoung v Del Mar Thoroughbred Club* (1984) 159 CA3d 858, 862, 206 CR 28 (documents never filed or lodged with superior court cannot be included in record by means of augmentation under Cal Rules of Ct 8.155(a)).

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2. Procedure

§9.121 a. On Reviewing Court's Own Motion

The appellate court, on its own motion, may augment the record by ordering that documents in the superior court file, or the entire file, be forwarded to it or that certain oral proceedings be transcribed, certified, and transmitted to it. Cal Rules of Ct 8.155(a)(1).

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§9.122 b. On Party's Motion

A party requesting augmentation must do so by filing and serving a motion to augment the record. Cal Rules of Ct 8.155(a)(1). The motion must be accompanied by copies of any documents or transcripts to be added to the record, if they are available to that party. The copies must be consecutively numbered, beginning with the number 1. Cal Rules of Ct 8.155(a)(2). If the moving party does not have a copy of the document it wants added, the procedures under Cal Rules of Ct 8.120-8.130 must be followed. Cal Rules of Ct 8.155(a)(3). If the request is granted, the copies are considered to be part of the record. Cal Rules of Ct 8.155(a)(2). A motion to augment, and any opposition to it, must meet the requirements of Cal Rules of Ct 8.40, 8.44, and 8.54 for appellate motion filing. See §§11.9-11.13.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.123 3. Cost of Additional Transcript

§9.123 3. Cost of Additional Transcript

Unless otherwise ordered, the appellant is responsible for the cost of any additional transcript that the appellate court may order added to the record. Cal Rules of Ct 8.155(a)(1)(B).

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§9.124 B. Correcting Record

"Correcting the record" means to conform the record to the truth, *e.g.,* by supplying a page missing from the clerk's transcript or correcting an error in the reporter's transcript. See Cal Rules of Ct 8.155(b).

The record may be corrected by stipulation of the parties, on the motion of a party, or on the appellate court's own motion. Cal Rules of Ct 8.155(c)(1). If the appellate court cannot resolve a dispute over the record on appeal, it may submit the record to the trial court judge who tried the case, and the trial court must then conform the record to the truth. Cal Rules of Ct 8.155(c)(2).

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§9.125 C. Omissions by Clerk

"Omission" refers to a designated or required portion of the record omitted by the clerk. Cal Rules of Ct 8.155(b). If this happens, a party may serve and file in the superior court a notice specifying the omitted portion and requesting that it be prepared, certified, and sent to the appellate court. Cal Rules of Ct 8.155(b)(1). The clerk must comply with the notice within 10 days after it is filed; if the clerk fails to do so, the party can file and serve a motion to augment the record. Cal Rules of Ct 8.155(b)(2).

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§9.126 D. Additional Evidence and Factual Determinations on Appeal

Although the record on appeal is usually the only source of factual information about the case before the appellate court, under CCP §909 the reviewing court may receive additional evidence on appeal, that is, evidence outside the record brought up from the trial court.

When a judge rather than a jury was the trier of fact, the court of appeal may make factual determinations on appeal contrary to or in addition to those of the trial court. CCP §909. In addition, in nonjury cases, in the interests of justice, the appellate court may receive additional evidence on facts occurring at any time before the appellate court's decision. CCP §909. See also Cal Rules of Ct 8.252. This procedure is different from correcting or augmenting the record on appeal because it permits the introduction of new evidence. The grounds and procedure for requesting additional evidence and factual determinations on appeal are discussed in §§11.81-11.85. For the form of motion to make factual determinations or to produce additional evidence, see §§11.80, 11.85, respectively.

NOTE: Appellate courts' authority to take evidence and make findings of fact on appeal under CCP §909 and Cal Rules of Ct 8.252(c) "should be exercised sparingly." Advisory Committee Comment to Cal Rules of Ct 8.252(c), citing *In re Zeth S.* (2003) 31 C4th 396, 2 CR2d 683.

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§9.127 E. Motion to Dismiss Appeal for Failure to Procure Filing of Record on Appeal

The appellate court can dismiss a case on its own motion "if a party fails to timely do an act required to procure the record." Cal Rules of Ct 8.140(a)(1). The clerk of the appellate court initiates this dismissal procedure by mailing a notice of the appellant's default to appellant's counsel of record. If appellant's counsel does not file a motion for relief from default within 15 days after the mailing, the appeal may be dismissed if the defaulting party is the appellant, or if the defaulting party is the respondent, the reviewing court may allow the appeal to go forward on the record submitted by the appellant. Cal Rules of Ct 8.140(a).

NOTE: If a party fails to comply with the clerk's notice under Rule 8.140(a), and if the appellant is the defaulting party, the court may vacate the dismissal for "good cause." Cal Rules of Ct 8.140(b)(1). If the respondent is the defaulting party, the court may allow the party to obtain relief under Cal Rules of Ct 8.60(d). Cal Rules of Ct 8.140(b)(2). See §9.22.

When the superior court clerk does not give a required notice under Rule 8.140(a), any party may serve and file a motion for sanctions under Rule 8.140(c), including dismissal of the appeal. The motion, however, will be denied by the reviewing court if the defaulting party "cures the default within 15 days after the motion is served." Cal Rules of Ct 8.140(c).

On these procedures, see §§11.40-11.48. For a form of motion to dismiss for failure to procure filing of the record, see §§11.46-11.47.

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§9.128 F. Motion for Relief From Default in Procuring Filing of Record on Appeal

When appellant's counsel fails to procure the filing of the record on appeal, the appellant may file a motion for relief from default under Cal Rules of Ct 8.60(d) and CCP §473 in the appellate court, not the trial court. Cal Rules of Ct 8.60(d)-(e). The motion must contain a memorandum and a declaration or an affidavit setting out the facts constituting mistake, surprise, inadvertence, or excusable neglect that led to the default from which relief is sought. CCP §473; Cal Rules of Ct 8.54(a)(1)-(2), 8.57(b), 8.60(d). It must be filed and served on all other parties to the appeal. Cal Rules of Ct 8.25(a). Any opposition to a motion for relief from default must be filed within 15 days after the motion is filed. Cal Rules of Ct 8.54(a)(3).

PRACTICE TIP: Although the court of appeal tends to be quite liberal in granting relief from default, barring any prejudice to the respondent (see 9 Witkin, California Procedure, *Appeal* §690 (5th ed 2008)), the risk of missing the deadline, the expense and embarrassment of seeking relief from default, and the risk that counsel will not be relieved from default can all be avoided if the notice designating the record on appeal is combined with the notice of appeal, as allowed by Cal Rules of Ct 8.121(a), or otherwise filed and served without fail within the 10-day period allowed under the rules.

On these procedures, see §11.61. For a form of motion for relief from default, see §11.62.

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IV. TRANSMISSION OF EXHIBITS

§9.129 A. Procedure for Transmission

A party may, within 10 days after the last respondent's brief is filed or could be filed under Cal Rules of Ct 8.220, serve and file a notice with the superior court clerk specifying any original exhibits, whether admitted in evidence, refused, or lodged but not copied in the clerk's transcript, that he or she wishes transmitted to the reviewing court. Cal Rules of Ct 8.224(a)(1).

PRACTICE TIP: Remember to request transmittal of exhibits that are material to issues on appeal and to adhere to the procedures on requesting transmission, because failure to do so may result in the appellate court's making its decision on the record without the exhibits. *Brown v Copp* (1951) 105 CA2d 1, 9, 232 P2d 868.

When a party wants to designate additional exhibits after an opposing party has served and filed its notice designating exhibits, Cal Rules of Ct 8.224(a)(2) allows that party, 10 days after notice is served under Rule 8.224(a)(1), to file and serve a notice in superior court designating such exhibits. Any party filing a notice under Rule 8.224(a)(1) or (2) must serve a copy on the reviewing court. Cal Rules of Ct 8.224(a)(3).

NOTE: A party who misses the deadlines of Cal Rules of Ct 8.224(a)(1)-(2) may apply at any time to the reviewing court for permission to send an exhibit to that court. Cal Rules of Ct 8.224(c). On format and contents of applications, see chap 11.

Within 20 days of receiving the notice, the superior court clerk transmits those exhibits to the appellate court along with a list of the exhibits, which serves as a receipt when signed by the appellate court clerk. Cal Rules of Ct 8.224(b). In addition, the appellate court may at any time request that original exhibits be transmitted to it by the superior court clerk, whether requested by the parties or not. Cal Rules of Ct 8.224(d).

PRACTICE TIP: Because the appellate court sometimes gives relatively short notice of a hearing, and because the superior court clerk's office sometimes has difficulty locating trial exhibits, particularly large or unconventional exhibits, counsel should follow up personally to ensure that important exhibits are in fact transmitted.

For an overview of deadlines for filing notices designating the record and related matters, see chart in §9.144.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.130 B. Return of Exhibits

§9.130 B. Return of Exhibits

The parties may request that certain exhibits be returned to the superior court before issuance of the remittitur if the exhibits are needed in connection with a collateral proceeding. When the appeal is concluded and the remittitur issued, the original exhibits must be returned to the trial court clerk. Cal Rules of Ct 8.224(d).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/ V. FORMS/§9.131 A. Form: Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) (Judicial Council Form APP-003)

V. FORMS

§9.131 A. Form: Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) (Judicial Council Form APP-003)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	Superior Court Case Number:
RE: Appeal filed on *(date)*:	Court of Appeal Case Number *(if known)*:

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

RECORD OF THE DOCUMENTS FILED IN THE TRIAL COURT

1. I elect to use the following method of providing the Court of Appeal with a record of the documents filed in the trial court (*check a, b, c, d, or e and fill in any required information*):
   - a. ☐ A clerk's transcript under rule 8.122 (*You must check (1) or (2) and fill out the clerk's transcript section on page 2 of this form.)*
     - (1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.
     - (2) ☐ I am asking that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have attached the following document (*check (a) or (b)*):
       - (a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or
       - (b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (*Use Application for Waiver of Court Fees and Costs (form FW-001) to prepare and file this application.*)
   - b. ☐ An appendix under rule 8.124.
   - c. ☐ The original superior court file under rule 8.128. (NOTE: *Local rules in the Court of Appeal, First, Third, Fourth, and Fifth Appellate Districts, permit parties to stipulate to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.*)
   - d. ☐ An agreed statement under rule 8.134 (*You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)*
   - e. ☐ A settled statement under rule 8.137. (*You must complete item 2b(3) below and attach to your proposed statement on appeal copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.137(b)(3).)*

RECORD OF ORAL PROCEEDINGS IN THE TRIAL COURT

2. I elect to proceed:
   - a. ☐ WITHOUT a record of the oral proceeding in the trial court. I understand that without a record of the oral proceeding in the trial court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether the trial court made an error.
   - b. ☐ WITH the following record of the oral proceeding in the trial court:
     - (1) ☐ A reporter's transcript under rule 8.130 (*You must fill out the reporter's transcript section on page 3 of this form.*)
     - (2) ☐ An agreed statement (*Check and complete either (a) or (b) below.*)
       - (a) ☐ I have attached an agreed statement to this notice.
       - (b) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement. (*You must attach a copy of this stipulation to this notice.*) I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.
     - (3) ☐ A settled statement under rule 8.137 *(You must attach the motion required under rule 8.137(a) to this form.)*

Form Approved for Optional Use
Judicial Council of California
APP-003 [Rev. January 1, 2008]

APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (Unlimited Civil Case)

Cal. Rules of Court, rules 3.50, 8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courtinfo.ca.gov

CASE NAME:	CASE NUMBER:

NOTICE DESIGNATING CLERK'S TRANSCRIPT

You must complete this section if you checked item 1.a. above indicating that you elect to use a clerk's transcript as the record of the documents filed in the trial court.

3. **Required documents.** The clerk will automatically include the following items in the clerk's transcript:
   a. Notice of appeal
   b. Notice designating record on appeal (*this document*)
   c. Judgment or order appealed from
   d. Notice of entry of judgment (*if any*)
   e. Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (*if any*)
   f. Ruling on one or more of the items listed in e.
   g. Register of actions or docket

4. **Additional documents.** If you want any documents from the trial court proceeding in addition to the items listed above to be included in the clerk's transcript, you must identify those documents here.

   I would like the clerk to include in the transcript the following documents from the trial court proceeding (*You must identify each document you want included by its title and provide the date it was filed, if you know it.*):

Document Title and Description	Date of Filing
h.	
i.	
j.	

☐ See additional pages

5. **Exhibits to be included in clerk's transcript.** I would like the clerk to include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court (f*or each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence*):

Exhibit Number	Description	Admitted (Yes/No)
a.		
b.		
c.		

☐ See additional pages

6. **Record of administrative proceeding to be transmitted to the reviewing court.** I would like the clerk to transmit to the reviewing court under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the trial court (give the title and date or dates of the administrative proceeding):

Title of Administrative Proceeding	Date or Dates

CASE NAME:	CASE NUMBER:

NOTICE DESIGNATING REPORTER'S TRANSCRIPT

You must complete this section if you checked item 2b(1) above indicating that you elect to use a reporter's transcript as the record of the oral proceedings in the trial court. Please remember that you must pay for the cost of preparing the reporter's transcript.

7. ☐ I request that the reporter(s) provide my copy of the reporter's transcript in computer-readable format. (*Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).*)

8. ☐ **Proceedings.** I would like the following proceedings in the trial court to be included in the reporter's transcript (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—and, if you know it, the name of the court reporter who recorded the proceedings.*):

Date	Department	Full/Partial Day	Description of Proceedings	Reporter's Name
a.				
b.				
c.				
d.				
e.				
f.				
g.				
h.				
i.				
j.				

☐ See additional pages

Date:_____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF APPELLANT OR ATTORNEY)

Comment: This is an optional Judicial Council form for filing a notice designating the record on appeal in an

unlimited civil case under Cal Rules of Ct 8.120-8.160. The Notice Designating Record on Appeal must be filed in the superior court, not in the court of appeal. Use the form to designate the record on appeal and elect what forms of the record to use (*e.g.,* Appendix only; Appendix and Reporter's transcript; Clerk's transcript only; Clerk's and Reporter's transcripts). See §§9.24-9.119 for discussion of the different forms of the record that may be used.

The Judicial Council's form for filing a notice designating the record on appeal in a limited civil case is in §10.194.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.132 B. Form: Notice to Prepare Reporter's Transcript (Appeal From Superior Court)

§9.132 B. Form: Notice to Prepare Reporter's Transcript (Appeal From Superior Court)

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE TO PREPARE REPORTER'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, request the preparation of a reporter's transcript, which shall include:**

All oral proceedings whether in chambers or in open court required by California Rules of Court 8.130, including without limitation all proceedings in the above-entitled case that took place on the following dates.

DATE	DEPARTMENT	FULL OR HALF DAY	NAME OF REPORTER	AMOUNT OF DEPOSIT
_ _[*date*]_ _	_ _[*department*]_ _	_ _[*full/half*]_ _	_ _[*name*]_ _	**$**_ _[*amount*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: Deposit*]

A deposit of _ _[*e.g., $325 (one half day at $325)*]_ _ **accompanies this notice, under Cal Rules of Ct 8.130(b).**

[*Alternative 2: Reporter's waiver*]

In lieu of a deposit, the reporter's written waiver of deposit accompanies this notice, under Cal Rules of Ct 8.130(b)(3).

[*Alternative 3: Transcript Reimbursement Fund application*]

In lieu of a deposit, a copy of the Transcript Reimbursement Fund application filed under Cal Rules of Ct 8.130(c)(1) accompanies this notice, under Cal Rules of Ct 8.130(b)(3).

[*Continue*]

The notice of appeal in this matter was filed on _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.133 C. Form: Respondent's Notice Designating Record on Appeal (Unlimited Civil Case) (Judicial Council Form APP-010)

§9.133 C. Form: Respondent's Notice Designating Record on Appeal (Unlimited Civil Case) (Judicial Council Form APP-010)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
— TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
RESPONDENT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	Superior Court Case Number:
RE: Appeal filed on *(date)*:	Court of Appeal Case Number *(if known)*:
Notice: Please read Judicial Council form APP-001 before completing this form. This form must be filed in the superior court, not in the Court of Appeal.	

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

The appellant has elected to use a clerk's transcript under rule 8.122.

a. ☐ **Additional documents.** *(If you want any documents from the superior court proceedings in addition to the documents designated by the appellant to be included in the clerk's transcript, you must identify those documents here.)*

In addition to the documents designated by the appellant, I request that the clerk include in the transcript the following documents from the superior court proceedings. *(You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

Document Title and Description	Date of Filing
(1)	
(2)	
(3)	

☐ See additional pages.

b. ☐ **Additional exhibits.** *(If you want any exhibits from the superior court proceedings in addition to those designated by the appellant to be included in the clerk's transcript, you must identify these exhibits here.)*

In addition to the exhibits designated by the appellant, I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. *(For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence.)*

Exhibit Number	Description	Admitted (Yes/No)
(1)		
(2)		
(3)		

☐ See additional pages.

Form Approved for Optional Use
Judicial Council of California
APP-010 [New January 1, 2010]

Cal. Rules of Court, rules 3.50, 8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courtinfo.ca.gov
CEB

CASE NAME:	CASE NUMBER:

1. c. ☐ **Copy of clerk's transcript.** I request a copy of the clerk's transcript. *(check (1) or (2).)*

(1) ☐ I will pay the superior court clerk for this transcript when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, I will not receive a copy.

(2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have attached the following document *(check (a) or (b)):*

(a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or

(b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (*Use* Request to Waive Court Fees *(form FW-001) to prepare and file this application.*)

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

The appellant has elected to use a reporter's transcript under rule 8.130.

a. ☐ **Additional proceedings.** *(If you want any oral proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*

In addition to the proceedings designated by the appellant, I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—and, if you know it, the name of the court reporter who recorded the proceedings.)*

Date	Department	Full/Partial Day	Description of Proceedings	Reporter's Name
(1)				
(2)				
(3)				
(4)				
(5)				
(6)				
(7)				

☐ See additional pages.

CASE NAME:	CASE NUMBER:

2.b. Copy of Reporter's Transcript.

(1) ☐ I request a copy of the reporter's transcript.

(2) ☐ I request that the reporters provide (*check (a), (b), or (c)*):

(a) ☐ My copy of the reporter's transcript in paper format.

(b) ☐ My copy of the reporter's transcript in computer-readable format.

(c) ☐ My copy of the reporter's transcript in paper format and a second copy of the reporter's transcript in computer-readable format.

(*Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).*)

(3) I have *(check all that apply)*:

(a) ☐ Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).

(b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(b)(3).

(c) ☐ Attached the reporter's written waiver of a deposit for *(check either (i) or (ii))*:

(i) ☐ All of the designated proceedings.

(ii) ☐ Part of the designated proceedings.

(d) ☐ Attached a certified transcript under rule 8.130(b)(3).

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF RESPONDENT OR ATTORNEY)

Comment: This is an optional Judicial Council form for filing a respondent's notice designating the record on appeal

under Cal Rules of Ct 8.120-8.160. The Respondent's Notice Designating Record on Appeal must be filed in the superior court, not in the court of appeal.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.134 D. Form: Notice to Prepare Partial Reporter's Transcript (Appeal From Superior Court)

§9.134 D. Form: Notice to Prepare Partial Reporter's Transcript (Appeal From Superior Court)

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE TO PREPARE PARTIAL REPORTER'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, request the preparation of a partial reporter's transcript, which shall include only the following proceedings in the above-entitled case that took place on the following dates:**

DATE	DEPARTMENT	FULL OR HALF DAY	NAME OF REPORTER	AMOUNT OF DEPOSIT
_ _[*date*]_ _	_ _[*department*]_ _	_ _[*full/half*]_ _	_ _[*name*]_ _	$_ _[*amount*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: Deposit*]

A deposit of _ _[*e.g., $325 (one half day at $325)*]_ _ **accompanies this notice, under California Rules of Court 8.130(b).**

[*Alternative 2: Reporter's waiver*]

In lieu of a deposit, the reporter's written waiver of deposit accompanies this notice, under Cal Rules of Ct 8.130(b)(3).

[*Alternative 3: Transcript Reimbursement Fund application*]

In lieu of a deposit, a copy of the Transcript Reimbursement Fund application filed under Cal Rules of Ct 8.130(c)(1) accompanies this notice, under Cal Rules of Ct 8.130(b)(3).

[*Continue*]

The notice of appeal in this matter was filed on _ _[*date*]_ _**.**

Appellant intends to raise the following points on appeal: _ _[*List points to be raised under Cal Rules of Ct 8.130(a)(2)*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.135 E. Form: Preliminary Stipulation on Attempt to Prepare Agreed Statement (Cal Rules of Ct 8.134)

§9.135 E. Form: Preliminary Stipulation on Attempt to Prepare Agreed Statement (Cal Rules of Ct 8.134)

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_ _[*Name, State Bar number address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

PRELIMINARY STIPULATION ON ATTEMPT TO PREPARE AGREED STATEMENT (CALIFORNIA RULES OF COURT 8.134)

To the clerk of the court:

It is stipulated between appellant, _ _[*name*]_ _, and respondent, _ _[*name*]_ _, through their attorneys of record, that the parties will attempt to prepare an agreed statement on appeal under Cal Rules of Ct 8.134.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.136 F. Form: Motion to Proceed by Settled Statement (Cal Rules of Ct 8.137)

§9.136 F. Form: Motion to Proceed by Settled Statement (Cal Rules of Ct 8.137)

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION TO PROCEED BY SETTLED STATEMENT (CALIFORNIA RULES OF COURT 8.137)

To the clerk of the court:

PLEASE TAKE NOTICE that appellant, _ _[*name*]_ _**, in lieu of a** _ _[*reporter's/reporter's and clerk's*]_ _ **transcript, moves to proceed by a settled statement under Cal Rules of Ct 8.137.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.137 G. Form: Appellant's Proposed Settled Statement (Cal Rules of Ct 8.137(a))

§9.137 G. Form: Appellant's Proposed Settled Statement (Cal Rules of Ct 8.137(a))

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

APPELLANT'S PROPOSED SETTLED STATEMENT
(CALIFORNIA RULES OF COURT 8.137(a))

To the clerk of the court:

Under Cal Rules of Ct 8.137, appellant, _ _[*name*]_ _**, submits this statement in lieu of a** _ _[*reporter's/reporter's and clerk's*]_ _ **transcript.**

Appellant proposes the following narrative summary of the oral proceedings during trial: _ _[*Summarize in narrative form all or those portions of the oral proceedings appellant considers material to a determination of the points on appeal*]_ _**.**

[*Add only if statement is being submitted in lieu of both reporter's and clerk's transcript*]

This narrative summary is proposed in lieu of both a reporter's and a clerk's transcript. As required by Cal Rules of Ct 8.137(b)(3), copies of the following documents are attached: _ _[*List documents required to be attached under Cal Rules of Ct 8.137(b)(3), and attach copies of those documents*]_ _**.**

[*Add if appellant desires to attach additional papers and records under Cal Rules of Ct 8.137(b)(5)*]

Under Cal Rules of Ct 8.137(b)(5), copies of the following are attached: _ _[*List desired papers and records that could have been incorporated in the clerk's transcript under Cal Rules of Ct 8.122; attach copies of all these papers and records*]_ _**.**

[*Add if narrative summary covers only a portion of oral proceedings*]

Appellant intends to raise the following points on appeal: _ _[*List*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.138 H. Form: Respondent's Proposed Amendments to Appellant's Proposed Settled Statement (Cal Rules of Ct 8.137(b)(4))

§9.138 H. Form: Respondent's Proposed Amendments to Appellant's Proposed Settled Statement (Cal Rules of Ct 8.137(b)(4))

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

RESPONDENT'S PROPOSED AMENDMENTS TO APPELLANT'S PROPOSED SETTLED STATEMENT (CALIFORNIA RULES OF COURT 8.137(b)(4))

To the clerk of the court:

PLEASE TAKE NOTICE that respondent, _ _[*name*]_ _**, proposes the following amendments to appellant's proposed settled statement:**

The proposed statement of the oral proceedings should include the following: _ _[*Specify*]_ _**.**

[*Add if appropriate*]

The summary of the testimony of witness _ _[*name*]_ _**, appearing at page** _ _[*number*]_ _**, lines** _ _[*number*]_ _ **through** _ _[*number*]_ _**, should be deleted and the following inserted,** _ _[*insert proposed amended version*]_ _**, for the following reason** _ _[*specify*]_ _**.**

[*Add if appropriate*]

The proposed statement should contain the following documents and records, copies of which are attached: _ _[*List desired documents and records, and attach copies*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.139 I. Form: Notice to Prepare Clerk's Transcript

§9.139 I. Form: Notice to Prepare Clerk's Transcript

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE TO PREPARE CLERK'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, designate, under California Rules of Court 8.122, the following papers or records on file or lodged with the clerk of this court to be included in the clerk's transcript on appeal, the notice of which appeal was filed on** _ _[*date*]_ _**:**

The documents and records required to be included in the clerk's transcript under Cal Rules of Ct 8.122(b).

[*Add if appropriate*]

The following additional documents and records: _ _[*List numerically by title and exact or approximate date of filing*]_ _**.**

[*Add if appropriate*]

The following exhibits to be copied: _ _[*List separately each exhibit admitted in evidence or rejected that appellant desires copied*]_ _**.**

[*Add if appropriate*]

The clerk is requested not to copy the following designated papers, copies of which appellant will supply: _ _[*List each paper for which copies will be supplied*]_ _**.**

[*Add if appropriate*]

The following _ _[*record/portion of the record*]_ _ **on the prior appeal to the** _ _[*e.g., Court of Appeal, Fourth District, Division Two*]_ _**, No.** _ _[*appellate case number*]_ _**, in this same** _ _[*action/proceeding*]_ _ **is to be incorporated by reference in the clerk's transcript for this appeal under Cal Rules of Ct 8.147(b):** _ _[*List all or a portion of the desired records, e.g., reporter's transcript, clerk's transcript, exhibits admitted and rejected, other special portions of appellate record*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

Comment: For a superior court form for designating clerk's transcript, see App E.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.140 J. Form: Respondent's Notice Designating Additions to Clerk's Transcript

§9.140 J. Form: Respondent's Notice Designating Additions to Clerk's Transcript

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

RESPONDENT'S NOTICE DESIGNATING ADDITIONS TO CLERK'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and respondent,** _ _[*name*]_ _**, request that the following papers and records be added to and included in the clerk's transcript, under California Rules of Court 8.122(a)(2):** _ _[*List each desired additional paper and record not designated in appellant's notice*]_ _**.**

[*Add if appropriate*]

The following exhibits are to be copied: _ _[*List each exhibit respondent wants copied*]_ _**.**

[*Add if appropriate*]

The following exhibits to be included in the clerk's transcript need not be copied by the clerk, because respondent _ _[*herewith furnishes/will furnish*]_ _ **two copies of each exhibit:** _ _[*List each exhibit for which copies are or will be supplied*]_ _**.**

[*Add if appropriate*]

The clerk is requested not to copy the following designated papers, copies of which respondent will supply: _ _[*List each paper for which copies will be supplied*]_ _**.**

[*Add if appropriate*]

The following _ _[*record/portion of the record*]_ _ **on the prior appeal to the** _ _[*e.g., Court of Appeal, Fourth District, Division Two*]_ _**, No.** _ _[*appellate case number*]_ _**, in this same** _ _[*action/proceeding*]_ _ **is to be incorporated by reference in the clerk's transcript for this appeal under Cal Rules of Ct 8.147(b):** _ _[*List all or a portion of the desired records, e.g., reporter's transcript, clerk's transcript, exhibits admitted and rejected, other desired special portions of appellate record*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and respondent**

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.141 K. Form: Request for Correction of Transcript

§9.141 K. Form: Request for Correction of Transcript

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

REQUEST FOR CORRECTION OF
_ _[*CLERK'S/REPORTER'S/CLERK'S AND REPORTER'S*]_ _ **TRANSCRIPTS**

To the clerk of the court:

_ _[*Name*]_ _**,** _ _[*plaintiff/defendant*]_ _**, and** _ _[*appellant/respondent*]_ _ **request that the** _ _[*clerk's/reporter's/clerk's and reporter's*]_ _ **transcript(s) be corrected as follows:** _ _[*List specific corrections to be made*]_ _**.**

_ _[*Plaintiff/Defendant*]_ _ **and** _ _[*appellant/respondent*]_ _ **further request that the clerk set a time for hearing for certification of the transcript(s) by the judge who tried the case under California Rules of Court 8.155(c)(1).**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and** _ _[*appellant/respondent*]_ _

Comment: When a document that should be included in the clerk's transcript has been lost or misfiled, the party desiring inclusion of the document can attach a copy of it to the party's request for correction and request that the copy be ordered accepted as an official record and be included in the clerk's transcript. This form should be filed with the reviewing court. See Cal Rules of Ct 8.155(b)(2).

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.142 L. Form: Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case) (Judicial Council Form APP-011)

§9.142 L. Form: Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case) (Judicial Council Form APP-011)



APP-011

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
— TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
RESPONDENT'S NOTICE ELECTING TO USE AN APPENDIX (UNLIMITED CIVIL CASE)	Superior Court Case Number:
RE: Appeal filed on *(date)*:	Court of Appeal Case Number *(if known)*:

Notice: Please read Judicial Council form APP-001 before completing this form. This form must be filed within 10 days after the notice of appeal is filed. It must be filed in the superior court, not in the Court of Appeal.

The appellant in this case has not been granted a waiver of the fees for preparing a clerk's transcript. I elect under rule 8.124(a) to use an appendix in lieu of a clerk's transcript.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF RESPONDENT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-011 [New January 1, 2010]

RESPONDENT'S NOTICE ELECTING TO USE AN APPENDIX (Unlimited Civil Case)

Cal. Rules of Court, rule 8.124
www.courtinfo.ca.gov
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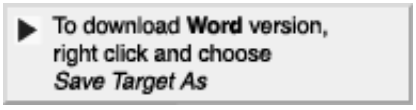
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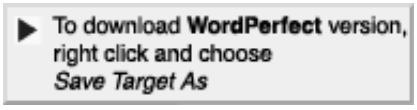
court of appeal.

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Source: Civil Litigation/California Civil Appellate Practice/9 Designating the Record/§9.143 M. Form: Stipulation Designating Contents of Joint Appendix

§9.143 M. Form: Stipulation Designating Contents of Joint Appendix





_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION DESIGNATING CONTENTS OF JOINT APPENDIX

To the clerk of the court:

[*Add one of the following alternatives*]

[*Alternative 1: Contents of appendix*]

It is hereby stipulated by and between appellant, _ _[*name*]_ _**, and respondent,** _ _[*name*]_ _**, through their attorneys of record, that the contents of the joint appendix shall consist of the following:** _ _[*List all papers to be included in joint appendix*]_ _**.**

[*Alternative 2: Contents of appendix under Cal Rules of Ct 8.124*]

It is hereby stipulated by and between appellant, _ _[*name*]_ _**, and respondent,** _ _[*name*]_ _**, through their attorneys of record, that the attached joint appendix shall constitute a full and complete copy of the documents required by California Rules of Court 8.124 or otherwise essential to the proper consideration of the issues on appeal.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

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§9.144 VI. CHART: PROCEDURES FOR DESIGNATING RECORD; TIME LIMITS

Form of Record	Action	Time Limit	Authority
Reporter's Transcript (or partial transcript)	Appellant's notice designating record on appeal and specifying reporter's transcript.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.130(a)(1), 8.121(a). See §9.19.
	Appellant's notice designating record on appeal and specifying partial transcript.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.130(a)(2), 8.121(a). See §§9.24-9.32.
	Appellant's deposit or waiver of estimated cost of preparing full or partial transcript.	Must be filed with notice to prepare reporter's transcript.	Cal Rules of Ct 8.130(b). See §§9.34-9.40.
	Respondent's notice designating additions to transcript.	Within 10 days after service of appellant's notice designating reporter's transcript.	Cal Rules of Ct 8.130(a)(3). See §§9.41-9.45.
	Respondent's deposit or waiver of estimated cost of preparing respondent's designated parts of transcript.	Must be filed with respondent's counterdesignation.	Cal Rules of Ct 8.130(b). See §9.44.
	Reporter's notice of estimate of additional cost of preparing transcript.	If deposit inadequate, reporter must mail notice to party within 15 days after clerk mails notice to reporter of transcript designation. No time limit specified for clerk to mail notice to reporter.	Cal Rules of Ct 8.130(b)(2), (d)(1). See §9.36.
	Payment of additional deposit.	Within 10 days after reporter mails estimate.	Cal Rules of Ct 8.130(b)(2). See §9.36.
	Reporter required to prepare transcript.	Within 30 days after receipt of notice from court clerk that notice to prepare record has been received.	Cal Rules of Ct 8.130(f)(1). See §9.46.
	Party's motion or stipulation to file agreed or settled statement when transcript unavailable.	Within 10 days after clerk mails notice of unavailable matter.	Cal Rules of Ct 8.130(g). See §§9.52-9.57.
	Court clerk mails notice stating date record was filed.	On completion.	Cal Rules of Ct 8.150(a).
	Correction, certification, or augmentation of record or transcript on party's motion stipulation or on court's motion.	None specified.	Cal Rules of Ct 8.155(a)(1), (c)(1). See §9.50.
	Parties' stipulation that transcript is correct.	Any time before certification by judge or clerk.	Cal Rules of Ct 8.155(c)(1).
	Respondent's notification to appellant to share transcript.	Within 20 days following filing of record in court of appeal.	Cal Rules of Ct 8.153(a). See §9.51.
Clerk's Transcript	Appellant's notice designating record on appeal and specifying clerk's transcript.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.122-8.123, 8.121(a). See §§9.67-9.73.
	Respondent's designation of additions to transcript.	Within 10 days after appellant's notice designating clerk's transcript served.	Cal Rules of Ct 8.122(a)(2). See §9.74.
	Clerk's notice of estimate of cost of preparing transcript.	Earlier of 30 days after respondent files designation under Rule 8.122(a)(2) or time for filing designation expires.	Cal Rules of Ct 8.122(c)(1). See §9.75.
	Appellant's deposit of estimate of cost of preparing transcript.	Within 10 days after clerk sends notice of estimated cost.	Cal Rules of Ct 8.122(c)(3). See §§9.76-9.78.

	Court clerk mails notice that clerk's transcript is complete.	Promptly on completion.	Cal Rules of Ct 8.150(a). See §9.79.
	Respondent's notification to appellant to share clerk's transcript.	Within 20 days following filing of record in court of appeal.	Cal Rules of Ct 8.153(a). See §9.80.

Correction and certification of clerk's transcript are same as for reporter's transcript.
See entries for reporter's transcript, above.

Original Exhibits	Notice specifying original exhibits to be transmitted to appellate court (any party).	10 days after last respondent's brief is filed or could be filed.	Cal Rules of Ct 8.224(a)(1). See §9.129.
Appendix in Lieu of Clerk's Transcript	Appellant's notice designating record on appeal and electing to use appendix.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.124(a)(1), 8.121(a). See §9.83.
	Respondent's objection to appellant's election.	Within 10 days after service of notice of election.	Cal Rules of Ct 8.124(a)(1). See §9.85.
	Joint appendix filed.	Served and filed with appellant's opening brief.	Cal Rules of Ct 8.124(e)(2). See §9.93.
	Appellant's appendix filed.	Served and filed with appellant's opening brief.	Cal Rules of Ct 8.124(e)(2). See §9.83.
	Respondent's appendix filed.	Served and filed with respondent's brief.	Cal Rules of Ct 8.124(e)(3). See §9.94.
	Appellant's reply appendix filed.	Served and filed with appellant's reply brief.	Cal Rules of Ct 8.124(e)(4). See §9.95.
Original Superior Court File (if approved by appellate district local rule)	Parties' stipulation to use original superior court file.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.128(a)(2), 8.121(a); 1st App Dist R 8; 3d App Dist R 2; 4th App Dist R 3. See §9.106.
Agreed Statement	Stipulation of parties regarding attempt to prepare agreed statement filed with notice designating record on appeal.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.134(b)(1), 8.121(a). See §§9.52, 9.55.
	Appellant files agreed statement.	Within 40 days after notice of appeal filed.	Cal Rules of Ct 8.134(b)(2). See §9.55.
	Appellant files new notice designating record on appeal (if attempt to prepare agreed statement fails).	Within 50 days after notice of appeal filed.	Cal Rules of Ct 8.134(b)(3). See §9.57.
Settled Statement	Appellant files motion to proceed by settled statement with notice designating record on appeal.	Within 10 days after notice of appeal filed.	Cal Rules of Ct 8.137(a)(1), 8.121(a). See §9.60.
	Appellant files proposed statement.	Within 30 days after order granting motion to use settled statement mailed by clerk or served by party.	Cal Rules of Ct 8.137(b)(1). See §9.61.
	Respondent files proposed amendments to appellant's statement.	Within 20 days after appellant's proposed statement served.	Cal Rules of Ct 8.137(b)(4). See §9.63.
	Clerk sets hearing for settlement of statement.	Earlier of 10 days after respondent files proposed amendments or time to do so expires.	Cal Rules of Ct 8.137(c)(1). See §9.65.
	Appellant settles statement in accordance with judge's order and prepares, serves, and files it.	As set by judge.	Cal Rules of Ct 8.137(c)(2). See §§9.64-9.65.
	Respondent files and serves objections to engrossed statement.	No later than 5 days after engrossed statement served.	Cal Rules of Ct 8.137(c)(3). See §9.65.

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Appeals in Limited Civil and Small Claims Cases

Robert M. Dato
Efrat M. Cogan

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§10.1 I. SCOPE OF CHAPTER

This chapter focuses on appeals in limited civil cases. See §§10.2-10.153. Although much of the procedure, and many practical considerations, that govern appellate practice before the courts of appeal and the supreme court apply equally to practice before appellate divisions of the superior court, there are differences. The most significant of these include the more restrictive limits on the times for filing a notice of appeal, completing the steps necessary to prepare the record on appeal, and the length and format of briefs. These restrictions reflect, in general, recognition of the smaller dollar amounts involved in such appeals and the need to process them on an expedited basis.

This chapter also discusses appeals in small claims actions. See §§10.154-10.191. These are not appeals in the traditional sense but are a method of providing a new trial to a defendant who is dissatisfied with a small claims judgment. Although parties cannot be represented by counsel while the action is being litigated in small claims court, they may be represented by counsel in the superior court on a trial de novo after an appeal has been taken. Attorneys should therefore be familiar with the procedures for filing an appeal and participating in the new trial.

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II. APPEALS IN LIMITED CIVIL CASES

§10.2 A. Superior Court Appellate Division

Appeals in limited civil cases are to the appellate division of the superior court. Cal Const art VI, §11(b); CCP §77(e); *Anchor Marine Repair Co. v Magnan* (2001) 93 CA4th 525, 528, 113 CR2d 284 (if appeal is properly before appellate division, court of appeal lacks jurisdiction over it). In certain circumstances, however, the court of appeal can order a case transferred to it from the superior court appellate division. See §§10.132-10.143. See also the Judicial Council's Information on Appeal Procedures for Limited Civil Cases (Judicial Council Form APP-101-INFO) in §10.192.

NOTE: Before the superior courts' unification, limited civil cases were within the jurisdiction of the municipal courts.

The appellate division has original jurisdiction to grant writs of mandate, prohibition, or review (certiorari) directed to the superior court in limited civil cases. Cal Const art VI, §10; CCP §§1068(b), 1085(b), 1103(b). The appellate division also has inherent power to issue auxiliary writs (*e.g.*, writ of supersedeas) to aid its appellate jurisdiction. See *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 537, 72 CR 790. For further discussion of writ proceedings in limited civil and small claims cases, see California Civil Writ Practice, chap 12 (4th ed Cal CEB 2008).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.3 1. Organization

§10.3 1. Organization

Each California county has an appellate division of the superior court (CCP §77(a)), which consists of three judges unless the Chief Justice finds it necessary that it consist of four judges. Each judge assigned to the appellate division of the superior court must be a judge of that court, a judge of the superior court of another county, a judge retired from the superior court, or a judge of a court of higher jurisdiction. The Chief Justice assigns judges to the appellate division and designates one of the judges of that appellate division as the presiding judge of the division. CCP §77(a). No more than three judges may participate in a hearing or decision. CCP §77(b).

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§10.4 a. Role of Presiding Justice

The presiding judge of the division designates the three judges who will participate in a particular appellate hearing or decision. CCP §77(b). In addition, the presiding judge is responsible for supervising the business of the appellate division and is empowered to make ex parte decisions on certain routine matters, such as applications for extensions of time, without the other judges' participation. CCP §77(d).

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§10.5 b. Panel Necessary for Decision

The concurrence of at least two judges is necessary for a decision. CCP §77(d). The presence of two appellate division judges, even in the absence of the presiding judge, constitutes a legally qualified division. *Ets-Hokin v Appellate Dep't* (1941) 42 CA2d 326, 108 P2d 943.

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§10.6 2. Applicable Rules of Court

The rules of court for appeals in limited civil cases are Cal Rules of Ct 8.800-8.936 and 10.1100-10.1108. The rules of court for appeals in small claims cases are Cal Rules of Ct 8.950-8.966. General information about appeals in limited civil cases can be found in the Judicial Council's Information on Appeal Procedures for Limited Civil Cases (Judicial Council Form APP-101-INFO).

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§10.7 B. Appealable Judgments and Orders

Appealable judgments and orders in limited civil cases are listed in CCP §904.2. For the most part, they are the same judgments and orders appealable in unlimited civil cases (see CCP §904.1, discussed in chap 3), and cases construing the corresponding provisions of the two sections may be used interchangeably. There are exceptions:

- **Change of venue:** Code of Civil Procedure §904.2(c) makes appealable orders granting or denying motions for a change of venue. Similar orders in unlimited civil cases are not appealable under CCP §904.1, although they are reviewable on a petition for a writ of mandate under CCP §400.
- **Proceedings vested in superior court's jurisdiction:** Code of Civil Procedure §904.1(a)(8)-(10) concerns proceedings in which original jurisdiction is vested only in the superior court.
- **Monetary sanctions:** Code of Civil Procedure §904.1(a)(11)-(12) provides that in unlimited civil cases, orders and interlocutory judgments directing the payment of monetary sanctions in excess of $5000 are appealable. Section 904.2 does not contain a parallel provision for limited civil cases. Case law is divided on this point. Compare *Drum v Superior Court* (2006) 139 CA4th 845, 851, 43 CR3d 279 (monetary sanctions are appealable in limited civil cases under "collateral order" rule) with *Lim v Silverton* (1997) 61 CA4th Supp 1, 4, 72 CR2d 408 (monetary sanctions are not appealable in limited civil cases).
- **Special motions to strike:** Code of Civil Procedure §904.1(a)(13) provides that orders granting or denying a special motions to strike under CCP §425.16 are appealable in unlimited civil cases. There is no similar provision in §904.2 for limited civil cases.

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§10.8 C. Determining Whether to Appeal

Many of the considerations informing the decision to pursue an appeal in an unlimited civil case (see chap 1) also apply to the decision whether to pursue an appeal in a limited civil case.

The record in a limited civil case may make it difficult to determine whether grounds for an appeal exist. In some counties, parties in a limited civil case must make their own arrangements to have a court reporter or electronic recording device present in order to obtain a reporter's transcript, which may increase costs. See CCP §269(a); Cal Rules of Ct 2.958. Without a reporter's transcript (see §§10.60-10.65) or an official electronic recording (see §§10.78-10.80), counsel will have difficulty in recreating a record of the oral proceedings. The only options are a statement on appeal (see §§10.67-10.77) or an agreed statement (see §10.66), both of which present the problem that the parties and the judge must try to remember and agree on what occurred long after the case was tried.

Even when the amount in dispute is small, the legal points may be just as complex as those in an appeal brought in the court of appeal. If counsel is to be compensated adequately for handling the appeal, the resulting legal fees may be disproportionate to the amount of the judgment counsel seeks to obtain for the plaintiff or from which he or she seeks to protect the defendant.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/ D. Filing the Notice of Appeal/§10.9 1. Time to File

D. Filing the Notice of Appeal

§10.9 1. Time to File

The appellant must file a notice of appeal in a limited civil case on or before the earliest of (Cal Rules of Ct 8.822(a)):

- 30 days after the court clerk mails a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either document was mailed;
- 30 days after the party filing the notice of appeal serves or is served by another party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by a proof of service; or
- 90 days after entry of the judgment.

Note that, as used in Cal Rules of Ct 8.822(a), "judgment" is defined as "any judgment or order that may be appealed." Cal Rules of Ct 8.804(23).

CAUTION: The provisions of CCP §1013, which extend the time to serve documents if service is by mail, do not apply to notices of appeal. See *Nu-Way Assocs. v Keefe* (1971) 15 CA3d 926, 93 CR 614 (CCP §1013 provision that service by mail is complete at time of deposit in mail does not apply to notices of appeal).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.10 a. Determining Date of Entry of Judgment or Order

§10.10 a. Determining Date of Entry of Judgment or Order

The date of entry of a *judgment* is the date that it is entered in the judgment book or that it is filed under CCP §668.5. Cal Rules of Ct 8.822(b)(1). The date of entry of an *appealable order* is the date that it is entered in the permanent minutes; however, if the minute order directs the preparation of a written order, the date of entry is the date that the signed order is filed. Cal Rules of Ct 8.822(b)(2). For appealable orders that are not entered in the minutes, the entry date is the date that the signed order is filed. Cal Rules of Ct 8.822(b)(3).

NOTE: A written order prepared under Cal Rules of Ct 3.1312, or a similar local rule, is not an order prepared by direction of a minute order. Cal Rules of Ct 8.822(b)(2).

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§10.11 b. If Notice Filed Late

The time limit for filing a notice of appeal is jurisdictional. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 113, 92 CR3d 595. If a notice of appeal is filed late, the appellate division of the superior court has no power to hear the appeal. Cal Rules of Ct 8.822(d); *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 674, 125 CR 757.

NOTE: In unusual circumstances, appellate courts may treat a late appeal as a petition for a writ of mandate. *Olson v Cory* (1983) 35 C3d 390, 400, 197 CR 843. For example, in *Drum v Superior Court* (2006) 139 CA4th 845, 852, 43 CR3d 279, the court construed a late appeal to be a petition for a writ of mandate due to the uncertainty of the law on the appealability of sanctions orders.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.12 c. If Notice Filed Early

§10.12 c. If Notice Filed Early

A notice of appeal that is filed either after the trial court has announced its ruling but before it has rendered judgment, or after the trial court has rendered judgment but before entry of the judgment, is valid and treated as filed immediately after entry of the judgment. Cal Rules of Ct 8.822(c).

JUDICIAL PERSPECTIVE: Early filing of the notice of appeal may make it difficult to designate the record in a timely manner because the notice triggers the 10-day period for filing the notice designating the record on appeal. See Cal Rules of Ct 8.831-8.837. For discussion of designing the record on appeal in limited civil cases, see §§10.41-10.80.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.13 2. Extension of Time to File

§10.13 2. Extension of Time to File

The deadline for filing a notice of appeal is extended only if a party makes one of four types of motions (Cal Rules of Ct 8.823(b)-(e)):

- A motion for a new trial (see §§10.14-10.15);
- A motion to vacate the judgment (see §10.16);
- A motion for judgment notwithstanding the verdict (see §10.17); or
- A motion to reconsider an appealable order (see §10.18).

The presiding judge of the appellate division is expressly precluded from extending the time for filing a notice of appeal. Cal Rules of Ct 8.810(c).

NOTE: Rule 8.823 can only *increase* the time to appeal; it cannot shorten it. If the normal time to appeal under Cal Rules of Ct 8.822(a) is longer than under Cal Rules of Ct 8.823, the time to appeal under Cal Rules of Ct 8.822(a) controls.

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a. Motion for New Trial

§10.14 (1) Denial of Motion

If a party serves and files a valid motion for a new trial, and the motion is *denied*, the time to appeal from the judgment is extended to the earliest of (Cal Rules of Ct 8.823(b)):

- 15 days after the trial court clerk mails, or a party serves, the order denying the motion or a notice of entry of that order;
- 15 days after denial of the motion by operation of law; or
- 90 after entry of the judgment.

Note that the deadline for filing a notice of appeal is extended only if the motion for a new trial is *valid*, that is, timely and made on the proper grounds. See CCP §§657, 659. See also discussion of this issue in the context of appeals from superior court cases in §§7.55-7.64.

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§10.15 (2) Acceptance of Additur or Remittitur

If a party serves and files a valid motion for a new trial, and also serves an acceptance of a conditionally ordered additur or remittitur of damages under a trial court finding of excessive or inadequate damages, the time to appeal from the judgment is extended to 15 days after the date that the party serves the acceptance. Cal Rules of Ct 8.823(b).

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§10.16 b. Motion to Vacate Judgment

If a party serves and files a valid motion to vacate the judgment before the time to file a notice of appeal under Cal Rules of Ct 8.222(a) has expired, the time to appeal from the judgment is extended to the earliest of (Cal Rules of Ct 8.823(c)):

- 15 days after the trial court clerk mails, or a party serves, the order denying the motion or a notice of entry of that order;
- 45 days after the first notice of intention to move or motion is filed; or
- 90 days after entry of the judgment.

NOTE: The deadline for filing a notice of appeal is extended only if the motion to vacate the judgment is *valid*, *i.e.,* one that complies with CCP §§663-663a. The time limits for filing a motion to vacate the judgment are generally set forth in CCP §663a. However, because Rule 8.823(c) does not mention CCP §663a, Rule 8.823(c) should apply to all types of motions to vacate on any ground, statutory or otherwise, not just those that arise under CCP §§663-663a. See *Knudson v Superior Court* (1968) 267 CA2d 876, 879, 73 CR 513 (extension of time under former Rule 8.752(b) (now Rule 8.823(c)) to file notice of appeal applied following timely motion to vacate under CCP §473 (relief from default)). See also discussion of this issue in the context of appeals from superior court cases in §§7.72-7.84.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.17 c. Motion for Judgment Notwithstanding the Verdict

§10.17 c. Motion for Judgment Notwithstanding the Verdict

When a party serves and files a valid motion for judgment notwithstanding the verdict, and the motion is *denied*, the time to appeal from the judgment is extended to the earliest of (Cal Rules of Ct 8.823(d)(1)):

- 15 days after the trial court clerk mails, or a party serves, the order denying the motion or a notice of entry of that order;
- 15 days after denial of the motion by operation of law; or
- 90 days after entry of the judgment.

Note that the deadline for filing a notice of appeal is extended only if the motion for judgment notwithstanding the verdict is *valid*, that is, one that complies with CCP §629. See discussion of this issue in the context of appeals from superior court cases in §§7.86-7.97.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.18 d. Motion to Reconsider Appealable Order

§10.18 d. Motion to Reconsider Appealable Order

When a party serves and files a valid motion to reconsider an appealable order under CCP §1008(a), the time to appeal from the order is extended to the earliest of (Cal Rules of Ct 8.823(e)):

- 15 days after the superior court clerk mails, or a party serves, the order denying the motion or a notice of entry of that order;
- 45 days after the first motion to reconsider is filed; or
- 90 days after entry of the appealable order.

Note that the deadline for filing a notice of appeal is extended only if the motion to reconsider is *valid*, that is, timely and based on new or different facts, circumstances, or law. CCP §1008(a). See discussion of this issue in the context of appeals from superior court cases in §§7.85-7.87.

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§10.19 3. Time to File Cross-Appeal

If a party has filed a timely notice of appeal, any other party who also wishes to appeal from the judgment or order must file a notice of appeal within 10 days after the clerk mails notice of the first appeal. Cal Rules of Ct 8.823(f)(1).

If a party files a timely appeal from an order granting a motion for a new trial, an order granting a motion to vacate a judgment that was granted within 75 days after entry of judgment, or a judgment notwithstanding the verdict, the time for any other party to appeal from the original judgment or from an order denying a motion for judgment notwithstanding the verdict is extended until 10 days after the clerk mails notification of the first appeal. Cal Rules of Ct 8.823(f)(2).

For further discussion of cross-appeals, see chap 8.

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4. Procedure for Filing Notice of Appeal

§10.20 a. Contents of Notice

The notice of appeal "is sufficient if it identifies the particular limited civil case judgment or order being appealed." Cal Rules of Ct 8.821(a)(2). The court must liberally construe the notice, which must be signed either by the appellant or the appellant's attorney. Cal Rules of Ct 8.821(a)(1)-(2).

For the Judicial Council's notice of appeal form, see Notice of Appeal/Cross Appeal (Limited Civil Case) (Judicial Council Form APP-102) in §10.193.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.21 b. Service and Filing

§10.21 b. Service and Filing

The appellant must file the notice of appeal in the superior court that issued the judgment or order. Cal Rules of Ct 8.821(a)(1). The appellant is also required to serve the notice of appeal on all parties; however, the failure to do so neither prevents its filing nor affects its validity, although the court may require the appellant to remedy the failure. Cal Rules of Ct 8.821(a)(3).

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§10.22 (1) Filing Fee Required

The notice of appeal must be accompanied either by the required filing fee or by an application for, or order granting, a fee waiver under Cal Rules of Ct 3.50-3.58. Cal Rules of Ct 8.818, 8.821(b)(1). Even if the appellant does not present the filing fee or an order or application for a fee waiver, the clerk must file the notice of appeal. Cal Rules of Ct 8.821(b)(2).

NOTE: If the trial court previously granted a party's request to waive court costs, and if the waiver is still in effect, court costs for an appeal to the appellate division are waived; the party is not required to file a new waiver application. Cal Rules of Ct 8.818(a)(1).

If the amount claimed in the case is over $10,000, the filing fee is $330; if the amount claimed is $10,000 or less, the fee is $205. Govt C §70621(a)-(b). A county may also include a supplemental fee for the county law library fund. See Bus & P C §§6321, 6322.1.

PRACTICE TIP: Before filing the notice of appeal, confirm the fee amount with the clerk of the superior court in which the appeal will be filed.

For discussion of exemptions from and waivers of the filing fee in the court of appeal, see §§7.23-7.26.

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§10.23 (2) Failure to Pay Filing Fee

If the appellant fails to pay the filing fee or a fee waiver application is denied, the clerk must notify the appellant that the appeal will be dismissed unless the appellant within 15 days after the notice is sent either pays the fee or files a fee waiver application (if the appellant had not previously filed one). Cal Rules of Ct 8.821(c)(1)-(2). If the appellant then fails to act, the appellate division may dismiss the appeal, but it may later vacate the dismissal for good cause. Cal Rules of Ct 8.821(c)(3).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.24 c. Notification of Appeal

§10.24 c. Notification of Appeal

When the notice of appeal is filed, the trial court clerk must promptly mail a notification of its filing, showing the date the notification was mailed and the date the notice of appeal was filed, to the attorney of record for each party, any unrepresented party, and the appellate division clerk. Cal Rules of Ct 8.821(d)(1)-(2).

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5. Consequences of Filing Notice of Appeal

§10.25 a. Jurisdiction Vested in Appellate Division

The filing of a notice of appeal immediately vests jurisdiction of the action in the appellate division. *Diesel Constr. Equip. Co. v Neveils* (1963) 214 CA2d Supp 877, 880, 30 CR 163.

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§10.26 b. Proceedings in Superior Court Automatically Stayed

The filing of the notice of appeal automatically stays proceedings in the superior court "upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." CCP §916(a). The superior court retains jurisdiction only of the parts of the action not "embraced" or "affected" by the judgment or order. CCP §916(a).

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§10.27 (1) Exceptions to Automatic Stay Rule

The enforcement of certain judgments (or appealable orders) is not automatically stayed on the filing of the notice of appeal, *e.g.:*

- Judgments or orders for money or directing payment of money (unless an undertaking is given; see §§6.28-6.29). CCP §917.1(a)(1).
- Costs awarded under CCP §998 or §1141.21 (unless an undertaking is given; see §§6.28-6.29). CCP §917.1(a)(2)-(3).
- Judgments directing the assignment or delivery of personal property in the appellant's possession or control. CCP §917.2.
- Judgments or orders directing the execution of an instrument. CCP §917.3.
- Judgments directing the sale, conveyance, or delivery of possession of real property in the appellant's possession or control. CCP §917.4.
- Judgments appointing a receiver. CCP §917.5.
- Judgments not listed in CCP §§917.1-917.8, if the trial court requires an undertaking and the undertaking is not given, in the following circumstances (CCP §917.9(a)):
- The appellant possesses money or property belonging to the respondent;
- The appellant is required to perform some act benefitting the respondent; or
- The judgment against the appellant is solely for costs awarded under CCP §§1021-1038.
- Judgments against the defendant in unlawful detainer actions. CCP §1176.

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§10.28 (2) Stay by Superior Court Order

The superior court can stay the enforcement of any judgment or order, regardless of whether an appeal is filed. CCP §918(a). However, if an undertaking is required to stay enforcement of a judgment or order, the superior court's power to effect a stay is limited to no more than 10 days after the last date on which a notice of appeal could be filed, unless the opposing party consents to a longer stay. CCP §918(b). The superior court can also condition any stay on the posting of an undertaking. CCP §917.9(a).

NOTE: Section 918 is primarily used to effect a temporary stay to allow the parties to evaluate the need for posttrial motions and an appeal. See §§6.16-6.17.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.29 (a) Ex Parte Application for Stay

§10.29 (a) Ex Parte Application for Stay

If there is a substantial danger that a judgment will be enforced before a noticed motion for a stay can be heard, the appellant should seek an ex parte order staying enforcement until the motion can be heard.

The application for this order must be supported by a declaration stating that (Cal Rules of Ct 3.1204(b)):

- The applicant informed all other parties of the applicant's intention to seek ex parte relief no later than 10:00 a.m. on the court day before the ex parte appearance, including the date, time, manner, and name of the party informed, the relief sought, any response, whether opposition is expected, and stating that the opposing party has been informed where and when application would be made; or
- The applicant made a good faith attempt to inform the opposing party but was unable to do so (including the specifics of efforts made); or
- For other specified reasons, the applicant should not be required to inform the opposing party of the application.

If the applicant provided notice later than 10:00 a.m. on the court day before the ex parte appearance, the declaration must explain the "exceptional circumstances" justifying the shorter notice. Cal Rules of Ct 3.1204(c).

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§10.30 (b) Noticed Motion for Stay

The motion for stay is governed by the uniform law and motion rules. Counsel should refer to those rules (Cal Rules of Ct 3.1100-3.1370) to ascertain that the format of the declarations and memorandum in support of the motion for stay complies with the rules. The moving papers should illustrate the need for a stay, indicate a basis for believing that the appeal is meritorious, and point out the injurious consequences to appellant if a stay is not granted.

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(3) Stay by Appellate Division

§10.31 (a) Writ of Supersedeas

After the appeal has been filed, the appellate division can stay proceedings in the superior court, including enforcement of the judgment or order, by issuing a writ of supersedeas. CCP §923; Cal Rules of Ct 8.824. The petition for a writ of supersedeas is usually made on an urgent basis and before the record on appeal is filed with the appellate court. The appellate division may issue the writ on any conditions it considers just, and it must notify the superior court of any writ or stay that it issues. Cal Rules of Ct 8.824(d).

For further discussion of writs of supersedeas generally, see §§6.68-6.85.

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§10.32 (i) Required Contents

The petition for a writ of supersedeas must be verified, explain why issuance of the writ is necessary, and include a memorandum. Cal Rules of Ct 8.824(a)(2)-(3), (5). In the likely circumstance that the appellate division has not yet received the record on appeal, "[t]he petition must include a statement of the case sufficient to show that the petitioner will raise substantial issues on appeal, including a fair summary of the material facts and the issues that are likely to be raised on appeal." Cal Rules of Ct 8.824(a)(4)(A). In addition, the petition must be accompanied by the following documents (Cal Rules of Ct 8.824(a)(4)(B)):

- The judgment or order, showing its date of entry;
- The notice of appeal, showing its date of filing;
- A reporter's transcript of any oral statement by the court supporting its rulings related to the issues that are likely to be raised on appeal or, if a transcript is unavailable, a declaration fairly summarizing any such statements;
- Any application for a stay filed in the superior court, any opposition to that application, and a reporter's transcript of the oral proceedings concerning the stay or, if a transcript is unavailable, a declaration fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling; and
- Any other document from the superior court proceeding that is necessary for proper consideration of the petition.

NOTE: A reporter's transcript is "unavailable" within the meaning of Cal Rules of Ct 8.824(a)(4)(B) if preparation of the transcript has not yet been completed when a petition for writ of supersedeas is filed. Advisory Committee Comment to Cal Rules of Ct 8.824(a).

These documents must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered, and the documents must be index-tabbed by number or letter. They must begin with a table of contents listing each document by its title and its index-tab number or letter. Cal Rules of Ct 8.824(a)(4)(C).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.33 (ii) Opposition

§10.33 (ii) Opposition

Any opposition must be served and filed within 15 days after the petition is filed, state any material facts not included in the petition, and include a memorandum. Cal Rules of Ct 8.824(b)(1)-(2). The court may not issue a writ of supersedeas until the respondent has had the opportunity to file an opposition. Cal Rules of Ct 8.824(b)(3).

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§10.34 (b) Temporary Stay

Writs of supersedeas are generally acted on promptly, but if time is critical, a petitioner may request a temporary stay, in either the petition or a separate request. Cal Rules of Ct 8.824(c)(1). A separately filed stay must be served on the respondent, although the presiding judge may excuse advance service for good cause. Cal Rules of Ct 8.824(c)(2).

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E. Record on Appeal

§10.35 1. What Constitutes the Record

The record must contain "all matters material to deciding the issues raised." Cal Rules of Court 8.830(b). This usually includes both relevant documents filed in the superior court proceedings and a record of any relevant oral proceedings.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.36 a. Documents Filed in Superior Court

§10.36 a. Documents Filed in Superior Court

The record on appeal *must* contain relevant written documents filed in the superior court proceedings in one of three forms (Cal Rules of Ct 8.830(a)(1)):

- A clerk's transcript (see §§10.43-10.51);
- The original superior court file (if the court has a local rule permitting its use) (see §10.52); or
- An agreed statement (see §§10.53-10.59).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.37 b. Oral Proceedings in Superior Court

§10.37 b. Oral Proceedings in Superior Court

If the appellant wants to raise an issue that requires consideration of oral proceedings in the superior court, the record must also include a record of these proceedings in one of the following forms (Cal Rules of Ct 8.830(a)(2)):

- A reporter's transcript (see §§10.60-10.65);
- An agreed statement (see §10.66);
- A statement on appeal (see §§10.67-10.77); or
- An official electronic recording of the proceedings (if the court has a local rule permitting its use) (see §§10.78-10.80).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.38 2. Determining Appropriate Form of the Record

§10.38 2. Determining Appropriate Form of the Record

The appropriate form of the record on appeal depends on the points to be argued. Counsel must be certain that all points can be adequately considered by the appellate division on the type of record presented, as "[t]he appellate division will presume that the record on appeal includes all matters material to deciding the issues raised." Cal Rules of Ct 8.830(b).

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§10.39 a. Issues Presented in Documents Only

Not every appeal requires a record of oral proceedings. If the case was decided on a point of law by demurrer, by a motion for judgment on the pleadings, or by a ruling on a pre- or posttrial motion based on declarations, no oral evidence is normally presented at the hearing on the motion, and a record of the argument might serve no purpose. In such cases, appellant can proceed on a record that contains only written documents.

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§10.40 b. Issues Require Consideration of Oral Proceedings

If any point raised on appeal requires consideration of issues discussed in oral proceedings, the failure to include a record of them will likely be fatal to a consideration of the point by the appellate division, which presumes that the record on appeal includes "all matters material to deciding the issues raised." Cal Rules of Ct 8.830(b). On an appeal without a record of oral proceedings (sometimes referred to as a "clerk's transcript" or "judgment roll" appeal), the appellate court will not consider the sufficiency of the evidence to support the judgment, presuming that it was sufficient. *Wheelright v County of Marin* (1970) 2 C3d 448, 454, 85 CR 809. Nor will the court consider trial exhibits, even if apparently inconsistent with the judgment, presuming that the evidence received during the trial was sufficient to explain or negate any inconsistencies. *Williams v Inglewood Bd. of Realtors* (1963) 219 CA2d 479, 482, 33 CR 289; *White v Jones* (1955) 136 CA2d 567, 569, 288 P2d 913.

When a record of oral proceedings is necessary, a reporter's transcript will be the most complete and accurate method of presenting them. It is also the most expensive, and sometimes appellate counsel will find that there was no court reporter at trial. Necessity or cost may require that the appellant proceed on a statement on appeal. See §§10.67-10.77

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3. Designating the Record

§10.41 a. Contents of Notice

The appellant must file a notice designating the record on appeal that specifies:

- The date that the notice of appeal was filed. Cal Rules of Ct 8.831(b)(1).
- The form of the record of the *written* documents that the appellant elects to use. Cal Rules of Ct 8.831(b)(2). If the appellant elects to use a clerk's transcript, the notice must also (Cal Rules of Ct 8.831(b)(2)(A)-(B)):
- Identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed; and
- Designate any documents supplementing those required by Cal Rules of Ct 8.832(a)(1).
- Whether the appellant also elects to use a record of *oral* proceedings and which form the appellant elects to use. Cal Rules of Ct 8.831(b)(3)-(4).
- If the appellant elects to use a reporter's transcript, the notice must designate the proceedings to be included as required by Cal Rules of Ct 8.834. Cal Rules of Ct 8.831(b)(5).
- If the appellant elects to use an official electronic recording, the notice must contain a copy of the stipulation required by Cal Rules of Ct 8.835(c). Cal Rules of Ct 8.831(b)(6).
- If the appellant elects to use an agreed statement, the notice must contain the agreed statement or a stipulation required by Cal Rules of Ct 8.836(c)(1). Cal Rules of Ct 8.831(b)(7).

For designation requirements particular to each form of the record, see §§10.47-10.48 (clerk's transcript), §10.52 (superior court file), §§10.55-10.57 (agreed statement), §10.61 (reporter's transcript), §10.69 (statement on appeal).

For the Judicial Council's notice form, see Notice Designating Record on Appeal (Limited Civil Case) (Judicial Council Form APP-103) in §10.194.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.42 b. Time to File

§10.42 b. Time to File

The appellant, within 10 days after filing the notice of appeal, must serve and file in the superior court the notice designating the record on appeal. Cal Rules of Ct 8.831(a). The appellant may combine the notice designating the record with the notice of appeal. Cal Rules of Ct 8.831(a).

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c. Designating Written Documents

§10.43 (1) Clerk's Transcript

The clerk's transcript is a compilation of docket items, such as pleadings, motions, formal orders and judgments, and other documents filed with the clerk. Although the appellant may choose to proceed with the record in the form of an agreed statement (see §§10.53-10.59) or the original superior court file (see §10.52), a clerk's transcript is the most commonly used type of record.

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§10.44 (a) Importance of Completeness

The importance of making sure that the clerk's transcript includes all relevant documents cannot be too strongly emphasized. It is well worth counsel's time and effort, whether representing the appellant or respondent, to personally review the case file, either online or by going to the courthouse and checking out the case file, to decide which documents will benefit the client and to make sure they are included.

JUDICIAL PERSPECTIVE: The appellate court on its own motion can always augment the record with the superior court file and exhibits (see Cal Rules of Ct 8.841(a)(1)), but neither party should count on the court to rescue it.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.45 (b) Mandatory Documents

§10.45 (b) Mandatory Documents

The clerk's transcript must contain (Cal Rules of Ct 8.832(a)(1)):

- The notice of appeal;
- Any judgment appealed from and any notice of its entry;
- Any order appealed from and any notice of its entry;
- Any notice of intention to move for a new trial, or motion to vacate the judgment, motion for judgment notwithstanding the verdict, or motion for reconsideration of an appealed order, along with the supporting and opposing memorandums and attachments, any order on the motion, and any notice of its entry;
- The notice designating the record on appeal; and
- Any register of actions.

NOTE: Each document, except the notice designating the record on appeal and the register of actions, must show the date necessary for the court to determine the timeliness of the appeal. Cal Rules of Ct 8.832(a)(2).

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§10.46 (c) Appellant Can Designate Additional Documents

In addition to the documents that must be included in the clerk's transcript (see §10.45), the appellant can include any additional document filed or lodged in the superior court, any exhibit admitted into evidence, refused, or lodged, and any jury instructions submitted or given. Cal Rules of Ct 8.832(a)(3).

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(d) Special Designation Requirements

§10.47 (i) Notice

The notice designating documents to be included in a clerk's transcript must identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed. Cal Rules of Ct 8.832(b)(2). A notice designating additional documents (see §10.46) may specify portions of designated documents that are not to be included in the clerk's transcript. In addition, for minute orders or jury instructions, it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates, or all written instructions given, refused, or withdrawn. Cal Rules of Ct 8.832(b)(2).

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§10.48 (ii) Exhibits

If the appellant wants an exhibit included in the clerk's transcript, that exhibit must be specified by number or letter in the notice of designation. If the trial court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the trial court clerk within 10 days after the notice designating the exhibit is served. Cal Rules of Ct 8.832(b)(3).

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§10.49 (e) Respondent May Designate Additional Documents

Within 10 days after the appellant serves a notice designating the record on appeal indicating that the appellant elects to use a clerk's transcript, the respondent may serve and file a notice in the superior court designating any additional documents to be included in the clerk's transcript. Cal Rules of Ct 8.832(b)(1).

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§10.50 (f) Cost; Time of Payment; Copies

Within 30 days after the respondent files a designation of additional records, or the time to file it expires, whichever occurs first, the superior court clerk will notify (1) appellant's counsel of the estimated cost of preparing an original and one copy of the clerk's transcript and (2) all other parties of the estimated cost to prepare a copy for that party's use. Cal Rules of Ct 8.832(c)(1).

Within 10 days after the clerk's notification of the cost estimate, the appellant and any party wanting to purchase a copy of the clerk's transcript must deposit the estimated cost with the clerk, unless otherwise provided by law or the party submits an application for, or an order granting, a cost waiver. Cal Rules of Ct 8.832(c)(3). On cost waivers, see Cal Rules of Ct 8.818.

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§10.51 (g) Preparation of Clerk's Transcript

The clerk must prepare the transcript within 30 days after the appellant has arranged for its payment, including any additional copies for other parties. Cal Rules of Ct 8.832(d)(1).

If the appeal is abandoned or dismissed before the clerk has completed preparing the transcript, the clerk must refund any portion of the deposit exceeding the preparation cost actually incurred. Cal Rules of Ct 8.832(d)(2).

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§10.52 (2) Superior Court File

If the superior court's local rules allow it, the parties may elect to use the original superior court file instead of a clerk's transcript. Cal Rules of Ct 8.833(a).

NOTE: Even if the appellant has elected to use a clerk's transcript, the appellate division can decide for itself to use the original superior court file. Cal Rules of Ct 8.833(b)(1).

Within 10 days after the clerk mails the estimated cost of preparing the court file, the appellant must deposit the estimated cost with the clerk, unless the appellant submits an application for, or an order granting, a cost waiver. Cal Rules of Ct 8.833(b)(2).

NOTE: If the trial court previously granted a party's request to waive court costs, and if the waiver is still in effect, court costs for an appeal to the appellate division are waived; the party is not required to file a new waiver application. Cal Rules of Ct 8.818(a)(1).

Within 10 days after the appellant deposits the estimated cost, the clerk must put the superior court file in chronological order, number the pages, and attach a chronological index and a list of all attorneys of record, the parties that they represent, and any unrepresented parties. Cal Rules of Ct 8.833(b)(3). The clerk then sends copies of the index to all attorneys of record and any unrepresented parties for their use in paginating their copies of the file to conform to the index. Cal Rules of Ct 8.833(b)(4).

NOTE: If the appellant has also elected to use a reporter's transcript, the clerk must send the prepared superior court file to the appellate division with the reporter's transcript. Cal Rules of Ct 8.833(b)(5).

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§10.53 (3) Agreed Statement

An agreed statement is a written summary of the superior court proceedings that the parties have agreed to and can be used in place of a clerk's transcript, a reporter's transcript, or both. Cal Rules of Ct 8.836(a). An agreed statement is principally used when the parties are concerned with a particular legal issue or issues on which they wish to have an appellate ruling. A typical situation is one in which there is a frequently recurring legal issue, and counsel for the parties to the appeal represent several other clients in the same position. An appellate decision in the case may then be used to govern disposition in the other cases.

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§10.54 (a) How to Initiate

If the parties elect to use an agreed statement, the appellant must indicate that election on its notice designating the record under Cal Rules of Ct 8.831 and attach to the notice either the agreed statement itself or a stipulation that the parties are attempting to agree on a statement. Cal Rules of Ct 8.836(c)(1). If the appellant files a stipulation, the agreed statement must be filed within 30 days of the filing of the notice of designation. Cal Rules of Ct 8.836(c)(2)(A). If the parties ultimately cannot agree on the statement, the appellant must file a notice stating that fact as well as a new notice designating the record. Cal Rules of Ct 8.836(c)(2)(B).

For a form for the stipulation to file an agreed statement, see §10.58.

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§10.55 (b) Contents

The parties have great flexibility on the contents of an agreed statement, although it should include only those portions of the proceedings that they deem significant to the points on appeal. Cal Rules of Ct 8.836(b)(1). If the trial testimony is relevant, the parties may stipulate as to the facts, agree to a statement of the testimony of a witness, or present a partial transcript.

For a form for the agreed statement, see §10.59.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.56 (i) Required Contents

§10.56 (i) Required Contents

At a minimum, the statement must explain (Cal Rules of Ct 8.836(b)(1)):

- The nature of the action;
- The basis for the appellate division's jurisdiction; and
- The rulings of the superior court relating to the points to be raised on appeal.

If the agreed statement replaces a clerk's transcript, the agreed statement must also include copies of the documents required by Cal Rules of Ct 8.832(a)(1). Cal Rules of Ct 8.836(b)(2).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.57 (ii) Optional Contents

§10.57 (ii) Optional Contents

The agreed statement can include any additional documents allowed under Cal Rules of Ct 8.832(a)(3), *e.g.,* exhibits (admitted in evidence, refused, or lodged), notices, declarations, orders, and jury instructions (given or refused). Cal Rules of Ct 8.836(b)(3).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.58 (c) Form: Stipulation Regarding Attempt to Prepare Agreed Statement

§10.58 (c) Form: Stipulation Regarding Attempt to Prepare Agreed Statement

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10.58-1 Stipulation regarding attempt to prepare agreed statement

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION REGARDING ATTEMPT TO PREPARE AGREED STATEMENT (CAL RULES OF CT 8.836)

It is stipulated between appellant, _ _[*name*]_ _, and respondent, _ _[*name*]_ _, through their counsel, that they will attempt to prepare an agreed statement on appeal under California Rules of Court 8.836.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: Original (filed with clerk of trial court); office and client copies.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.59 (d) Form: Agreed Statement on Appeal

§10.59 (d) Form: Agreed Statement on Appeal

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10.59-1 Agreed statement on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

AGREED STATEMENT ON APPEAL
(CAL RULES OF CT 8.836)

Appellant and respondent file this agreed statement under California Rules of Court 8.836, signed by appellant and respondent through their counsel:

1. A copy of the judgment is attached.

2. Notice of appeal was filed on _ _[*date*]_ _**, a copy of which is attached.**

3. The following papers on file or lodged with the clerk of the court are to be transmitted as originals: _ _[*List, e.g., notices, affidavits, orders, instructions given or refused*]_ _**.**

4. The following trial exhibits on file with the clerk that were _ _[*admitted in evidence/admitted in evidence or rejected/offered in evidence but rejected*]_ _ **are to be transmitted as originals:** _ _[*List*]_ _**.**

5. The following facts were alleged and proved: _ _[*Specify*]_ _**.**

[*Add if desired*]

6. The following facts were offered by _ _[*name*]_ _ **to be proved:** _ _[*Specify*]_ _**.**

[*Continue*]

[7]. The following questions arose in and were decided by the trial court: _ _[*List questions and how they were decided*]_ _**.**

[8]. The issue(s) on appeal _ _[*is/are*]_ _ **as follows:** _ _[*Specify*]_ _**.**

[9]. The reviewing court has jurisdiction of this controversy because of the following: _ _[*Specify*]_ _**.**

[*Add one of the following options if desired*]

[*Option 1: No motion for new trial or to vacate*]

[10]. There was no motion for new trial or motion to vacate judgment.

[*Option 2: Motion for new trial or to vacate*]

[10]. A notice of motion _ _[*for new trial/to vacate judgment*]_ _ **was filed by** _ _[*appellant/respondent*]_ _ **on** _ _[*date*]_ _**, and was heard by the trial court on** _ _[*date*]_ _**.** _ _[*Summarize oral proceedings, if any*]_ _**. On** _ _[*date*]_ _**, the trial court ruled that** _ _[*state ruling*]_ _**. A copy of the moving papers, the response, and the court's ruling are included in the papers designated in paragraph 3 of this agreed statement.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: Original (filed with clerk of trial court); office and client copies.

Comment: When a motion is made for new trial or to vacate judgment and there have been oral proceedings concerning it, a recital of these proceedings must be included in the statement.

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d. Designating Oral Proceedings

(1) Reporter's Transcript

§10.60 (a) Contents

The reporter's transcript is a written compilation of oral proceedings in the superior court. It consists of transcriptions of any proceedings designated by the appellant in the notice, although the reporter must also "note in the transcript where any proceedings were omitted and the nature of those proceedings." Cal Rules of Ct 8.834(c)(1). The reporter must also note whether an exhibit was marked for identification and whether it was admitted or refused, and must identify the exhibits by number or letter. Cal Rules of Ct 8.834(c)(1). In addition, unless a party designates the voir dire of the jurors, the opening statements, or the proceedings on a motion for new trial, the reporter will not transcribe them. Cal Rules of Ct 8.834(c)(2).

If a party designates only a part of a witness's testimony, the reporter must still transcribe the witness's entire testimony, unless the parties stipulate otherwise. Cal Rules of Ct 8.834(c)(3).

NOTE: The reporter will not copy any document that may be included in the clerk's transcript. Cal Rules of Ct 8.834(c)(4).

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§10.61 (b) Special Designation Requirements

The notice designating the reporter's transcript must specify the date of each oral proceeding to be included in the transcript and may specify portions of the designated proceedings that are not to be included. Cal Rules of Ct 8.834(a)(1). If the appellant designates less than all the testimony, the notice must state the points to be raised on the appeal, and the appeal is then limited to those points unless, on motion, the appellate division permits otherwise. Cal Rules of Ct 8.834(a)(2).

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§10.62 (c) Respondent May Designate Additional Proceedings

Within 10 days after the appellant serves and files a notice designating a reporter's transcript, the respondent may serve and file in the superior court a notice designating any additional proceedings that the respondent wishes to include in the reporter's transcript. Cal Rules of Ct 8.834(a)(3).

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§10.63 (d) Cost; Time of Payment

The court reporter has 10 days after the clerk transmits a copy of a designation notice either to file an estimated cost of preparing the transcript or give the clerk written notice of the date that the reporter notified the appellant of the estimated cost. Cal Rules of Ct 8.834(b)(1).

The appellant, within 10 days after receiving notice from the clerk of the cost estimate or within 10 days after being notified directly by the reporter, must deposit that amount with the clerk or obtain from the reporter and file with the clerk a signed waiver of the deposit. The clerk must then promptly notify the reporter to prepare the transcript. Cal Rules of Ct 8.834(b)(2).

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§10.64 (e) Filing

Within 20 days after the clerk notifies the reporter to prepare the transcript, or the reporter receives the fees from the appellant, the reporter must prepare and certify an original of the reporter's transcript and file it in the superior court along with one copy (or more than one copy if multiple appellants equally share the cost of preparing the record). Cal Rules of Ct 8.834(d)(1).

When the transcript is completed, the reporter must bill each designating party at the statutory rate and send a copy of the bill to the clerk. The clerk must pay the reporter from that party's deposited funds and refund any excess deposit or notify the party of any additional funds needed. In a multiple reporter case, the clerk must pay each reporter who certifies under penalty of perjury that his or her transcript portion is completed. Cal Rules of Ct 8.834(d)(2).

If the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit. Cal Rules of Ct 8.834(d)(3).

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§10.65 (f) When Proceedings Cannot Be Transcribed

The superior court clerk must notify the appellant if some parts of the designated oral proceedings were not reported or cannot be transcribed. Cal Rules of Ct 8.834(e)(1). Within 10 days after the notice is mailed, the appellant must notify the court whether the party elects to proceed with or without a record of the unreported or untranscribed oral proceedings. If the appellant elects to proceed with a record of these oral proceedings, the notice must specify which form of the record (other than a reporter's transcript) the party elects to use. Cal Rules of Ct 8.834(e)(2).

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§10.66 (2) Agreed Statement

In lieu of a reporter's transcript (see §§10.60-10.65), oral proceedings can be in the form of an agreed statement. Cal Rules of Ct 8.830(a)(2)(C), 8.836. For discussion of the contents of an agreed statement and the procedures for its filing, see §§10.53-10.59.

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(3) Statement on Appeal

§10.67 (a) Definition

In lieu of a reporter's transcript (see §§10.60-10.65), the appellant can elect to use a statement on appeal, which is a written summary of the superior court proceedings that is approved by the superior court. Cal Rules of Ct 8.837(a).

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§10.68 (b) Time Limitations

Within 20 days after filing the notice designating the record on appeal, the appellant must serve and file a proposed statement on appeal. Cal Rules of Ct 8.837(b)(1). If the appellant does not do so, the superior court clerk must promptly notify the appellant by mail that the appellant must file the proposed statement within 15 days after the notice is mailed and that failure to comply will result in the appeal being dismissed. Cal Rules of Ct 8.837(b)(1).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.69 (c) Contents

§10.69 (c) Contents

The proposed statement must contain the following information:

- A condensed narrative of the oral proceedings that the appellant believes necessary for the appeal, and a summary of the superior court's holding and judgment. If the court approves it, the appellant may present some or all of the evidence in question-and-answer form. Cal Rules of Ct 8.837(c)(1).
- A statement of the points the appellant is raising on appeal. Cal Rules of Ct 8.837(c)(2).
- Although it must clearly state each point to be raised, the statement need not identify each particular challenged ruling or matter. Cal Rules of Ct 8.837(c)(2)(A).
- The statement must include as much of the evidence or proceeding as necessary to support the stated grounds. Any evidence or portion of a proceeding not included will be presumed to support the judgment or order appealed from. Cal Rules of Ct 8.837(c)(2)(B).
- If one of the grounds of appeal is insufficiency of the evidence, the statement must specify how it is insufficient. Cal Rules of Ct 8.837(c)(2)(C).
- If one of the grounds of appeal challenges the giving, refusal, or modification of a jury instruction, the statement must include any instructions submitted orally and identify the party that requested the instruction and any modification. Cal Rules of Ct 8.837(c)(2)(D).

For the Judicial Council's proposed statement on appeal form, see Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-104) in §10.195.

NOTE: Except if excused on a showing of good cause, appellants who are not represented by an attorney must use the Judicial Council's proposed statement on appeal form. Cal Rules of Ct 8.837(b)(2).

PRACTICE TIP: Although the narrative statement is primarily concerned with testimony presented during the trial, it should include a sufficient recitation of the procedural background to place the testimony in context and to enable the points on appeal to be understood. For example, when contending that the evidence is insufficient to support the judgment, the appellant should include a sufficient recitation of the proceedings to show the significance of the evidentiary point and include the testimony of all witnesses on the subject. If it is a procedural or evidentiary ruling, the appellant should indicate all testimony bearing on the ruling, the specific motion or objection made, reasons given for the ruling, and any offers of proof.

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§10.70 (d) Respondent's Proposed Amendments

The respondent has 10 days after the appellant files the proposed statement on appeal in which to serve and file proposed amendments to it. Cal Rules of Ct 8.837(d)(1). See §10.71 for form of the proposed amendments.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.71 (e) Form: Respondent's Proposed Amendments to Appellant's Proposed Statement on Appeal

§10.71 (e) Form: Respondent's Proposed Amendments to Appellant's Proposed Statement on Appeal

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10.71-1 Respondent's proposed amendments to appellant's proposed statement on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

RESPONDENT'S PROPOSED AMENDMENTS TO APPELLANT'S PROPOSED STATEMENT ON APPEAL (CAL RULES OF CT 8.837)

PLEASE TAKE NOTICE that respondent, _ _[*name*]_ _, proposes the following amendments to Appellant's Proposed Statement on Appeal: _ _[*List numerically, e.g., 1. The summary of the testimony of witness, _ _[name]_ _, appearing at page _ _ _, lines _ _ _ through _ _ _, should be deleted and the following inserted in its place. _ _[Insert proposed amended version*]_ _]_ _.

Reason: _ _[*Specify*]_ _.

[*Add if desired*]

[2]. The proposed statement should contain the following oral instructions that were _ _[*given/given or refused/refused*]_ _**:** _ _[*Specify*]_ _.

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: Original (filed in trial court with proof of service); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: The respondent can only amend the appellant's proposed statement on appeal and cannot propose his or her own narrative summary. For clarity, the respondent's proposed amendment should refer to the appellant's proposed statement on appeal by page and line and may, if necessary, quote particular language with which respondent disagrees. It is also helpful to give reasons for the proposed change so that the trial judge will understand its significance.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.72 (f) Correcting and Reviewing Statement

§10.72 (f) Correcting and Reviewing Statement

Within 10 days after the respondent files proposed amendments or the time to do so expires, a party may request a hearing to review and correct the proposed statement. Cal Rules of Ct 8.837(d)(2). However, the superior court will only order a hearing if there is a factual dispute about a material aspect of the proceedings. Cal Rules of Ct 8.837(d)(2).

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§10.73 (i) If Court Orders Hearing

If the superior court orders a hearing, it must promptly set the hearing date, providing the parties with at least 5 days' written notice. Cal Rules of Ct 8.837(d)(3). Within 10 days after the hearing, the superior court judge must make any corrections or modifications to the statement. Cal Rules of Ct 8.837(d)(4).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.74 (ii) If Court Does Not Order Hearing

§10.74 (ii) If Court Does Not Order Hearing

If the superior court does not order a hearing, within 10 days after the time for requesting a hearing expires, the superior court must review the proposed statement and any amendments, and make any corrections or modifications to ensure that it is an accurate summary of the superior court proceedings. Cal Rules of Ct 8.837(d)(4).

NOTE: The superior court must not eliminate the appellant's specification of grounds of appeal from the proposed statement. Cal Rules of Ct 8.837(d)(5).

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§10.75 (g) Court-Ordered Transcript

If the superior court determines that it would save court time and resources, and the proceedings were reported by a court reporter or officially electronically recorded, the court may order that a transcript or a copy of an electronic recording be prepared. Cal Rules of Ct 8.837(d)(6). The court will pay for the ordered transcript or copy of the electronic recording. Cal Rules of Ct 8.837(d)(6).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.76 (h) Review of Corrected Statement

§10.76 (h) Review of Corrected Statement

Within 10 days after the clerk sends the statement to the parties, any party may serve and file proposed modifications or objections to the statement. Cal Rules of Ct 8.837(e)(2).

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§10.77 (i) Certification of Statement

If the superior court judge does not make any corrections or modifications to the proposed statement, and does not order an official electronic recording or the preparation of a transcript, the judge must promptly certify the statement. Cal Rules of Ct 8.837(f)(1).

If the superior court judge corrects or modifies an appellant's proposed statement, within 5 days after the time for filing proposed modifications or objections has expired, the judge must review any proposed modifications or objections to the statement filed by the parties, make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the superior court proceedings, and certify the statement. Cal Rules of Ct 8.837(f)(2).

For the Judicial Council's order concerning the appellant's proposed statement on appeal, see Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-105) in §10.196.

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§10.78 (4) Official Electronic Recording

If the superior court proceedings were officially electronically recorded under Govt C §69957, and the electronic recording was prepared in compliance with applicable local court rules, a written transcript of the official electronic recording may be prepared under Cal Rules of Ct 2.952. Cal Rules of Ct 8.835(a)-(b). A transcript prepared and certified in this manner is prima facie a true and complete record of the oral proceedings that it purports to cover and satisfies any requirement for a reporter's transcript of oral proceedings. Cal Rules of Ct 8.835(b).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.79 (a) Use of Official Recording as Record of Oral Proceedings

§10.79 (a) Use of Official Recording as Record of Oral Proceedings

The original of an official electronic recording of the oral proceedings, or a copy made by the court, may be transmitted as the record of the oral proceedings without being transcribed on stipulation of the parties, or on order of the trial, if the local rules allow it. This official electronic recording satisfies any requirement for a reporter's transcript of these proceedings. Cal Rules of Ct 8.835(c).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.80 (b) When Proceedings Were Not Officially Electronically Recorded or Cannot Be Transcribed

§10.80 (b) When Proceedings Were Not Officially Electronically Recorded or Cannot Be Transcribed

If the appellant elects to use a transcript prepared from an official electronic recording, or the recording itself, the superior court clerk must notify the appellant by mail if any part of the designated proceedings was not officially electronically recorded or cannot be transcribed. Cal Rules of Ct 8.835(d)(1).

Within 10 days after the notice is mailed, the appellant must notify the court whether the appellant elects to proceed with or without a record of the unrecorded or untranscribed oral proceedings. If the party elects to proceed with a record of these oral proceedings, the notice must specify which form of the record (other than an electronic recording) the appellant elects to use. Cal Rules of Ct 8.835(d)(2).

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4. Extension of Time to Prepare Record

§10.81 a. Application for Extension of Time

A party may file an application for an extension of time to prepare the record on appeal in either the superior court or the appellate division. Cal Rules of Ct 8.806(a). The superior court may extend for good cause the time limitations for preparing the record on appeal as long as the application is made before expiration of the time required by the rules or any valid extension of that time. Cal Rules of Ct 8.810(b)(2). The appellate division may for good cause extend the time to do any act required or permitted under the appellate division court rules, except the time to file a notice of appeal. Cal Rules of Ct 8.810(c).

A party must file an application in the manner provided in the Cal Rules of Ct 8.810(d). Applications are usually made and granted ex parte, but the superior court or local rules may require a noticed motion. See Cal Rules of Ct 8.810(b)(3) (initial extension of time may be granted ex parte) and Los Angeles Super Ct R 11.8 (application and motions must be served on all parties).

After the record is filed in the appellate division, all further applications for relief must be made there. Cal Rules of Ct 8.806(a).

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§10.82 b. If Deadlines Are Missed

The appellant will be in default, and the appeal may be dismissed, for failure to comply with the time limits for preparing the record.

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§10.83 5. Record When Multiple Appeals

If multiple appeals are taken from the same judgment or order, only one record need be prepared, which must be filed within the time allowed for filing the record in the latest appeal. Cal Rules of Ct 8.839(a).

If there are multiple separately represented appellants, they must equally share the cost of preparing the record, unless otherwise agreed by the appellants or ordered by the superior court. Appellants equally sharing the cost are each entitled to a copy of the record. Cal Rules of Ct 8.839(b).

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§10.84 6. Filing Record in Appellate Division

When the record on appeal has been completed, the superior court clerk must promptly send the original to the appellate division and send to the appellant and respondent copies of any certified statement on appeal and any copies of transcripts or official electronic recordings that they have purchased. The appellate division clerk must promptly file the original record and mail notice of the filing date to the parties. Cal Rules of Ct 8.840.

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§10.85 7. Augmenting and Correcting Record

The appellate division may order the augmentation or correction of the record. See generally Cal Rules of Ct 8.841.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.86 a. Augmentation

§10.86 a. Augmentation

Augmentation occurs when a party or the appellate division adds to the record on appeal documents or transcripts not previously included. The court on its own motion, or on motion of a party, may order the record augmented to include (Cal Rules of Ct 8.841(a)):

- Any document filed or lodged in the case in the superior court; or
- A certified transcript, or an agreed statement, or a statement on appeal, of oral proceedings not designated under Cal Rules of Ct 8.831.

PRACTICE TIP: Although the court may augment the record on its own motion, counsel should make a formal motion to augment the record as soon as the need is recognized, supported by a showing of good cause.

A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. If the appellate division grants the motion, it may augment the record with the copy. Cal Rules of Ct 8.841(a)(2). If the party cannot attach a copy of the matter to be added, the party must identify it as required under Cal Rules of Ct 8.831. Cal Rules of Ct 8.841(a)(3).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.87 b. Correction

§10.87 b. Correction

The appellate division on its own motion, on a party's motion, or on agreement of the parties, may order the correction of the record. Cal Rules of Ct 8.841(b)(1). The appellate division may also order the superior court to settle disputes about omissions or errors in the record, and may order the superior court to make corrections to the record under the parties' stipulation. Cal Rules of Ct 8.841(b)(2).

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§10.88 c. Omissions

If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in the superior court (with service on the appellate division) specifying the omitted portion and requesting that it be prepared, certified, and sent to the appellate division. Cal Rules of Ct 8.841(c)(1). If the clerk does not comply with the notice within 10 days after it is filed, the party may serve and file a motion to augment the record, attaching a copy of the notice. Cal Rules of Ct 8.841(c)(2).

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§10.89 8. Failure to Procure Record

If a party fails to do any act required to procure the record, the superior court clerk must promptly mail a notice to the party stating that the party must comply within 15 days after the notice is mailed or face sanctions by the appellate division. Cal Rules of Ct 8.842(a). If the noncomplying party is the appellant, the appellate division may dismiss the appeal. Cal Rules of Ct 8.842(b)(1). If the noncomplying party is the respondent, the appellate division may proceed with the appeal on the record designated by the appellant. Cal Rules of Ct 8.842(b)(2).

The appellate division may vacate for good cause the dismissal of the appeal and grant the respondent relief from default under Cal Rules of Ct 8.60(d). Cal Rules of Ct 8.842(b).

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F. Settlement, Abandonment, and Involuntary Dismissal

§10.90 1. Settlement of Case

If the case settles partially or wholly after a notice of appeal has been filed, the settling appellant must immediately serve and file a notice of settlement in the appellate division. Cal Rules of Ct 8.825(a)(1). If the parties have designated a clerk's or reporter's transcript, and the record has not been filed in the appellate division, the appellant must also immediately serve a copy of the settlement notice on the superior court clerk. Cal Rules of Ct 8.825(a)(1).

NOTE: The right to abandon an appeal is not absolute when a minor or a ward of the court is a party. If a guardian or conservator seeks approval of a proposed compromise of a pending appeal, the appellate division may, before ruling on the compromise, direct the superior court to determine whether the compromise is in the minor's or the conservatee's best interest and to report its findings. Cal Rules of Ct 8.825(c).

If the case settles after the appellant receives a notice setting oral argument, the appellant must immediately notify the appellate division of the settlement by telephone or other expeditious method (in addition to serving and filing a notice of settlement). Cal Rules of Ct 8.825(a)(2).

Unless the court has ordered a longer time period on a showing of good cause, within 45 days after filing a notice of settlement, the appellant who filed the notice must file an abandonment. Cal Rules of Ct 8.825(a)(3). If the appellant does not file an abandonment or a letter stating good cause why the appeal should not be dismissed, the court may dismiss the appeal as to that appellant and order each side to bear its own costs. Cal Rules of Ct 8.825(a)(4).

NOTE: Rule 8.825(a) does not apply to settlements requiring findings to be made by the court of appeal under CCP §128(a)(8). Cal Rules of Ct 8.825(a)(5).

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§10.91 2. Abandonment

The appellant may abandon the appeal at any time before the record is filed in the appellate division by filing a written abandonment or stipulation for abandonment in the superior court. When the abandonment is filed, the appeal is immediately deemed dismissed and jurisdiction of the case is restored to the trial court. Cal Rules of Ct 8.825(b)(2). If the record has already been filed in the appellate division at the time the appellant serves and files the abandonment, the appellate division may dismiss the appeal and direct the immediate issuance of the remittitur. Cal Rules of Ct 8.825(b)(2).

The clerk must promptly notify the adverse party of an abandonment. If the record has not been filed in the appellate division, the clerk must also immediately notify the superior court. Cal Rules of Ct 8.825(b)(3). If the appellant abandons the appeal before the clerk has completed preparation of the transcript, the clerk must refund any portion of a deposit exceeding the preparation cost actually incurred. Cal Rules of Ct 8.825(b)(4).

If the appeal is abandoned before the reporter has filed the transcript, the reporter must inform the superior court clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit. Cal Rules of Ct 8.825(b)(5).

For the Judicial Council's abandonment of appeal form, see Abandonment of Appeal (Limited Civil Case) (Judicial Council Form APP-106) in §10.197.

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§10.92 3. Involuntary Dismissal

The appellate division may involuntarily dismiss an appeal if the appellant fails to perform a required act (*e.g.*, pay the required filing fee for the notice of appeal, procure the record on appeal, or timely file a brief). If the appellant fails to do any required act, the superior court clerk must promptly send a notice stating that the appellant must perform the act within a certain time and that, if the appellant fails to comply, the appellate division may dismiss the appeal. See, *e.g.,* Cal Rules of Ct 8.821(c)(3), 8.842(a)(1), 8.882(c)(1)(A).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.93 G. Applications and Motions

§10.93 G. Applications and Motions

Two basic categories of motions can be presented to the appellate division: applications under Cal Rules of Ct 8.806 and motions under Cal Rules of Ct 8.808.

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§10.94 1. Application Defined

Applications are motions that do not require a memorandum and on which the court may rule without an opposition. They are usually heard ex parte by the presiding judge, although the judge may order that an application be heard before a full panel. Cal Rules of Ct 8.806(d). Examples are:

- Application for an extension of time (Cal Rules of Ct 8.810, 8.811, 8.882(b));
- Application for relief from default (Cal Rules of Ct 8.812);
- Application to waive court fees when filing the notice of appeal (Cal Rules of Ct 8.821);
- Application for waiver of the cost of the clerk's transcript (Cal Rules of Ct 8.832);
- Application for waiver of the cost of court file (Cal Rules of Ct 8.833);
- Application to file an amicus curiae brief (Cal Rules of Ct 8.882(d)); and
- Application to file a longer brief (Cal Rules of Ct 8.883).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.95 a. Contents

§10.95 a. Contents

An application must set forth facts showing good cause to grant the application and identify any previous applications relating to the same subject filed by any party in the same appeal. Cal Rules of Ct 8.806(b).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.96 b. Filing and Service

§10.96 b. Filing and Service

Parties must serve and file all applications, including applications to extend time to file records, briefs, or other documents and applications to shorten time. Cal Rules of Ct 8.806(a). Unless excused for good cause by the presiding justice of the appellate division, parties must give notice of an application to other parties. Cal Rules of Ct 8.806(a). Parties must file all applications in the appellate division, except for an application to extend time to prepare the record on appeal, which may be filed in either the trial court or the appellate division. Cal Rules of Ct 8.806(a).

The moving party must provide the clerk with postage-prepaid envelopes addressed to the other parties and a sufficient number of copies of the application so that the clerk can serve the other parties with copies of the order granting or denying the application together with the application. Cal Rules of Ct 8.806(c).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.97 2. Motions

§10.97 2. Motions

Motions concerning nonroutine matters must conform to Cal Rules of Ct 8.808. Examples are:

- Motion for substitution of parties or attorneys (Cal Rules of Ct 8.814(a)-(b));
- Motion for attorney to withdraw (Cal Rules of Ct 8.814(c));
- Motion to augment the record (Cal Rules of Ct 8.841(a));
- Motion to correct the record (Cal Rules of Ct 8.841(b));
- Motion to stay issuance of remittitur (Cal Rules of Ct 8.890);
- Motion for costs (Cal Rules of Ct 8.891(b)); and
- Motion for sanctions (Cal Rules of Ct 8.891(e)).

Parties must serve and file a written motion, state the grounds and the relief requested, and identify any documents on which it is based. Cal Rules of Ct 8.808(a)(1). A motion must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence. Cal Rules of Ct 8.808(a)(2).

The opposing party may serve and file a response within 15 days after the motion is filed. Cal Rules of Ct 8.808(a)(3). After that time, the court may rule without a hearing. Cal Rules of Ct 8.808(b)(1). On a party's request or the court's own motion, the court may place it on calendar for argument, in which event the clerk will mail notice of the hearing date and time to all parties. Cal Rules of Ct 8.808(b)(2).

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H. Briefs

§10.98 1. Time Limitations for Filing

The appellant must serve and file an opening brief within 30 days after the record on appeal is filed with the appellate division. Cal Rules of Ct 8.882(a)(1). The respondent must serve and file a brief within 30 days after the appellant's brief is filed. Cal Rules of Ct 8.882(a)(2). The appellant may then serve and file a reply brief within 20 days after the respondent's brief is filed. Cal Rules of Ct 8.882(a)(3). No other brief may be filed except with the permission of the presiding judge. Cal Rules of Ct 8.882(a)(4). Instead of filing a brief, a party may join in a brief or adopt by reference all or part of a brief in the same or a related appeal. Cal Rules of Ct 8.882(a)(5).

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§10.99 2. Filing Requirements

A party need only file in the appellate division the original brief (with a proof of service), unless a local rule or court order provides otherwise. Cal Rules of Court 8.882(e)(2).

A document is considered filed on the date that the clerk receives it. Cal Rules of Ct 8.25(b)(1). A brief is also timely if the date on which it is mailed by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt, is on or before the date that it is due. Cal Rules of Ct 8.25(b)(3).

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§10.100 3. Service Requirements

Briefs must be served on attorneys of record and unrepresented parties as required by Cal Rules of Ct 8.25. Cal Rules of Court 8.882(e)(1). A party must also serve a copy of each brief on the superior court judge who tried the case (Cal Rules of Court 8.882(e)(3)) and on a public official or agency if required under Cal Rules of Ct 8.29 (Cal Rules of Court 8.882(e)(4)).

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4. Contents, Format, and Length

§10.101 a. Contents

A brief must state each point under a separate appropriate heading or subheading summarizing the point, and each point must be supported by argument and, if possible, by citation to legal authority. Cal Rules of Ct 8.883(a)(1)(A). Every factual reference should be supported by an accurate citation to the record. Cal Rules of Ct 8.883(a)(1)(B).

In addition, the appellant's opening brief must (Cal Rules of Ct 8.883(a)(2)):

- State the nature of the action, the relief sought in the superior court, and the judgment or order appealed from;
- State that the judgment appealed from is final or explain why the order appealed from is appealable; and
- Provide a summary of the significant facts limited to matters in the record.

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§10.102 b. Format

The format of briefs in the appellate division is similar to briefs to the court of appeal under Cal Rules of Ct 8.204(b). See chap 12. The particular format requirements (*e.g.,* type of paper, acceptable fonts, margins, page numbering) are enumerated in Cal Rules of Ct 8.883(c).

NOTE: A party may file a typewritten original with carbon copies only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies. Cal Rules of Ct 8.883(c)(10)(A). Additional formatting requirements for typewritten briefs are listed in Cal Rules of Ct 8.883(c)(10)(B)-(C).

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§10.103 c. Length

Unless the presiding judge permits, appellate briefs produced on a computer may not be more than 6800 words, including footnotes, and the brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. Cal Rules of Ct 8.883(b)(1). A brief produced on a typewriter must not exceed 20 pages. Cal Rules of Ct 8.883(b)(2). The word-count certificate and any attachment under Cal Rules of Ct 8.883(d) are excluded from the length limits. Cal Rules of Ct 8.883(b)(3).

A party may file an application to file a longer brief, showing good cause for the additional length (*e.g.,* a voluminous record or numerous or complex issues). Cal Rules of Ct 8.883(b)(4). If the court grants an application to file a longer brief, it may also order that the brief include a table of contents and a table of authorities. Cal Rules of Ct 8.883(b)(4).

For discussion of the practical considerations of brief length, see §§12.14-12.18.

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§10.104 5. Noncomplying Briefs

The appellate division clerk may decline to file a noncomplying brief, but must mark it "received but not filed" and return it to the party. Cal Rules of Ct 8.883(d)(1). If the clerk files the noncomplying brief, the presiding judge may order the brief returned for corrections and refiling within a certain time, strike the brief with leave to file a new brief within a certain time, or disregard the noncompliance. Cal Rules of Ct 8.883(d)(2).

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§10.105 6. Respondent's Brief

Requirements for the respondent's brief are similar to those for the appellant's brief, *i.e.,* the rules in Cal Rules of Ct 8.883 on content, format, and length must be followed. See chap 12. It will assist the appellate division if reference is made to the pages and lines of the appellant's brief that the respondent is discussing, particularly if parts of the appellant's argument are quoted.

A major tactical question for respondents is whether to adopt the organizational scheme of the appellant's opening brief. Generally, it is helpful to the appellate division and provides greater clarity if the respondent follows the same numbering of arguments, but when the appellant's organization is too unwieldy, a different format must be created. If so, make the necessary reorganization and refer to the appellant's argument by the heading or subheading numbers in the appellant's brief. In addition, the respondent might be able to refocus the appellate division's attention by restructuring the order of arguments.

JUDICIAL PERSPECTIVE: The respondent's job is simply to defeat the appellant's contentions. Except when the appellant's brief is difficult to follow, tracking the appellant's brief is the better tactic.

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§10.106 7. Reply Brief

The general format of the brief should be similar to the opening brief, except that it does not require a procedural history, statement of issues, or statement of facts. It should contain argument addressed to the points raised by the respondent's brief, but it should not raise new issues that could and should have been raised in the opening brief.

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§10.107 8. Amicus Curiae Briefs

Within 14 days after the appellant's reply brief is filed, or is required to be filed, whichever is earlier, any person or entity may serve and file an application for permission to file an amicus curiae brief. Cal Rules of Ct 8.882(d)(1). The proposed brief must accompany the application and may be combined with it. Cal Rules of Ct 8.882(d)(4).

The application must (Cal Rules of Ct 8.882(c)(2)-(3)):

- State the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.
- Identify any party or any counsel for any party in the appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief;
- Identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the amicus curiae brief, other than the amicus curiae, its members, or its counsel;

The Attorney General may file an amicus curiae brief without the presiding judge's permission, unless the brief is submitted on behalf of another state officer or agency; but the presiding judge may prescribe reasonable conditions for filing and answering the brief. Cal Rules of Ct 8.882(c)(4).

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§10.108 9. Briefing Schedule

When the record on appeal is filed in the appellate division, the clerk mails to each attorney of record and unrepresented party a notice of the dates that briefs are due under Cal Rules of Ct 8.882. Cal Rules of Ct 8.881. See §10.98. These dates presuppose that the briefs will be filed within the allotted times.

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§10.108A 10. Extension of Time

A party may apply for an extension of time in which to file a brief, which if granted may result in the clerk's mailing to all parties' counsel a new schedule of briefing dates and perhaps a new hearing date. If the clerk does not mail a new briefing schedule, the parties must calculate the date that their briefs are due on the basis of the extension.

The parties may extend the period to file a brief by up to 30 days by a stipulation signed by and served on all of the parties and filed in the appellate division before the brief is due. Cal Rules of Ct 8.882(b)(1). This stipulation is effective when filed; the appellate division may not shorten the stipulated extension. Cal Rules of Ct 8.882(b)(2).

Before a brief is due, a party may also apply to the presiding judge of the appellate division for an extension of time to file a brief. The application must show any of the following:

- Good cause to grant the extension under Cal Rules of Ct 8.811(b);
- The applicant would have been unable to obtain—or it would have been futile to seek—the extension by stipulation; or
- The parties have already stipulated to the maximum 30-day extension permitted under Cal Rules of Ct 8.882(b)(1), and the applicant seeks a further extension. Cal Rules of Ct 8.882(b)(3).

A party that fails to timely file an opening or responding brief need not apply for an extension if the party can file its brief within the time prescribed by the clerk's notice under Cal Rules of Ct 8.882(c)(1). The clerk must file a brief submitted within that time if the brief otherwise complies with the rules of court. Cal Rules of Ct 8.882(b)(4).

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I. Hearings

§10.109 1. Regular Sessions

Appellate divisions are required to hold a session at least once each quarter, unless no matters are set for oral argument that quarter. Cal Rules of Ct 10.1108. The time and place of any session is determined by the presiding judge of the appellate division. Cal Rules of Ct 10.1108. In most counties, one session per quarter is adequate to dispose of the court's business, but more frequent sessions may be necessary, particularly in larger counties.

Unless otherwise ordered, the clerk must place on the calendar of a regular appellate division session all appeals in which the last reply brief was filed, or the time for filing this brief expired, at least 45 days before the date of that session. Cal Rules of Ct 8.885(a). The presiding judge or the appellate division may order that an appeal be placed on the calendar for hearing at any session of the division. Cal Rules of Ct 8.885(a).

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§10.110 2. Oral Argument

After all briefs have been filed, or the time for filing briefs has expired, the appellate division clerk must send a notice of oral argument to all parties at least 20 days before the date for oral argument. Cal Rules of Ct 8.885(c). The presiding judge may shorten the notice period for good cause. Cal Rules of Ct 8.885(c).

Parties have the option of waiving oral argument. Cal Rules of Ct 8.885(d). Unless allowed by local rule or ordered by the court, all parties must participate in oral argument in person. Cal Rules of Ct 8.885(b)(2).

Oral argument may be conducted by videoconference if (1) ordered by the court on application of a party or on the court's own motion or (2) authorized by local rule. Cal Rules of Ct 8.885(b)(1). An application for a videoconference oral argument must be filed within 10 days after the court sends notice of oral argument. Cal Rules of Ct 8.885(b)(1).

NOTE: In Los Angeles County, tentative opinions are available by telephone the day before argument or online at http://www.lasuperiorcourt.org/tentativeruling/?casetype=appellate. The court is *not* bound by its tentative opinion, even if both sides waive argument. Los Angeles Super Ct R 11.6(e). Check local rules and practice to learn whether the appellate division might issue a tentative opinion.

The appellant has the right to open and close oral argument. Cal Rules of Ct 8.885(d)(1). Only one counsel may argue for each separately represented party, and each side has 10 minutes to argue, but the court may allow more time if multiple parties are represented by counsel or the court has granted an amicus curiae permission to argue. Cal Rules of Ct 8.885(d)(2)-(3).

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§10.111 3. Additional Evidence

Counsel who desires that the appellate division take additional evidence, when permissible (see CCP §§908-909), should make a motion as early as possible and preferably notice it for hearing before oral argument. Knowing the appellate division's decision on the motion as early as possible can aid counsel in preparing the brief and oral argument to take into account the availability of the evidence. On when the appellate division may take evidence generally, see *Gurewitz v Kinder* (1979) 96 CA3d 460, 467, 158 CR 102 (power to take additional evidence and make findings limited to questions of law); *Jacobs v State Bd. of Optometry* (1978) 81 CA3d 1022, 1034, 147 CR 225 (purely fact-finding power should be used sparingly).

JUDICIAL PERSPECTIVE: Counsel should not count on a CCP §§908-909 hearing; courts are reluctant to hold such hearings.

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§10.112 J. Submission of Case

A cause is submitted after the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental briefs permitted by the court. Cal Rules of Ct 8.886(a). The appellate division may order the cause submitted at an earlier time under the parties' stipulation. Cal Rules of Ct 8.886(a).

A court may vacate submission only by an order stating its reasons and setting a timetable for resubmission. Cal Rules of Ct 8.886(b).

The effect of submission is a 90-day time limit in which a decision must be rendered. See Cal Const art VI, §19.

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K. Determination of Appeal

§10.113 1. Judge's Conferences

In many appellate divisions, the judges meet in conference before oral argument to review the issues of each appeal. It is also common for the judges to meet after oral argument for further review before making a decision.

In many counties, the appeal is assigned in advance to a particular judge, who reviews it and prepares a memorandum or assigns the appeal to a research attorney, who prepares a memorandum abstracting the file and reviewing the merits of the points in issue.

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§10.114 2. Decisions

Unlike courts of appeal and the supreme court, appellate divisions are not required to prepare a written opinion, although they may do so if they deem it advisable or in the public interest. Cal Rules of Ct 8.887(a). The practice among appellate divisions varies greatly. Some write extensive opinions on all or most matters; others decide appeals by a concise order. In either case, the appellate division clerk must promptly file the opinion and any orders and send copies to the parties. Cal Rules of Ct 8.887(b).

JUDICIAL PERSPECTIVE: Los Angeles County issues detailed opinions in every case, differing from court of appeal opinions only in that a statement of facts is usually omitted. See Los Angeles Super Ct R 11.7(b).

An appellate division's written opinion may be published if a majority of the justices certify the opinion for publication before the decision is final in that court and if the opinion meets the requirements of Cal Rules of Ct 8.1105(c). Cal Rules of Ct 8.1105(b). For discussion of the standards of Cal Rules of Ct 8.1105(c), see §21.7. If the court declines to publish its opinion, any person may make a written request to the court for publication within 20 days after the opinion is filed. Cal Rules of Ct 8.1120(a). For discussion of publication of opinions, see §§21.5-21.18.

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§10.115 3. Judgment

The judgment of the appellate division is the order by which it disposes of the appeal. The judgment is entered in the court minutes and usually consists of a brief sentence affirming or reversing the judgment or order appealed from, but it may contain an elaborate series of directions to the superior court.

The appellate division may affirm, reverse, or modify the judgment or order appealed from and direct that a proper judgment or order be entered, and, if necessary, direct that a new trial or further proceedings be held. CCP §906. When a judgment or an order is reversed, the appellate division may order restitution on reasonable terms and conditions and may direct entry of a money judgment to compensate for property or rights that cannot be restored. CCP §908.

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§10.116 4. Petition for Rehearing

On petition of a party, or on its own motion, the appellate division may order the rehearing of any decision that is not final in that court. Cal Rules of Ct 8.889(a). If the clerk's office is closed on the date of finality, the court may file the order on the next day that the clerk's office is open. Cal Rules of Ct 8.889(a)(2). On when decisions are final, see §10.120.

An order granting a rehearing vacates the decision and any opinion filed in the case, and the appellate division can either submit the case or put it on calendar for further argument. Cal Rules of Ct 8.889(d).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.117 a. Time to Petition for Rehearing

§10.117 a. Time to Petition for Rehearing

A party may serve and file a petition for rehearing within 15 days after (Cal Rules of Ct 8.889(b)(1)):

- A decision is filed;
- A consent is filed;
- A publication order restarts the finality period, if a party has not already filed a petition for rehearing; or
- A modification order changes the appellate judgment.

The court cannot extend the time for granting or denying a petition for rehearing. If the court does not rule on the petition before the decision is final, the petition is considered denied. Cal Rules of Ct 8.889(c).

For a discussion of tactical considerations in deciding whether to petition for rehearing, see §§19.3-19.5.

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§10.118 b. Court Must Request Answer to Petition

Unless the court requests an answer, a party must *not* file an answer to a petition for rehearing. Cal Rules of Ct 8.889(b)(2). The clerk must promptly send any order requesting an answer and notify the parties by telephone or another expeditious method. Cal Rules of Ct 8.889(b)(2). Any answer must be served and filed within 8 days after the order is filed, unless the court orders otherwise. Cal Rules of Ct 8.889(b)(2).

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§10.119 c. Grounds for Rehearing

If the appellate division renders a decision based on an issue that was not proposed or briefed by any party, it must give the parties an opportunity to file supplemental briefs on the issue. If it does not, any party's petition for rehearing must be granted. Govt C §68081; *California Cas. Ins. Co. v Appellate Dep't* (1996) 46 CA4th 1145, 1150, 54 CR2d 118 (writ of mandate issued directing appellate division to grant rehearing to allow parties to brief new issue). For discussion of other factors that might persuade the appellate division to grant a petition for rehearing, see §§19.6-19.11.

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5. Finality and Modification of Decision

§10.120 a. Finality

Appellate division decisions, including orders involuntarily dismissing an appeal, become final 30 days after the court files the decision. Cal Rules of Ct 8.888(a)(1). The denial of a petition for a writ of supersedeas, or the dismissal of an appeal by request or stipulation, are final when filed. Cal Rules of Ct 8.888(a)(3)(A), (C).

If the appellate division certifies an opinion for full or partial publication after the decision is filed and before the decision is final in the court, the finality period begins with the filing date of the publication order. Cal Rules of Ct 8.888(a)(2).

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§10.121 b. Modification

It is not uncommon for the appellate division to change its opinion, either on its own motion or as the result of the filing of a petition for rehearing, to correct errors in language or for clarification. The appellate division may modify its decision until the decision is final in that court. Cal Rules of Ct 8.888(b)(1).

If a modification order changes the appellate judgment, the finality period begins with the filing date of the order. Cal Rules of Ct 8.888(b)(2). A modification order must state whether it changes the appellate judgment, and a modification that does not change the appellate judgment does not extend the finality date of the decision. Cal Rules of Ct 8.888(b)(2).

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§10.122 c. Consent to Increase or Decrease in Amount in Judgment

If an appellate division decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless the party serves and files two copies of a consent in the appellate division before the decision is final. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one file-stamped copy of the consent to the trial court with the remittitur. Cal Rules of Ct 8.888(c).

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§10.123 6. Remittitur

The appellate division must issue a remittitur after a decision on appeal. Cal Rules of Ct 8.890(a). If the case is not transferred to the court of appeal, and after the appellate division decision has become final, the clerk remits the case to the superior court by sending it a remittitur, a file-stamped copy of the opinion or order, and all documents sent from the superior court as the record on appeal, except for the notice of appeal and the transcripts or statement on appeal. Cal Rules of Ct 8.890(a)-(b)(1).

The remittitur is considered issued when the clerk enters it in the record. The clerk must immediately send the parties notice of issuance of the remittitur, showing the date of its entry. Cal Rules of Ct 8.890(d).

In cases transferred to the court of appeal, after the appellate division clerk receives the court of appeal's remittitur, the clerk will issue a remittitur and return the superior court documents. Cal Rules of Ct 8.890(b)(2).

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§10.124 a. Immediate Issuance or Stay of Remittitur

The appellate division may order that the remittitur issue immediately only on stipulation of the parties, or on dismissal of the appeal on request or stipulation of the parties. Cal Rules of Ct 8.890(c)(1). On motion or stipulation, and for good cause, the appellate division may stay issuance of the remittitur for a reasonable period or order its recall. Cal Rules of Ct 8.890(c)(2).

If the case has been certified and transferred to the court of appeal (see §10.133), the clerk withholds issuance of the remittitur until it receives a remittitur from the court of appeal. Cal Rules of Ct 8.890(b)(2).

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§10.125 b. Effect of Remittitur

When the appellate division issues the remittitur, it loses its jurisdiction, which is revested in the superior court for all further orders or proceedings necessary to effectuate the appellate division's judgment. See *Gallenkamp v Superior Court* (1990) 221 CA3d 1, 10, 270 CR 346.

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§10.126 c. Recall of Remittitur

After issuance of the remittitur, the appellate division retains jurisdiction to recall for good cause the remittitur on its own motion, on motion of a party, or on stipulation of the parties setting forth the facts justifying a recall. Cal Rules of Ct 8.890(c)(2). Rule 8.890(c)(2) does not specifically restrict the grounds on which the remittitur may be recalled or the time for doing so, but case authority indicates that reviewing courts may exercise this power only when, due to clerical error, the remittitur does not conform to the appellate division's judgment, or when a judgment on appeal was obtained by improper means, such as fraud or mistake of fact. See 9 Witkin, California Procedure, *Appeal* §§849-850 (5th ed 2008).

A motion to recall the remittitur should be made promptly and should be supported by a substantial showing of the ground for relief. See 9 Witkin, Procedure, *Appeal* §§847-852.

An order recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status. Cal Rules of Ct 8.890(c)(3).

On remittitur being recalled for correction to enter costs when the clerk has failed to do so, see Cal Rules of Ct 8.278(b)(2).

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L. Review of Appellate Division Decisions

§10.127 1. No Right to Review

A litigant has no *right* to further review of an appellate division decision; such review is discretionary and requires some affirmative action by either the appellate division or a higher court. A party may, however, apply to the appellate division or to a higher court for review of the appellate division's judgment, but grant of such review is discretionary. See Cal Rules of Ct 8.1000-8.1018.

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§10.128 2. Certification for Transfer to Court of Appeal

On its own motion or on a party's application, the appellate division may certify a case for transfer to the court of appeal if necessary "to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.1002. Certification must be by a majority of the appellate division judges. Cal Rules of Ct 8.1005(a)(2).

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§10.129 a. Procedure

A party may serve and file with the appellate division an application for certification any time after the record on appeal is filed in the appellate division and within 15 days after judgment is pronounced or a modification order changing the judgment is filed. Cal Rules of Ct 8.1005(b)(1).

PRACTICE TIP: An application should be filed as soon as possible, because the last day to file an application for certification is also the last day on which the appellate division may issue a certification order. See Cal Rules of Ct 8.1005(d); §10.130.

"The application must explain why transfer is necessary to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.1005(b)(2). The application for certification may be filed concurrently with, or included in, a petition for rehearing. Cal Rules of Ct 8.1005(b)(1).

PRACTICE TIP: Although the rules state that a party may request certification via an "application" instead of a "motion" or "petition," the rules also state that when an appellate division certifies a case for transfer to the court of appeal, the certification must "describe any conflict of decision—citing the decisions creating the conflict—or important question of law to be settled." Cal Rules of Ct 8.1005(e)(1). For that reason, the better practice may be to file a motion with a supporting memorandum (conforming to the requirements of Cal Rules of Ct 8.808) setting forth opinions that created the conflict in decisions or that described the important question of law, to aid the court in drafting the certification if one is granted.

Within 5 days after the application is filed, any other party may serve and file an opposition. Cal Rules of Ct 8.1005(b)(3).

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§10.130 b. When Appellate Division May Certify

The appellate division can certify a case for transfer on its own motion at any time after the record on appeal is filed and before the appellate division judgment is final. Cal Rules of Ct 8.1005(d). On the finality of decisions, see §10.120. If no hearing is held on the application, the court's failure to certify the case is deemed a denial of the application. Cal Rules of Ct 8.1005(b)(4).

If the appellate division denies certification by order, the clerk must promptly send a copy of the order to the parties and to the court of appeal clerk. Cal Rules of Ct 8.1005(f)(2). See §§10.139-10.143 for procedures if the court orders certification. If the application is denied and the court does not certify its opinion for publication, a party may petition the court of appeal to transfer the case to its jurisdiction. Cal Rules of Ct 8.1008(b)(1). See §10.136.

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§10.131 c. Effect of Certification

If the appellate division orders certification, the clerk must promptly send a copy of the order to the clerk of the court of appeal and all parties. The clerk must also transfer the record on appeal to the court of appeal and notify the parties that it has done so. Cal Rules of Ct 8.1005(f), 8.1010(b)(1). On the contents of the record on transfer, see Cal Rules of Ct 8.1010(a). The court of appeal then has 20 days from the date the record is filed in which to order the transfer, which period the court may extend by no more than 20 days. Cal Rules of Ct 8.1008(c)(1)-(2). If the court does not timely order the transfer, it is deemed denied. Cal Rules of Ct 8.1008(c)(3). If the court of appeal accepts the transfer, jurisdiction is transferred to that court and all further proceedings are conducted in the court of appeal until remittitur issues. Cal Rules of Ct 8.1014. For proceedings after transfer, see §§10.139-10.142. On remittitur, see §10.143.

PRACTICE TIP: If the clerk fails to file the certification order with the court of appeal, the case may be dismissed or the parties may be bound by the judgment of the appellate division. The court of appeal must decide whether to accept a case on transfer within 20 days after receiving the record on appeal from the appellate division. If the court of appeal receives the record on appeal but does not receive the certification order, the judges of the court of appeal may not know to consider the request for transfer. See *Corcoran v Universal Guardian Corp.* (1977) 72 CA3d 904, 909, 140 CR 421. For this reason, counsel may want to verify receipt of the certification order with the clerk of the court of appeal.

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§10.132 3. Transfer of Case From Appellate Division

If the appellate division denies a party's application for certification to the court of appeal and if the appellate division's opinion is unpublished, then a party may petition the court of appeal to transfer the case to itself. Cal Rules of Ct 8.1008(b)(1); but see *Anchor Marine Repair Co. v Magnan* (2001) 93 CA4th 525, 529, 113 CR2d 284 (writ review of decision denying motion for certification and transfer to the court of appeal is limited to correcting abuse of discretion or lack of jurisdiction). Such transfer is discretionary and will only be granted "to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.1008(b)(3).

If the appellate division's opinion is published, then the court of appeal with jurisdiction over the appellate division receives a copy of the opinion and may transfer the matter to itself on its own motion, again "to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.1002. See also Cal Rules of Ct 8.1008(a).

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a. On Motion of Court of Appeal

§10.133 (1) Court of Appeal Receives Copy of Opinion and Record

If the appellate division opinion has been certified for publication under Cal Rules of Ct 8.1105, the court of appeal with jurisdiction over the appellate division receives a copy of the opinion and the record. Cal Rules of Ct 8.1010(b)(1)(B), 8.887(c). On the contents of the record on transfer, see Cal Rules of Ct 8.1010(a). In reviewing the opinion and record, the court of appeal may decide "that transfer is necessary to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.1002. See also CCP §911; *Miller v Foremost Motors, Inc.* (1993) 16 CA4th 1271, 1273, 20 CR2d 503.

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§10.134 (2) When Court Must Order Transfer

The court of appeal has 20 days from the date the record and opinion are filed in which to order the transfer, which period the court may extend by no more than 20 days. Cal Rules of Ct 8.1008(c)(1)-(2). If the court does not timely order the transfer, it is deemed denied. Cal Rules of Ct 8.1008(c)(3). If the court of appeal accepts the transfer, jurisdiction is transferred to it and all further proceedings are conducted in that court. Cal Rules of Ct 8.1014. For proceedings after transfer, see §§10.139-10.143.

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§10.135 (3) Counsel May Write Letter in Support or Opposition

Counsel will receive notice from the clerk of the appellate division when the record on transfer is filed with the court of appeal. Cal Rules of Ct 8.1010(b)(2). Within 10 days, counsel or any party may send the court of appeal (with service on all other parties) a letter supporting or opposing transfer. Cal Rules of Ct 8.1008(d)(1). The letter must be double-spaced and no longer than 1400 words if produced on a computer or 5 pages if typewritten. Cal Rules of Ct 8.1008(d)(2).

PRACTICE TIP: Counsel should take advantage of this opportunity, especially when the appellate division has denied a party's application for certification.

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§10.136 b. On Party's Petition

If the appellate division denies a party's application for certification and does not certify its opinion for publication, a party may petition the court of appeal to transfer the case to its jurisdiction. Cal Rules of Ct 8.1008(b)(1).

The petition must be served and filed in the court of appeal within 15 days after the appellate division judgment is final, along with proof of service on all other parties and on the appellate division clerk. Cal Rules of Ct 8.1008(b)(2). The petition must explain why transfer is necessary "to secure uniformity of opinion or to settle an important question of law" and must comply as nearly as possible with Cal Rules of Ct 8.504. Cal Rules of Ct 8.1008(b)(3), (5).

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§10.137 (1) Answer Only if Requested by Court of Appeal

A party must *not* file an answer to a petition for transfer unless the court of appeal requests one. Any answer must be served and filed within 10 days after the order requesting an answer is filed, unless the court orders otherwise. Cal Rules of Ct 8.1008(b)(4). The answer must comply with Cal Rules of Ct 8.504. Cal Rules of Ct 8.1008(b)(5).

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§10.138 (2) Determination

When the appellate division clerk receives its copy of the petition for transfer, it transmits a copy of the record on appeal to the court of appeal. Cal Rules of Ct 8.1010(b)(1)(C). On the contents of the record on transfer, see Cal Rules of Ct 8.1010(a). The court of appeal has 20 days from the date the record and opinion are filed in which to order the transfer, which period the court may extend by no more than 20 days. Cal Rules of Ct 8.1008(c)(1)-(2).

If the court does not timely order the transfer, it is deemed denied. Cal Rules of Ct 8.1008(c)(3). No further review is available if the court of appeal denies transfer, *i.e.,* a party may not seek a petition for review in the supreme court. If the court of appeal denies transfer, the clerk must "promptly" notify all parties of the denial and return the record on appeal to the appellate division. Cal Rules of Ct 8.1008(f)(3).

If the court of appeal accepts the transfer, jurisdiction is transferred to, and all further proceedings are conducted in, that court. Cal Rules of Ct 8.1014.

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§10.139 c. Proceedings After Transfer

If the court of appeal orders transfer, either as a result of certification or on its own transfer order, the appellate clerk must promptly send a copy of the order to the superior court clerk and all parties. Cal Rules of Ct 8.1008(f)(1). The clerk should include notice of the time to serve and file any briefs ordered by the court and the issues to be briefed and argued. Cal Rules of Ct 8.1008(f)(2).

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§10.140 (1) Briefing

The parties may file briefs only if the court of appeal so orders, although a party can apply for permission to file briefs. If the court orders briefing, it must specify the briefing sequence in its order. Cal Rules of Ct 8.1012(a)(1).

The appellant's opening brief must be filed and served within 20 days after entry of the briefing order. Cal Rules of Ct 8.1012(b)(1). The respondent's brief must be filed and served within 20 days after the opening brief is filed. Cal Rules of Ct 8.1012(b)(2). Any reply brief must be filed and served within 10 days after the respondent's brief is filed. Cal Rules of Ct 8.1012(b)(3). All briefs must be served on all parties and on the clerk of the appellate division. Cal Rules of Ct 8.1012(c)(2).

The court may also specify which issues it wants briefed, in which case "the parties must limit their briefs and arguments to those issues and any issues fairly included in those issues." Cal Rules of Ct 8.1008(e)(1). In lieu of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related case. Cal Rules of Ct 8.1012(a)(2).

No brief may exceed 5600 words if produced on a computer or 20 pages if typewritten. In all other respects, briefs must comply with Cal Rules of Ct 8.204. Cal Rules of Ct 8.1012(d).

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§10.141 (2) Argument

The rules of court imply but do not require that the court of appeal will hear argument on a transferred case. See Cal Rules of Ct 8.1008(e), noting that the court of appeal may specify the issues to be briefed and argued. Although there may be no time to present a lengthy, well-organized presentation covering all points, counsel should still be thoroughly prepared on all issues if the court has any questions. Anticipate both substantial restrictions of time to argue and the need to emphasize the most significant points.

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§10.142 (3) Disposition of Case

After the court of appeal has ordered transfer, it may (Cal Rules of Ct 8.1016(a), (b)(1)):

- Decide all issues presented in the original appeal to the appellate division;
- Decide fewer than all issues raised and retransfer the case to the appellate division for decision on any remaining issues; or
- Vacate the transfer order without any decision and retransfer the case to the appellate decision with or without directions to conduct further proceedings.

If the appellate division pronounced judgment before transfer and the court of appeal directs no further proceedings, the judgment is final when the appellate division receives the order vacating transfer and its clerk must promptly issue a remittitur. Cal Rules of Ct 8.1016(b)(2).

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§10.143 d. Remittitur

After the court of appeal decision on a transferred case is final (either by reason of judgment on some or all issues or by an order vacating the transfer order and retransferring the case to the superior court appellate division), the clerk must promptly issue a remittitur to the appellate division, along with two file-stamped copies of the decision or order of the court of appeal. Cal Rules of Ct 8.1018(a)-(b).

When the appellate division clerk receives the remittitur, it must promptly issue a remittitur to the superior court unless further proceedings must be held in the appellate division. Cal Rules of Ct 8.1018(c). For further discussion of remittitur generally, see chap 18.

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§10.144 4. Review by Extraordinary Writ

The overwhelming majority of appellate division opinions are not published, and certification is rarely granted. Although the law is not entirely clear, further review might be obtained by extraordinary writ to the court of appeal or the supreme court if certification is denied. *Anchor Marine Repair Co. v Magnan* (2001) 93 CA4th 525, 113 CR2d 284.

For further discussion of extraordinary petitions to the supreme court, see California Civil Writ Practice, chap 12 (4th ed Cal CEB 2008).

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§10.145 a. Excess of Jurisdiction; Denial of Fair Hearing

Generally, a petitioner must show that the appellate division acted in excess of jurisdiction, *e.g.,* deliberately refused to follow binding precedent. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321. A decision amounting to a denial of a fair hearing has also been held to warrant extraordinary relief. *Dvorin v Appellate Dep't* (1975) 15 C3d 648, 650, 125 CR 771; *California Cas. Ins. Co. v Appellate Dep't* (1996) 46 CA4th 1145, 1149, 54 CR2d 118.

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§10.146 b. Mere Erroneous Decision Insufficient

In *Brown Co. v Appellate Dep't* (1983) 148 CA3d 891, 196 CR 258, the court of appeal refused to review an appellate division decision even though that decision was erroneous. It may be possible, however, to persuade a court of appeal to issue relief in exceptional circumstances. See *Loska v Superior Court* (1986) 188 CA3d 569, 574 n4, 233 CR 213 (addressing constitutionality of ordinance).

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§10.147 c. Court of Appeal or Supreme Court?

It is unclear whether a petitioner must first seek review in the court of appeal and then proceed to the supreme court. If the appellate division certifies the case but the court of appeal refuses certification, no further court of appeal involvement is required. *Vargas v Municipal Court* (1978) 22 C3d 902, 910, 150 CR 918. In at least one case, the supreme court accepted review when the court of appeal had no involvement. See *Randone v Appellate Dep't* (1971) 5 C3d 536, 96 CR 709.

As a practical matter, the chances of obtaining extraordinary relief are better in the court of appeal than they are in the supreme court. Code of Civil Procedure §1068 empowers the court of appeal to grant writ relief over any inferior court, including the superior court appellate division. Therefore, seek extraordinary relief in the court of appeal first.

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M. Costs

§10.148 1. Right to Costs on Appeal

The prevailing party has the right to recover costs on appeal. Cal Rules of Ct 8.891(a)(1). If the appellate division affirms the judgment without modification or dismisses the appeal, the respondent is deemed the prevailing party. Cal Rules of Ct 8.891(a)(2). If the appellate division reverses the judgment in its entirety, the appellant is deemed the prevailing party. Cal Rules of Ct 8.891(a)(2). If the appellate division reverses in part or modifies the judgment, or if there are more than one notices of appeal, the court must specify the award or denial of costs in its decision. Cal Rules of Ct 8.891(a)(3).

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§10.149 2. Appellate Division Determines Award or Denial

If the appellate division reverses in part or modifies the judgment, or if there is more than one notice of appeal, the court must specify the award or denial of costs in its decision. Cal Rules of Ct 8.891(a)(3). The appellate division also has authority to make a different award or apportion costs "in the interests of justice." Cal Rules of Ct 8.891(a)(4). It may assess costs for taking a frivolous appeal, appealing solely to cause delay, or committing any other unreasonable infraction of the rules on appeals. Cal Rules of Ct 8.891(e)(1).

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§10.150 3. Items Recoverable as Costs

Items recoverable as costs are limited to (Cal Rules of Ct 8.891(d)):

- Filing fees;
- Costs paid for any portion of the record, whether an original or a copy or both, subject to reduction by the issuance of sanctions;
- Costs to produce additional evidence on appeal;
- Costs to notarize, serve, mail, and file the record, briefs, and other papers;
- Costs to print and reproduce any brief, including any petition for rehearing or review, answer, or reply; and
- Costs to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

A special problem arises in connection with attorney fees recoverable under CC §1717 as a cost of litigation. An award of costs may not include attorney fees on appeal, but it does not preclude a party from claiming attorney fees. Cal Rules of Ct 8.891(d)(2). When the appellate division renders judgment in such a case, it may itself elect to fix appellate counsel's fee and specify it in the judgment. Seldom, however, does the division have sufficient information about the work that has gone into the appeal. Thus, that determination is left to be made in the superior court on a subsequent motion for attorney fees or on a motion to tax the amount claimed as attorney fees in the prevailing party's cost bill.

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§10.151 4. Procedure for Claiming or Opposing Costs

Within 30 days after the clerk sends notice of issuance of the remittitur, a party claiming appellate costs must serve and file in the superior court a verified memorandum of costs under Cal Rules of Ct 3.1702(a)(1). Cal Rules of Ct 8.891(c)(1). A party may then serve and file a motion in the superior court to strike or tax costs. Cal Rules of Ct 8.891(c)(2). An award of costs is enforceable as a money judgment. Cal Rules of Ct 8.891(c)(3).

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§10.152 5. Judgment for Costs

The appellate division clerk must enter on the record and insert in the remittitur a judgment awarding costs to the prevailing party. Cal Rules of Ct 8.891(b)(1). If the clerk fails to enter judgment for costs, the appellate division may recall the remittitur for correction on its own motion or on a party's motion made not later than 30 days after the remittitur issues. Cal Rules of Ct 8.891(b)(2).

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§10.153 N. Sanctions

On its own or a party's motion, the appellate division may impose sanctions, including the award or denial of costs, on a party or an attorney for taking a frivolous appeal, appealing solely to cause delay, or committing an unreasonable violation of the rules of court. Cal Rules of Ct 8.891(e)(1).

A party must serve and file the motion before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due. Cal Rules of Ct 8.891(e)(2). The motion must include a declaration supporting the amount of any monetary sanction sought. Cal Rules of Ct 8.891(e)(2). If a party files a motion for sanctions, along with a motion to dismiss the appeal, and the court does not grant the motion, the party may file a new motion for sanctions within 10 days after the appellant's reply brief is due. Cal Rules of Ct 8.891(e)(2).

The court must notify a party or its attorney in writing if it is considering imposing sanctions. Cal Rules of Ct 8.891(e)(3). An opposition may *not* be filed unless the court sends this notice. Cal Rules of Ct 8.891(e)(3). Within 10 days after the court sends the notice, a party may serve and file an opposition, but failure to file an opposition is not consent to sanctions. Cal Rules of Ct 8.891(e)(3). Unless otherwise ordered, argument on sanctions will be heard at the same time as oral argument on the merits of the appeal. Cal Rules of Ct 8.891(e)(4).

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III. APPEALS IN SMALL CLAIMS CASES

§10.154 A. Applicable Statutes and Rules of Court

Actions in small claims courts are generally governed by CCP §§116.110-116.950. Appeals in small claims cases are governed by CCP §§116.710 and 116.750-116.795, as well as Cal Rules of Ct 8.950-8.966.

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§10.155 B. Attorney Involvement

Counsel will not be involved in the trial stage of a small claims actions because, under CCP §116.530(a)-(b), an attorney cannot appear on behalf of a plaintiff or defendant unless:

- The attorney is one of the litigants;
- The attorney prosecutes or defends an action by or against a partnership in which the attorney is a general partner and all the partners are attorneys; or
- The attorney prosecutes or defends an action by or against a professional corporation in which the attorney is an officer or director and all other officers and directors are attorneys.

However, an attorney may advise a party in a small claims action. CCP §116.530(c); *City & County of San Francisco v Small Claims Court* (1983) 141 CA3d 470, 480, 190 CR 340. Trials are conducted informally (CCP §116.510), pleadings are by statutory forms, and most courts provide litigants with a manual of court rules and procedures (see CCP §116.940).

Usually counsel becomes involved only after a judgment has been rendered. The attorney may file a notice of appeal and appear on the client's behalf in the superior court for a trial de novo. CCP §§116.530(c), 116.770(c).

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C. Who May Appeal

1. Defendant

§10.156 a. If Defendant Appeared at Trial

A defendant may appeal a judgment to the superior court in the county in which the small claims court action was heard. CCP §116.710(b). A defendant may appeal only the part of the judgment awarding the plaintiff affirmative relief; a defendant who seeks any affirmative relief by way of a cross-claim has no right to appeal from the judgment on that claim. CCP §116.710; *Davis v Superior Court* (1980) 102 CA3d 164, 167, 162 CR 167. When the defendant prevails on a cross-claim, the plaintiff is considered a "defendant" on the cross-claim and thus may appeal affirmative relief awarded the cross-complaining defendant in the small claims court action. CCP §116.710(b).

NOTE: When a husband and wife sue or are sued in small claims court, one of them may appear and participate on behalf of both as long as the claims are joint, the nonappearing spouse has given consent, and the court decides that the interests of justice would be served. CCP §116.540(k). On appeal of any small claims judgment, the court cannot dismiss the appeals of the nonappearing spouse on the ground of nonappearance without giving that spouse an opportunity to be heard. *Bricker v Superior Court* (2005) 133 CA4th 634, 638, 35 CR3d 7.

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§10.157 (1) Right to Appeal if Defendant Has Mandatory Cross-Claim

If the defendant must file a mandatory cross-claim in the small claims action, the defendant has a right to appeal from an adverse judgment on that claim. *Skaff v Small Claims Court* (1968) 68 C2d 76, 79 n3, 65 CR 65; *Thompson v Chew Quan* (1959) 167 CA2d Supp 825, 334 P2d 1074 (cross-claim cannot be considered mandatory in small claims proceeding unless within jurisdiction of small claims court).

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§10.158 (2) Defendant's Insurer

A defendant's insurer may appeal a judgment to superior court if the judgment exceeds $2500 and if the insurer stipulates that the policy covers the matter to which the judgment applies. See CCP §116.710(c).

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§10.159 b. If Defendant Did Not Appear at Trial: Motion to Vacate

A defendant who did not appear at trial in the small claims court has no right to appeal the judgment but can move to vacate the judgment under CCP §116.730 or (in the case of improper service) §116.740. If the motion to vacate the judgment is denied, the defendant may appeal the denial. CCP §116.710(d). The nonappearing defendant must file a motion to vacate the judgment with the clerk in small claims and then either appear at the hearing on the motion to vacate or submit a written explanation for not appearing, together with evidence to support the motion. CCP §116.730(a)-(b).

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2. Plaintiff

§10.160 a. Appeal Generally Prohibited

The plaintiff in a small claims action has no right to appeal an adverse judgment. CCP §116.710(a). Denial of a plaintiff's right to appeal has been upheld against constitutional challenge on the ground that, by electing the inexpensive and informal method of a small claims action, the plaintiff voluntarily accepts loss of the right to appeal. *Superior Wheeler Cake Corp. v Superior Court* (1928) 203 C 384, 387, 264 P 488.

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§10.161 b. Appeal Permitted on Defendant's Cross-Claim

When the defendant prevails on a cross-claim, the plaintiff is considered a defendant in the cross-claim and may appeal from the part of the judgment awarding the defendant relief against the plaintiff. CCP §116.710(b).

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§10.162 c. May Move to Vacate

If the plaintiff fails to appear and judgment is entered against him or her, the plaintiff may move to vacate the judgment within 30 days after the notice of entry of the judgment is mailed to the parties. CCP §§116.710(a), 116.720(a). The court may grant the motion on a showing of good cause and, if all parties are present and agree, the matter may be heard without recalendaring. If the defendant is not present, the motion will be heard in his or her absence. If the motion is granted, the matter will be reset and notice given under CCP §116.330. CCP §116.720(c)-(d).

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§10.163 d. Extraordinary Writ

Although the plaintiff cannot appeal from a small claims court judgment denying his or her claim (see §10.160), in limited circumstances the plaintiff can obtain review of the small claims court's action or inaction by writ of mandate or writ of review (certiorari). Use of these writs is limited to situations in which the small claims court refuses to act or acted in excess of its jurisdiction. See *Green v Superior Court* (1974) 10 C3d 616, 621, 111 CR 704 (writ review available for issues of statewide importance); *Davis v Superior Court* (1980) 102 CA3d 164, 168, 162 CR 167 (writ review available to secure uniformity in operations of small claims courts and of interpretation of statutes governing small claims courts). Such situations are construed strictly against the plaintiff, who may not disguise an appeal by filing a petition for a writ of mandate or review when the only assertion is that the small claims court erroneously weighed the evidence or committed some other legal error in exercising its jurisdiction. See *Pitzen v Superior Court* (2004) 120 CA4th 1374, 1380, 16 CR3d 628; *Parada v Small Claims Court* (1977) 70 CA3d 766, 769, 139 CR 87; *Yoakum v Small Claims Court* (1975) 53 CA3d 398, 404, 125 CR 882.

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D. Motion to Vacate

§10.164 1. Plaintiff

If the plaintiff fails to appear and judgment is entered against him or her, the plaintiff may move to vacate the judgment within 30 days after the notice of entry of the judgment is mailed to the parties. CCP §§116.710(a), 116.720(a). For further discussion, see §10.162.

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§10.165 2. Defendant

A defendant who did not appear at trial in small claims court can file a motion to vacate the judgment under CCP §116.730 or (in the event of improper service) §116.740. A defendant can appeal denial of that motion. CCP §116.710(d).

The Judicial Council has adopted a mandatory official form for the notice of motion to vacate the judgment, together with the supporting declaration. See Notice of Motion to Vacate Judgment and Declaration (Judicial Council Form SC 135) in §10.198.

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§10.166 a. When to File Motion to Vacate

A nonappearing defendant must file a motion to vacate the judgment with the clerk in small claims court within 30 days after the clerk mails notice of entry of judgment. The defendant must then either appear at the hearing on the motion to vacate or submit a written explanation for not appearing, together with evidence to support the motion. CCP §116.730(a)-(b). As a practical matter, it is often good practice to agree to reimburse the opposing party for any costs associated with appearing at trial.

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§10.167 b. Appeal From Denial of Motion

If the motion to vacate is denied, the defendant may appeal the denial by filing a notice of appeal with the clerk of the small claims court within 10 days after the clerk has mailed or delivered notice of the denial. CCP §116.730(e).

If on appeal the superior court finds that the motion to vacate should have been granted, it may proceed without recalendaring to hear the appeal as long as all parties are present and the defendant has complied with the requirements of CCP §§116.710-116.795, or the court may order the case transferred back to the small claims court for a hearing. CCP §116.730(f).

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§10.168 c. Extension of Time to File Motion

If the defendant was neither properly served with the claim in the small claims action nor appeared at the hearing, the defendant's time in which to move to vacate the judgment is extended. Rather than having only 30 days after the clerk mails notice of entry of judgment in which to make the motion, the defendant must move to vacate within 180 days after the defendant discovers or should have discovered that judgment was entered against him or her. CCP §116.740(a).

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E. Filing Notice of Appeal

§10.169 1. Time to File

The notice of appeal must be filed with the clerk of the small claims court (see Cal Rules of Ct 8.954(a)-(b)) within 30 days after the clerk delivers or mails notice of entry of the judgment. CCP §116.750(b). The statute specifies that a notice of appeal filed after the 30-day period is "ineffective for any purpose."

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§10.170 a. No Extension if Deadline Missed

Code of Civil Procedure §116.750(b) makes clear that no appeal will be considered if the 30-day deadline is missed. The rule is that the time for filing a notice of appeal is mandatory and jurisdictional; thus, a court cannot act if the notice of appeal is untimely. *Hollister Convalescent Hosp. v Rico* (1975) 15 C3d 660, 674, 125 CR 757 (discussing rule in superior court appeals).

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§10.171 b. No Extension of Time for Proceedings to Correct Judgment

The time for filing a notice of appeal is not extended by the filing of a request to correct a mistake or by virtue of any later proceedings on that request, except that a new period for filing a notice of appeal begins on the delivery or mailing of notice of entry of any modified judgment. CCP §116.750(c).

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§10.172 c. When Defendant Has Not Appeared at Trial

A defendant who did not appear at trial in small claims court cannot appeal the judgment but can file a motion to vacate the judgment under CCP §116.730 or (in the event of improper service) §116.740. See §10.165 for discussion of motion to vacate.

If the motion to vacate is denied, the defendant may appeal that denial by filing a notice of appeal with the clerk of the small claims court within 10 days after the court has mailed or delivered notice of its denial. CCP §116.730(e).

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§10.173 d. Effect of Early Filing

A notice of appeal that is filed before entry of judgment, but after its rendition, is valid and is deemed filed immediately after the judgment's entry. Cal Rules of Ct 8.954(c). When a notice of appeal is filed after the judge has announced the intended ruling, but before rendition of the judgment, the reviewing court may treat it as filed immediately after the judgment's entry. Cal Rules of Ct 8.954(c).

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§10.174 2. Clerk Serves Notice of Appeal

Responsibility for serving the notice of appeal rests with the clerk of the small claims court in which the action was originally filed. Cal Rules of Ct 8.954(b). Notification is complete when the clerk mails to all parties other than the appellant the notice stating the title and number of the case and the date the notice was filed. Cal Rules of Ct 8.954(a)-(b).

PRACTICE TIP: A better practice is to send a courtesy copy of the notice of appeal to the opposing party when it is filed.

Within 5 days after fees are paid and the notice is filed, the small claims clerk must transmit the case file and all related papers, including the notice of appeal, to the clerk of the court assigned to hear the appeal. Cal Rules of Ct 8.957. See §10.177.

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§10.175 3. Filing Fee

The appealing party is required to pay a filing fee of $75. CCP §116.760(a). No fee is charged to a nonappealing party for filing documents in the superior court. CCP §116.760(b). A county may also include a supplemental fee for the county law library fund. See Bus & P C §§6321, 6322.1. Practitioners should confirm the fee amount with the clerk of the superior court in which the appeal is filed.

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§10.176 4. Abandonment and Dismissal Before Record Filed; Compromise

Before the record has been transmitted to the court assigned to hear the appeal, the appellant may abandon the appeal by filing a notice of abandonment with the clerk of the small claims court. Cal Rules of Ct 8.963(a). Within the same time deadline, the parties may stipulate to abandonment and file the stipulation with the clerk. Cal Rules of Ct 8.963(a). In either case, the appeal is dismissed and the case is returned to the small claims court. Cal Rules of Ct 8.963(a). See §10.181 on dismissal after record is filed.

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F. Proceedings on Appeal

§10.177 1. Clerk Prepares Record on Appeal

Within 5 days of the filing of a notice of appeal and payment of the required fees, the small claims court clerk must transmit the record on appeal to the court assigned to hear the appeal. Cal Rules of Ct 8.957. Counsel should carefully review the record on appeal to make sure all necessary documents have been transmitted, including a certified copy of the entries in the register of actions or docket relating to the action, together with the pleadings, exhibits, notices, motions, and other papers and documents filed in the action, including the notice of appeal.

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§10.178 2. Clerk Sets Case for Hearing

The superior court clerk schedules the hearing for the earliest available time and mails written notice of the hearing to the parties at least 14 days before the day set for the hearing. CCP §116.770(e).

Continuances may be granted for good cause and a request may be made by one party or by stipulation. The continuances may not exceed a total of 30 days, except on a showing of extreme hardship. Cal Rules of Ct 8.960.

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3. Nature of Review

§10.179 a. Informal Trial De Novo

Appellate review in small claims cases consists of a trial de novo before a one-judge superior court rather than an appellate division. CCP §116.770(a) ("appeal to the superior court shall consist of a new hearing"); *Whittaker v Superior Court* (1968) 68 C2d 357, 364, 66 CR 710. The superior court hearing must be conducted "informally," pretrial discovery procedures described in CCP §2019.010 are not permitted, no party has a right to trial by jury, and no tentative decision or statement of decision is required. CCP §116.770(b); *Crouchman v Superior Court* (1988) 45 C3d 1167, 1172, 248 CR 626.

The trial is conducted under CCP §§116.510-116.550, which govern hearing procedures in small claims cases. Attorneys, however, may participate. CCP §116.770(c).

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§10.180 b. Scope of Appeal

The scope of the hearing on appeal includes the claims of everyone who was a party to the small claims action at the time the notice of appeal was filed, and any claim of a defendant that was heard in the small claims court. CCP §116.770(d).

Despite the restrictive language on the right to appeal in CCP §116.710(b) (see §10.156), there is a split of authority on the superior court's jurisdiction to consider claims decided against a party, either plaintiff or defendant, when a defendant appeals a small claims court judgment. In *Anderson v Superior Court* (1990) 226 CA3d 698, 276 CR 18, and *Davis v Superior Court* (1980) 102 CA3d 164, 167, 162 CR 167, the courts of appeal held that superior courts lack jurisdiction to hear an appeal from a party's own claim if that party lost the claim in superior court, *i.e.,* the party failed to obtain affirmative relief. Agreeing with this holding, the court in *Township Homes, Inc. v Superior Court* (1994) 22 CA4th 1587, 1589, 27 CR2d 852, went one step further and held that the superior court could use a party's own unsuccessful claim in the small claims proceeding to offset a judgment awarded on appeal in favor of the opposing party. In other words, a party whose claim was decided against it in small claims court could not obtain affirmative relief in superior court beyond an offset.

In *Universal City Nissan v Superior Court* (1998) 65 CA4th 203, 209, 75 CR2d 910, the Second District Court of Appeal, Division Four, disagreed with *Anderson, Davis,* and *Township Homes,* holding that full review of an unsuccessful claim or counterclaim is available when a party appeals to superior court. The court in *Universal City Nissan* relied on the language and legislative history of CCP §116.770(d), which states that a hearing de novo on appeal "shall include the claims of all parties" to the small claims action when the notice of appeal was filed.

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4. Abandonment and Dismissal; Compromise

§10.181 a. Voluntary Dismissal

Before the record has been transmitted to the court assigned to hear the appeal, the appellant may abandon the appeal by filing a written notice of abandonment with the clerk of the small claims court, or the parties may file a stipulation for abandonment with the clerk. Cal Rules of Ct 8.963(a). See §10.176. After the record has been transmitted to the court assigned to hear the appeal, the court may dismiss the appeal either on stipulation of the parties or on the appellant's written request. Cal Rules of Ct 8.963(b).

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§10.182 b. Involuntary Dismissal

The appeal is subject to mandatory dismissal if it is not brought to trial within 1 year after the appeal is filed or, after a trial de novo, within 1 year after entry of the order granting the new trial. Cal Rules of Ct 8.963(c)(1).

The 1-year period may be extended if the parties so stipulate in writing or if the appellant can show that he or she exercised reasonable diligence to bring the case to trial. Despite this extension, the appeal must be dismissed if not brought to trial within 3 years after the filing of the appeal in the superior court or entry of the most recent superior court order granting a new trial. Cal Rules of Ct 8.963(c)(2)-(3).

If the appellant does not appear at the hearing or if the appeal is not heard within 1 year after the date the notice of appeal was filed with the clerk of the small claims court, the superior court has discretion to dismiss the appeal. CCP §116.795(a).

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§10.183 c. Compromise of Claim of Minor or Incompetent Person

The power to abandon an appeal from small claims court is not absolute when a guardian of a minor or an incompetent person is a party. When such a party seeks approval of a proposed compromise of the case on appeal, the superior court may hear and decide whether the proposed settlement is in the best interest of the minor or incompetent person. Cal Rules of Ct 8.963(f).

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G. Judgment on Small Claims Appeal

§10.184 1. Limited Res Judicata

A judgment of a small claims court or a judgment on appeal from a small claims court has limited res judicata effect. It is res judicata (or "claim preclusion") between the parties and bars relitigation of the same cause of action between them. *Sanderson v Niemann* (1941) 17 C2d 563, 573, 110 P2d 1025 (no issue preclusion from small claims judgment in separate action based on different cause of action); *Allstate Ins. Co. v Mel Rapton, Inc.* (2000) 77 CA4th 901, 907, 92 CR2d 151 (insurer's separate subrogation action barred by small claims judgment obtained by insured against tortfeasor for damages not covered by insurance).

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§10.185 2. No Collateral Estoppel

The parties to the second suit on a different cause of action are not collaterally estopped from relitigating issues that were decided in the earlier small claims action, whether or not a judgment was issued on appeal to superior court. *Sanderson v Niemann* (1941) 17 C2d 563, 573, 110 P2d 1025 (new superior court claim after judgment in small claims court), cited with approval in *Vandenberg v Superior Court* (1999) 21 C4th 815, 829, 88 CR2d 366; *Rosse v DeSoto Cab Co.* (1995) 34 CA4th 1047, 1052, 40 CR2d 680 (new superior court claim after judgment on appeal from small claims court). Informality of the proceedings in small claims court or in de novo appeal is the theoretical ground for precluding any collateral estoppel effect for the small claims judgment. *Sanderson v Niemann, supra; Mackinder v OSCA Dev. Co.* (1984) 151 CA3d 728, 735, 198 CR 864. But see *Pitzen v Superior Court* (2004) 120 CA4th 1374, 1385, 16 CR3d 628 (suggesting that collateral estoppel may bar losing small claims plaintiff, as opposed to defendant, from bringing new action).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.186 3. Costs

§10.186 3. Costs

For good cause and when necessary to achieve substantial justice between the parties, the superior court may award a party to an appeal up to $150 for (CCP §116.780(c)):

- Attorney fees actually and reasonably incurred; and
- Actual loss of earnings, transportation expenses, and lodging incurred in connection with the appeal.

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§10.187 4. Sanctions

If the superior court finds that the appeal was without substantial merit and not based on good faith, but was intended to harass or delay the other party, or to encourage the other party to abandon the claim, the court may award the other party (CCP §116.790):

- Attorney fees actually and reasonably incurred in connection with the appeal, not exceeding $1000; and
- Any actual lost earnings, and transportation and lodging expenses in connection with the appeal, not exceeding $1000.

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§10.188 H. Finality of Judgment: Appeal Not Available

A judgment rendered in superior court after a hearing on appeal (*i.e.,* a trial de novo) is final and not appealable. CCP §116.780(a); *ERA-Trotter Girouard Assoc. v Superior Court* (1996) 50 CA4th 1851, 58 CR2d 381. But the superior court appellate division can review a postjudgment order by petition for a writ of mandate. *General Elec. Capital Auto Fin. Servs., Inc. v Appellate Division* (2001) 88 CA4th 136, 138, 105 CR2d 552 ("small claims enforcement orders are reviewed in the same manner as postjudgment enforcement orders in a limited civil case").

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§10.189 1. No Motion for New Trial or Motion to Vacate

A motion for a new trial under CCP §659 and a motion to vacate the judgment under either CCP §663 or §473 are not available to a party to set aside a superior court judgment on a small claims appeal. *ERA-Trotter Girouard Assoc. v Superior Court* (1996) 50 CA4th 1851, 1854, 58 CR2d 381 (small claims judgment "is immune from virtually any postjudgment attack"); *Eloby v Superior Court* (1978) 78 CA3d 972, 976, 144 CR 597.

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§10.190 2. Court May Not Grant Rehearing

The superior court may not grant a rehearing of the appeal under Cal Rules of Ct 8.889(a). *ERA-Trotter Girouard Assoc. v Superior Court* (1996) 50 CA4th 1851, 58 CR2d 381 (former Cal Rules of Ct 107 (now Cal Rules of Ct 8.889) applies only to appeals from judgments of limited civil cases).

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§10.191 3. Writ May Be Available

A superior judgment on small claims appeal that decides important legal issues may be reviewed on a petition for an extraordinary writ to the court of appeal. *Davis v Superior Court* (1980) 102 CA3d 164, 168, 162 CR 167. The *Davis* court stated (102 CA3d at 168):

> Since statewide precedents can only be created by appellate courts, jurisdiction to decide appropriate small claims court issues must be retained by appellate courts in order to secure uniformity in the operations of the small claims court and uniform interpretation of the statutes governing them.

See also *Houghtaling v Superior Court* (1993) 17 CA4th 1128, 1131, 21 CR2d 855; *Calvao v Superior Court* (1988) 201 CA3d 921, 922 n1, 247 CR 470; *Adamson v Superior Court* (1980) 113 CA3d 505, 508, 169 CR 866 (court of appeal retains inherent jurisdiction to review, on extraordinary writ, small claims matters raising sufficiently important, and perhaps jurisdictional, issues).

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/ IV. FORMS/§10.192 A. Form: Information on Appeal Procedures for Limited Civil Cases (Judicial Council Form APP-101-INFO)

IV. FORMS

§10.192 A. Form: Information on Appeal Procedures for Limited Civil Cases (Judicial Council Form APP-101-INFO)



APP-101-INFO Information on Appeal Procedures for Limited Civil Cases

GENERAL INFORMATION

(1) What does this information sheet cover?

This information sheet tells you about appeals in limited civil cases. These are civil cases in which the amount of money claimed is $25,000 or less.

If you are the party who is appealing (asking for the trial court's decision to be reviewed), you are called the APPELLANT, and you should read Information for the Appellant, starting on page 2. If you received notice that another party in your case is appealing, you are called the RESPONDENT and you should read Information for the Respondent, starting on page 11.

This information sheet does not cover everything you may need to know about appeals in limited civil cases. It is meant only to give you a general idea of the appeal process. To learn more, you should read rules 8.800–8.843 and 8.880–8.891 of the California Rules of Court, which set out the procedures for limited civil appeals. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

(2) What is an appeal?

An appeal is a request to a higher court to review a decision made by a judge or jury in a lower court. **In a limited civil case, the court hearing the appeal is the appellate division of the superior court and the lower court—called the "trial court" in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate division's job is to review a record of what happened in the trial court and the trial court's decision to see if certain kinds of legal errors were made:

For information about appeal procedures in other kinds of cases, see:

- *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)

You can get these forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

- ***Prejudicial error:*** The appellant (the party who is appealing) may ask the appellate division to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called "prejudicial error").

  Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the appellate division presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the appellate division that an error was made and that the error was harmful.
- ***No substantial evidence:*** The appellant may also ask the appellate division to determine if there was substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the appellate division only looks to see if there was evidence that reasonably supports the decision. The appellate division generally will not reconsider the jury's or trial court's conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

The appellate division generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.

APP-101-INFO Information on Appeal Procedures for Limited Civil Cases

3 Do I need a lawyer to represent me in an appeal?

You do not *have* to have a lawyer; if you are an individual (rather than a corporation, for example), you are allowed to represent yourself in an appeal in a limited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If you decide not to use a lawyer, you must let the court know if your address, telephone number, or other contact information changes so that the court can contact you if needed.

4 Where can I find a lawyer to help me with my appeal?

You have to hire your own attorney if you want one. You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost*.

INFORMATION FOR THE APPELLANT

This part of the information sheet is written for the appellant—the party who is appealing the trial court's decision. It explains some of the rules and procedures relating to appealing a decision in a limited civil case. The information may also be helpful to the respondent. Additional information for respondents can be found starting on page 11 of this information sheet.

5 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative unless you are a legally appointed representative of that person (such as the person's guardian or conservator).

6 Can I appeal *any* decision the trial court made?

No. Generally, you can only appeal the final judgment—the decision at the end that decides the whole case. Other rulings made by the trial court before the final judgment generally cannot be separately appealed but can be reviewed only later as part of an appeal of the final judgment. There are a few exceptions to this general rule. Code of Civil Procedure section 904.2 lists a few types of orders in a limited civil case that can be appealed right away. These include orders that:

- Change or refuse to change the place of trial (venue)
- Grant a motion to quash service of summons or grant a motion to stay or dismiss the action on the ground of inconvenient forum
- Grant a new trial or deny a motion for judgment notwithstanding the verdict
- Discharge or refuse to discharge an attachment or grant a right to attach
- Grant or dissolve an injunction or refuse to grant or dissolve an injunction
- Appoint a receiver
- Are made after final judgment in the case

(You can get a copy of Code of Civil Procedure section 904.2 at *www.leginfo.ca.gov/calaw.html*.)

7 How do I start my appeal?

First, you must serve and file a notice of appeal. The notice of appeal tells the other party or parties in the case and the trial court that you are appealing the trial court's decision. You may use *Notice of Appeal/Cross-Appeal (Limited Civil Case)* (form APP-102) to prepare a notice of appeal in a limited civil case. You can get form APP-102 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

8 How do I "serve and file" the notice of appeal?

"Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the notice of appeal to the other party or parties in the way required by law.
- Make a record that the notice of appeal has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the notice of appeal, who was served with the notice of appeal, how the notice of appeal was served (by mail or in person), and the date the notice of appeal was served.
- Bring or mail the original notice of appeal and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice of appeal you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice of appeal to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.

9 Is there a deadline to file my notice of appeal?

Yes. In a limited civil case, except in the very limited circumstances listed in rule 8.823, you must file your notice of appeal within **30 days** after the trial court clerk mails or a party serves either a document called a "Notice of Entry" of the trial court judgment or a file-stamped copy of the judgment or within 90 days after entry of the judgment, whichever is earlier. **This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the appellate division will not be able to consider your appeal.**

10 Do I have to pay to file an appeal?

Yes. Unless the court waives this fee, you must pay a fee for filing your notice of appeal. You can ask the clerk of the court where you are filing the notice of appeal what the fee is or look at Government Code section 70621. (You can get a copy of this law at *www.leginfo.ca.gov.calaw.html.*) If you cannot afford to pay the fee, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*. You can file this application either before you file your notice of appeal or with your notice of appeal. The court will review this application to determine if you are eligible for a fee waiver.

11 If I file a notice of appeal, do I still have to do what the trial court ordered me to do?

Filing a notice of appeal does NOT automatically postpone most judgments or orders, such as those requiring you to pay another party money or to deliver property to another party (see Code of Civil Procedure sections 917.1–917.9 and 1176; you can get a copy of these laws at *www.leginfo.ca.gov.calaw.html*). These kinds of judgments or orders will be postponed, or "stayed," only if you request a stay and the court grants your request. In most cases, other than unlawful detainer cases in which the trial court's judgment gives a party possession of the property, if the trial court denies your request for a stay, you can apply to the appellate division for a stay. If you do not get a stay and you do not do what the trial court ordered you to do, court proceedings to collect the money or otherwise enforce the judgment or order may be started against you.

12 What do I need to do after I file my notice of appeal?

You must ask the clerk of the trial court to prepare and send the official record of what happened in the trial court in your case to the appellate division.

Since the appellate division judges were not there to see what happened in the trial court, an official record of what happened must be prepared and sent to the appellate division for its review. You can use *Notice*

Designating Record on Appeal (Limited Civil Case) (form APP-103) to ask the trial court to prepare this record. You can get form APP-103 at any courthouse or county law library or online at *www.courtinfo.ca.gov /forms*.

You must serve and file this notice designating the record on appeal within 10 days after you file your notice of appeal. "Serving and filing" this notice means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the notice to the other party or parties in the way required by law.
- Make a record that the notice has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the notice, who was served with the notice, how the notice was served (by mail or in person), and the date the notice was served.
- Bring or mail the original notice and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*

13 What is the official record of the trial court proceedings?

There are three parts of the official record:

a. A record of the documents filed in the trial court (other than exhibits)

b. A record of what was said in the trial court (this is called the "oral proceedings")

c. Exhibits that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court

Read below for more information about these parts of the record.

a. Record of the documents filed in the trial court

The first part of the official record of the trial court proceedings is a record of the documents that were filed in the trial court. There are three ways in which a record of the documents filed in the trial court can be prepared for the appellate division:

(1) A *clerk's transcript*
(2) The original *trial court file* or
(3) An *agreed statement*

Read below for more information about these options.

(1) Clerk's transcript

Description: A clerk's transcript is a record of the documents filed in the trial court prepared by the clerk of the trial court.

Contents: Certain documents, such as the notice of appeal and the trial court judgment or order being appealed, must be included in the clerk's transcript. These documents are listed in rule 8.832(a) of the California Rules of Court and in *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103).

If you want any documents other than those listed in rule 8.832(a) to be included in the clerk's transcript, you must tell the trial court in your notice designating the record on appeal. You can use form APP-103 to do this. You will need to identify each document you want included in the clerk's transcript by its title and filing date or, if you do not know the filing date, the date the document was signed.

If you—the appellant—request a clerk's transcript, the respondent also has the right to ask the clerk to include additional documents in the clerk's transcript. If this happens, you will be served with a notice saying what other documents the respondent wants included in the clerk's transcript.

Cost: The appellant is responsible for paying for preparing a clerk's transcript. The trial court clerk will send you a bill for the cost of preparing an original and one copy of the clerk's transcript. You must do one of the following things within 10 days after the clerk sends this bill or the appellate division may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www courtinfo.ca. gov/forms*. The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the clerk's transcript has been paid or waived, the trial court clerk will compile the requested documents into a transcript format and forward the original clerk's transcript to the appellate division for filing. The trial court clerk will send you a copy of the transcript. If the respondent bought a copy, the clerk will also send a copy of the transcript to the respondent.

(2) Trial court file

When available: If the court has a local rule allowing this, the clerk can send the appellate division the original trial court file instead of a clerk's transcript (see rule 8.833 of the California Rules of Court).

Cost: As with a clerk's transcript, the appellant is responsible for paying for preparing the trial court file. The trial court clerk will send you a bill for this preparation cost. You must do one of the following things within 10 days after the clerk sends this bill or the appellate division may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca. gov/forms*. The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the trial court file has been paid or waived, the trial court clerk will send the file and a list of the documents in the file to the appellate division. The trial court clerk will also send a copy of the list of documents to the appellant and respondent so that you can put your own files of documents from the trial court in the correct order.

(3) Agreed statement

Description: An agreed statement is a summary of the trial court proceedings agreed to by the parties (see rule 8.836 of the California Rules of Court).

When available: If you and the respondent agree to this, you can use an agreed statement instead of a clerk's transcript. To do this, you must attach to your agreed statement all of the documents that are required to be included in a clerk's transcript. If you choose this alternative, you must file with your notice designating the record on appeal either the agreed statement or a written agreement with the respondent (a "stipulation"), stating that you are trying to

agree on a statement. Within the next 30 days, you must then file the agreed statement or tell the court that you were unable to agree on a statement and file a new notice designating the record.

b. Record of what was said in the trial court (the "oral proceedings")

The second part of the official record of the trial court proceedings is a record of what was said in the trial court (this is called a record of the "oral proceedings"). You do not *have* to send the appellate division a record of the oral proceedings. But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, the appellate division will need a record of those oral proceedings. For example, if you are claiming that there was not substantial evidence supporting the judgment, order, or other decision you are appealing, the appellate division will need a record of the oral proceedings.

You are responsible for deciding how the record of the oral proceedings will be provided and, depending on what option you select and your circumstances, you may also be responsible for paying for preparing this record or for preparing an initial draft of the record. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and sent to the appellate division. **If the appellate division does not receive this record, it will not be able to review any issues that are based on what was said in the trial court.**

In a limited civil case, you can use *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) to tell the court whether you want a record of the oral proceedings and, if so, the form of the record that you want to use. You can get form APP-103 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

There are four ways in which a record of the oral proceedings can be prepared for the appellate division:

(1) If you or the other party arranged to have a court reporter there during the trial court proceedings, the reporter can prepare a record, called a *"reporter's transcript."*

(2) If the proceedings were officially electronically recorded, the trial court can have a transcript prepared from that recording or, if the court has a local rule permitting this and you and the other party agree ("stipulate") to this, you can use the *official electronic recording* itself instead of a transcript.

(3) You can use an *agreed statement.*

(4) You can use a *statement on appeal.*

Read below for more information about these options.

(1) Reporter's transcript

Description: A reporter's transcript is a written record (sometimes called a "verbatim" record) of the oral proceedings in the trial court prepared by a court reporter. Rule 8.834 of the California Rules of Court establishes the requirements relating to reporter's transcripts.

When available: If a court reporter was there in the trial court and made a record of the oral proceedings, you can choose ("elect") to have the court reporter prepare a reporter's transcript for the appellate division. In most limited civil cases, however, a court reporter will not have been there unless you or another party in your case made specific arrangements to have a court reporter there. Check with the court to see if a court reporter made a record of the oral proceedings in your case before choosing this option.

Contents: If you elect to use a reporter's transcript, you must identify by date (this is called "designating") what proceedings you want to be included in the reporter's transcript. You can use the same form you used to tell the court you wanted to use a reporter's transcript—*Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103)—to do this.

If you elect to use a reporter's transcript, the respondent also has the right to designate additional proceedings to be included in the reporter's transcript. If you elect to proceed without a reporter's transcript, however, the

respondent may not designate a reporter's transcript without first getting an order from the appellate division.

Cost: The appellant is responsible for paying for preparing a reporter's transcript. The trial court clerk or the court reporter will notify you of the cost of preparing an original and one copy of the reporter's transcript. You must deposit payment for this cost with the trial court clerk within 10 days after this notice is sent.

Unlike the fee for filing the notice of appeal and the costs for preparing a clerk's transcript, the court cannot waive the fee for preparing a reporter's transcript. If you are represented by a lawyer in your appeal, a special fund, called the Transcript Reimbursement Fund, may be able to help pay for the transcript. However, there is no financial help available for parties who are not represented by lawyers. If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by using an agreed statement or a statement on appeal, which are described below.

Completion and delivery: After the cost of preparing the reporter's transcript has been deposited, the court reporter will prepare the transcript and submit it to the trial court clerk. The trial court clerk will submit the original transcript to the appellate division and send you a copy of the transcript. If the respondent has purchased it, a copy of the reporter's transcript will also be mailed to the respondent.

(2) Official electronic recording or transcript

When available: In some limited civil cases, the trial court proceedings were officially recorded on approved electronic recording equipment. If your case was officially recorded, you can choose ("elect") to have a transcript prepared from the recording. Check with the trial court to see if the oral proceedings in your case were officially electronically recorded before you choose this option. If the court has a local rule permitting this and all the parties agree ("stipulate"), a copy of an official electronic recording itself can be used as the record, instead of preparing a transcript. If you choose this option, you must attach a copy of this agreement ("stipulation") to your notice designating the record on appeal.

Cost: The appellant is responsible for paying for preparing this transcript or making a copy of the official electronic recording. If you cannot afford to pay this cost, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*. The court will review this application to determine if you are eligible for a fee waiver.

Completion and delivery: After the estimated cost of the transcript or official electronic recording has been paid or waived, the clerk will have the transcript or copy of the recording prepared. When the transcript is completed or the copy of the official electronic recording is prepared, the clerk will send it to the appellate division.

(3) Agreed statement

Description: An agreed statement is a written summary of the trial court proceedings agreed to by all the parties.

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment or if you do not want to use one of these options, you can choose ("elect") to use an agreed statement as the record of the oral proceedings (please note that it may take more of your time to prepare an agreed statement than to use either a reporter's transcript or official electronic recording, if they are available).

Contents: An agreed statement must explain what the trial court case was about, describe why the appellate division is the right court to consider an appeal in this case (why the appellate division has "jurisdiction"), and describe the rulings of the trial court relating to the points to be raised on appeal. The statement should include only those facts that you and the other parties think are needed to decide the appeal.

Preparation: If you elect to use this option, you must file the agreed statement with your notice designating the record on appeal or, if you and the other parties need more time to work on the statement, you can file a written agreement with the other parties (called a "stipulation") stating that you are trying to agree on a statement. If you file this stipulation, within the next 30 days you must either file the agreed statement or tell the court that you and the other parties were unable to agree on a statement and file a new notice designating the record.

(4) Statement on appeal

Description: A statement on appeal is a summary of the trial court proceedings that is approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment or if you do not want to use one of these options, you can choose ("elect") to use a statement on appeal as the record of the oral proceedings (please note that it may take more of your time to prepare a statement on appeal than to use either a reporter's transcript or official electronic recording, if they are available).

Contents: A statement on appeal must include a summary of the oral proceedings that the appellant believes necessary for the appeal and a summary of the trial court's decision. It must also include a statement of the points the appellant is raising on appeal (see rule 8.837 of the California Rules of Court for more information about what must be included in a statement on appeal and the procedures for preparing a statement. You can get a copy of this rule at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*).

Preparing a proposed statement: If you elect to use a statement on appeal, you must prepare a proposed statement. If you are not represented by a lawyer, you must use *Proposed Statement on Appeal (Limited Civil Case)* (form APP-104) to prepare your proposed statement. You can get form APP-104 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

Serving and filing a proposed statement: You must serve and file the proposed statement with the trial court within 20 days after you file your notice designating the record. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the proposed statement to the respondent in the way required by law.
- Make a record that the proposed statement has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail or in person), and the date the proposed statement was served.
- File the original proposed statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and about proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.

Review and modifications: The respondent has 10 days from the date you serve your proposed statement to serve and file proposed changes (called "amendments") to this statement. The trial court judge then reviews both your proposed statement and any proposed amendments filed by the respondent and makes any corrections or modifications to the statement that are needed to make sure that the statement provides a complete and accurate summary of the trial court proceedings.

Completion and certification: If the judge makes any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you and the respondent for your review. If you disagree with anything in the judge's statement, you have 10 days from the date the statement is sent to you to serve and file objections to the statement. The judge then reviews any objections, makes any additional corrections to the statement, and certifies the statement as a complete and accurate summary of the trial court proceedings.

Sending statement to the appellate division: Once the trial court judge certifies the statement on appeal, the trial court clerk will send the statement to the appellate division along with any record of the documents filed in the trial court.

c. Exhibits

The third part of the official record of the trial court proceeding is the exhibits, such as photographs, documents, or other items that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court. Exhibits are considered part of the record on appeal, but the clerk will not include any exhibits in the clerk's transcript unless you ask that they be included in your notice designating the record on appeal. *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103), includes a space for you to make this request.

You also can ask the trial court to send original exhibits to the appellate division at the time briefs are filed (see rule 8.843 for more information about this procedure and see below for information about briefs).

Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for that exhibit to be included in the clerk's transcript or sent to the appellate division, the party who has the exhibit must deliver that exhibit to the trial court clerk as soon as possible.

(14) What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the appellate division. When the appellate division receives the record, it will send you a notice telling you when you must file your brief in the appellate division.

(15) What is a brief?

Description: A "brief" is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If you are not represented by a lawyer, you will have to prepare your brief yourself. You should read rules 8.882–8.884 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in limited civil appeals, including requirements for the format and length of these briefs. You can get copies of these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

Contents: If you are the appellant, your brief, called an "appellant's opening brief," must clearly explain what you believe are the legal errors made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or the other forms of the record you are using) that support your argument. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits so do not include any new evidence in your brief.

Serving and filing: You must serve and file your brief in the appellate division by the deadline the court set in the notice it sent you, which is usually 30 days after the record is filed in the appellate division. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the brief to the other parties in the way required by law.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show

who served the brief, who was served with the brief, how the brief was served (by mail or in person), and the date the brief was served.

- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and about proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.

If you do not file your brief by the deadline set by the appellate division, the court may dismiss your appeal.

16 What happens after I file my brief?

Within 30 days after you serve and file your brief, the respondent may, but is not required to, respond by serving and filing a respondent's brief. If the respondent does not file a brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant.

If the respondent files a brief, within 20 days after the respondent's brief was filed, you may, but are not required to, file another brief replying to the respondent's brief. This is called a "reply brief."

17 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the appellate division will notify you of the date for oral argument in your case.

18 What is "oral argument?"

"Oral argument" is the parties' chance to explain their arguments to the appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to "waive" oral argument. If all parties waive oral argument, the judges will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties does not, the appellate division will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 10 minutes for your argument unless the appellate division orders otherwise. Remember that the judges will have already read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in your appeal or ask the judges if they have any questions you could answer.

19 What happens after oral argument?

After oral argument is held (or the date it was scheduled passes if all the parties waive oral argument), the judges of the appellate division will make a decision about your appeal. The appellate division has 90 days after the date scheduled for oral argument to decide the appeal. The clerk of the court will mail you a notice of the appellate division's decision.

20 What should I do if I want to give up my appeal?

If you decide you do not want to continue with your appeal, you must file a written document with the appellate division notifying it that you are giving up (this is called "abandoning") your appeal. You can use *Abandonment of Appeal (Limited Civil Case)* (form APP-106) to file this notice in a limited civil case. You can get form APP-106 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

APP-101-INFO Information on Appeal Procedures for Limited Civil Cases

INFORMATION FOR THE RESPONDENT

This section of this information sheet is written for the respondent—the party responding to an appeal filed by another party. It explains some of the rules and procedures relating to responding to an appeal in a limited civil case. The information may also be helpful to the appellant.

(21) I have received a notice of appeal from another party. Do I need to do anything?

You do not *have* to do anything. The notice of appeal simply tells you that another party is appealing the trial court's decision. However, this would be a good time to get advice from a lawyer, if you want it. You do not *have* to have a lawyer; if you are an individual (not a corporation, for example), you are allowed to represent yourself in an appeal in a limited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer. You must hire your own lawyer if you want one. You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/*.

(22) If the other party appealed, can I appeal too?

Yes. Even if another party has already appealed, you may still appeal the same judgment or order. This is called a "cross-appeal." To cross-appeal, you must serve and file a notice of appeal. You can use *Notice of Appeal/Cross-Appeal (Limited Civil Case)* (form APP-102) to file this notice in a limited civil case. Please read the information for appellants about filing a notice of appeal, starting on page 2 of this information sheet, if you are considering filing a cross-appeal.

(23) Is there a deadline to file a cross-appeal?

Yes. You must serve and file your notice of appeal within either the regular time for filing a notice of appeal (generally 30 days after mailing or service of Notice of Entry of the judgment or a file-stamped copy of the judgment) or within 10 days after the clerk of the trial court mails notice of the first appeal, whichever is later.

(24) I have received a notice designating the record on appeal from another party. Do I need to do anything?

You do not *have* to do anything. A notice designating the record on appeal lets you know what kind of official record the appellant has asked to be sent to the appellate division. Depending on the kind of record chosen by the appellant, however, you may have the option to:

- Add to what is included in the record
- Participate in preparing the record *or*
- Ask for a copy of the record

Look at the appellant's notice designating the record on appeal to see what kind of record the appellant has chosen and read about that form of the record in the response to question (13) above. Then read below for what your options are when the appellant has chosen that form of the record.

(a) Clerk's transcript

If the appellant is using a clerk's transcript, you have the option of asking the clerk to include additional documents in the clerk's transcript. To do this, within 10 days after the appellant serves its notice designating the record on appeal, you must serve and file a notice designating additional documents to be included in the clerk's transcript.

Whether or not you ask for additional documents to be included in the clerk's transcript, you must pay a fee if you want a copy of the clerk's transcript. The trial court clerk will send you a notice indicating the cost for a copy of the clerk's transcript. If you want a copy, you must deposit this amount with the court within 10 days after the clerk's notice was sent. If you cannot afford to pay this cost, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at

www.courtinfo.ca.gov/forms. The court will review this application and determine if you are eligible for a fee waiver. The clerk will not prepare a copy of the clerk's transcript for you unless you deposit payment for the cost or obtain a fee waiver.

(b) Reporter's transcript

If the appellant is using a reporter's transcript, you have the option of asking for additional proceedings to be included in the reporter's transcript. To do this, within 10 days after the appellant files its notice designating the record on appeal, you must serve and file a notice designating additional proceedings to be included in the reporter's transcript.

Whether or not you ask for additional proceedings to be included in the reporter's transcript, you must pay a fee if you want a copy of the reporter's transcript. The trial court clerk or reporter will send you a notice indicating the cost of preparing a copy of the reporter's transcript. If you want a copy of the reporter's transcript, you must deposit this amount with the court within 10 days after the clerk's notice was sent. The reporter will not prepare a copy of the reporter's transcript for you unless you pay this deposit.

If the appellant elects not to use a reporter's transcript, you may not designate a reporter's transcript without first getting an order from the appellate division.

(c) Agreed statement

If you and the appellant agree to prepare an agreed statement (a summary of the trial court proceedings that is agreed to by the parties), you and the appellant will need to reach an agreement on that statement within 30 days after the appellant files its notice designating the record.

(d) Statement on appeal

If the appellant elects to use a statement on appeal (a summary of the trial court proceedings that is approved by the trial court), the appellant will send you a proposed statement to review. You will have 10 days from the date the appellant sent you this proposed statement to serve and file suggested changes (called "amendments") that you think are needed to make sure that the statement provides a complete and accurate summary of the trial court proceedings. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the proposed amendments to the appellant in the way required by law.
- Make a record that the proposed amendments have been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the proposed amendments, who was served with the proposed amendments, how the proposed amendments were served (by mail or in person), and the date the proposed amendments were served.
- File the original proposed amendments and the proof of service with the trial court. You should make a copy of the proposed amendments you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the proposed amendments to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*.

(25) What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the appellate division. When

the appellate division receives this record, it will send you a notice telling you when you must file your brief in the appellate division.

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer, your lawyer will prepare your brief. If you are not represented by a lawyer in your appeal, you will have to prepare your brief yourself. You should read rules 8.882–8.884 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in limited civil appeals, including requirements for the format and length of these briefs. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

The appellant serves and files the first brief, called an "appellant's opening brief." You may, but are not required to, respond by serving and filing a respondent's brief within 30 days after the appellant's opening brief is filed. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the brief to the other parties in the way required by law.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail or in person), and the date the brief was served.
- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*.

If you do not file a respondent's brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

If you file a respondent's brief, the appellant then has an opportunity to serve and file another brief within 20 days replying to your brief.

26 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the court will notify you of the date for oral argument in your case.

"Oral argument" is the parties' chance to explain their arguments to appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to "waive" oral argument. If all parties waive oral argument, the judges will decide the appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties does not, the appellate division will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 10 minutes for your argument unless the appellate division orders otherwise. Remember that the judges will have already read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in the appeal or ask the judges if they have any questions you could answer.

After oral argument is held (or the scheduled date passes if all parties waive argument), the judges of the appellate division will make a decision about the appeal. The appellate division has 90 days after oral argument to decide the appeal. The clerk of the court will mail you a notice of the appellate division's decision.

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.193 B. Form: Notice of Appeal/Cross-Appeal (Limited Civil Case) (Judicial Council Form APP-102)

§10.193 B. Form: Notice of Appeal/Cross-Appeal (Limited Civil Case) (Judicial Council Form APP-102)



APP-102 Notice of Appeal/Cross-Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for appealing in a **limited civil case.** You can get other forms for appealing in criminal cases at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- You must serve and file this form **no later than 30 days** after the trial court mails or a party serves a document called a Notice of Entry of the trial court judgment or a file-stamped copy of the judgment or 90 days after entry of judgment, whichever is earlier (see rule 8.823 of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, your appeal will be dismissed.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

The clerk will fill in the number below:

Appellate Division Case Number:

1 Your Information

a. Name of appellant (the party who is filing this appeal):

_____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street* / *City* / *State* / *Zip*)

Mailing address *(if different):* _____ (*Street* / *City* / *State* / *Zip*)

Phone: ( ) _____ E-mail *(optional):* _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street* / *City* / *State* / *Zip*)

Mailing address *(if different):* _____ (*Street* / *City* / *State* / *Zip*)

Phone: ( ) _____ E-mail *(optional):* _____

Fax *(optional):* ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

2 This is *(check a or b):*

a. ☐ The first appeal in this case.

b. ☐ A cross-appeal (an appeal filed after the first appeal in this case *(complete (1), (2), and (3))*.

(1) The notice of appeal in the first appeal was filed on *(fill in the date that the other party filed its notice of appeal in this case):* _____

(2) The trial court clerk mailed notice of the first appeal on *(fill in the date that the clerk mailed the notice of the other party's appeal in this case):* _____

(3) The appellate division case number for the first appeal is *(fill in the appellate division case number of the other party's appeal, if you know it):* _____

3 Judgment or Order You Are Appealing

I am /My client is appealing *(check a or b):*

a. ☐ The final judgment in the trial court case identified in the box on page 1 of this form.
The date the trial court entered this judgment was *(fill in the date):* _____

b. ☐ Other:

(1) ☐ An order made after final judgment in the case.
The date the trial court entered this order was *(fill in the date):* _____

(2) ☐ An order changing or refusing to change the place of trial (venue).
The date the trial court entered this order was *(fill in the date):* _____

(3) ☐ An order granting a motion to quash service of summons.
The date the trial court entered this order was *(fill in the date):* _____

(4) ☐ An order granting a motion to stay or dismiss the action on the ground of inconvenient forum.
The date the trial court entered this order was *(fill in the date):* _____

(5) ☐ An order granting a new trial.
The date the trial court entered this order was *(fill in the date):* _____

(6) ☐ An order denying a motion for judgment notwithstanding the verdict.
The date the trial court entered this order was *(fill in the date):* _____

(7) ☐ An order granting or dissolving an injunction or refusing to grant or dissolve an injunction.
The date the trial court entered this order was *(fill in the date):* _____

Print

Trial Court Case Name: _____ | Trial Court Case Number:

3 *(continued)*

(8) ☐ An order appointing a receiver.
The date the trial court entered this order was *(fill in the date):* _____

(9) ☐ Other action *(please describe and indicate the date the trial court took the action you are appealing):*

_____
_____
_____
_____
_____

4 Record Preparation Election

Complete this section only if you are filing the first appeal in this case. If you are filing a cross-appeal, skip this section and go to the signature line.

Check a or b if you are filing the first appeal in this case:

a. ☐ I have/My client has completed *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) and attached it to this notice of appeal.

b. ☐ I/My client will complete *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) later. I understand that I must file this notice in the trial court within 10 days of the date I file this notice of appeal.

REMINDER: Except in the very limited circumstances listed in rule 8.823, you must serve and file this form no later than (1) 30 days after the trial court clerk mails or a party serves either a document called a Notice of Entry of the trial court judgment or a file-stamped copy of the judgment or (2) within 90 days after entry of judgment, whichever is earlier. If your notice of appeal is late, your appeal will be dismissed.

Date: _____

_____ ▶ _____

Type or print your name | *Signature of appellant/cross-appellant or attorney*

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.194 C. Form: Notice Designating Record on Appeal (Limited Civil Case) (Judicial Council Form APP-103)

§10.194 C. Form: Notice Designating Record on Appeal (Limited Civil Case) (Judicial Council Form APP-103)



APP-103 Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be attached to your notice of appeal. If it is not attached to your notice of appeal, you must serve and file this form within 10 days after you file your notice of appeal. **If you do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center site at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of appellant (the party who is filing this appeal):

_____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different):* _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional):* _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different):* _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional):* _____

Fax *(optional):* ( ) _____

Print

Trial Court Case Name: _____

Trial Court Case Number:

Information About Your Appeal

2 On *(fill in the date):* _____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Record of the Documents Filed in the Trial Court

3 I elect (choose)/My client elects to use the following record of the documents filed in the trial court *(check a or b and fill in any required information):*

a. ☐ **Clerk's Transcript.** *(Fill out (1)–(4).) Note that, if the court has adopted a local rule permitting this, the clerk may prepare and send the original court file to the appellate division instead of a clerk's transcript.*

(1) **Required documents.** *The clerk will automatically include the following items in the clerk's transcript but you must provide the date each document was filed:*

Document Title and Description	Date of Filing
(1) Notice of appeal	
(2) Notice designating record on appeal (this document)	
(3) Judgment or order appealed from	
(4) Notice of entry of judgment (if any)	
(5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)	
(6) Ruling on any item included under 5	
(7) Register of actions or docket	
(8) Any transcript furnished to the jury or tendered to the court under rule 2.1040.	

(2) **Additional documents.** *If you want any documents in addition to the required documents listed above to be included in the clerk's transcript, you must identify those documents here.*

☐ I would like the clerk to include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed, if you know it.)*

Document Title and Description	Date of Filing
(1)	
(2)	
(3)	
(4)	
(5)	

☐ *Check here if you need more space to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-103, item 3a(2)."*

Print

Trial Court Case Name: _____

Trial Court Case Number:

3 a. (continued)

(3) **Exhibits.**

☐ I would like the clerk to include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number (such as Plaintiff's #1 or Defendant's A) and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need more space to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-103, item 3a(3)."*

(4) **Payment for clerk's transcript.** *(Check a or b.)*

(a) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(b) ☐ I am asking that the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (i) or (ii) and attach the checked document):*

(i) ☐ An order granting a waiver of the cost under rules 3.50–3.58

(ii) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 (use *Request to Waive Court Fees* (form FW-001))

OR

b. ☐ **Agreed statement.** *(You must complete item 5 d below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in 3a(1) above and in rule 8.832 of the California Rules of Court.)*

Record of Oral Proceedings in the Trial Court

You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings"). But, if you do not, the appellate division will not be able to consider what was said during the trial court proceedings in deciding whether a legal error was made in those proceedings.

4 I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court (*skip 5; sign and date this form*). I understand that if I elect to proceed without a record of the oral proceedings in the trial court the appellate division will not be able to consider what was said during those proceedings in determining whether a legal error was made.

(Write initials here): _____

Print

Trial Court Case Name: _____ | Trial Court Case Number:

4 (continued)

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item 5 below)*. I understand that, if I elect (choose) to proceed WITH a record of the oral proceedings in the trial court, I have to choose the record I want to use and take the actions described below to make sure that this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal.

(Write initials here): _____

5 I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, d, or e):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Complete (1) and (2)):*

(1) **Designation of proceedings to be included in reporter's transcript.** I would like the following proceedings in the trial court to be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings [for example the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions], and, if you know it, the name of the court reporter who recorded the proceedings.*)

Date	Department	Description	Court Reporter's Name
(1)			
(2)			
(3)			
(4)			
(5)			
(6)			
(7)			

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-103, item 5a."*

(2) **Payment for reporter's transcript.** I will pay the trial court clerk's office for this transcript myself when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(Write initials here): _____

OR

Print

Trial Court Case Name: _____

Trial Court Case Number:

5 (continued)

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver).*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division authorizing parties to use the official electronic recording itself as the record of the court proceedings, and all of the parties have agreed (stipulated) that they want to use the recording itself as the record of what was said in the case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of your agreement (stipulation) with the other parties to this notice. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the costs of this copy. I understand that if I do not pay for this copy of the recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that a copy of the recording be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver).*

OR

d. ☐ **Agreed Statement.** I want to use an agreed statement (a summary of the trial court proceedings agreed to by the parties) as the record of what was said in my case. *(Check (1) or (2)):*

(1) ☐ I have attached an agreed statement to this notice.

(2) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement *(you must attach a copy of this agreement (stipulation) to this notice).* I understand that, within 30 days after I file this notice, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

Print

Trial Court Case Name: _____

Trial Court Case Number:

5 (continued)

OR

e. ☐ **Statement on Appeal.** I want to use a statement on appeal (a summary of the trial court proceedings approved by the trial court) as the record of what was said in my case. (*Check (1) or (2)):*

(1) ☐ I have attached my proposed statement on appeal to this notice of appeal. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Limited Civil Case) *(form APP-104) to prepare and file this proposed statement. You can get a copy of form APP-104 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms.)

(2) ☐ I have NOT attached my proposed statement. I understand that I must serve and file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.194A D. Form: Respondent's Notice Designating Record on Appeal (Limited Civil Case) (Judicial Council Form APP-110)

§10.194A D. Form: Respondent's Notice Designating Record on Appeal (Limited Civil Case) (Judicial Council Form APP-110)



APP-110 Respondent's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) or on the California Courts Online Self-Help Center Web site at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order that is being appealed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order that is being appealed:

Superior Court of California, County of

You fill in the number and name of the trial court case in which the judgment or order is being appealed:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of respondent (the party who is responding to an appeal filed by another party):

_____

b. Respondent's contact information *(skip this if the respondent has a lawyer for this appeal):*

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

c. Respondent's lawyer *(skip this if the respondent does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name: _____

Trial Court Case Number:

Information About the Appeal

2 On *(fill in the date):* _____ another party filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

3 On *(fill in the date):* _____ the appellant filed an appellant's notice designating the record on appeal.

Record of the Documents Filed in the Trial Court

4 The appellant elected (chose) to use a clerk's transcript under rule 8.832 as the record of the documents filed in the trial court.

a. ☐ **Additional documents or exhibits.** *If you want any documents or exhibits in addition to those designated by the appellant to be included in the clerk's transcript, you must identify those documents here.*

(1) **Documents**

☐ In addition to the documents designated by the appellant, I request that the clerk include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed).*

Document Title and Description	Date of Filing
(a)	
(b)	
(c)	
(d)	

☐ *Check here if you need more space to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-110, item 4a(1)."*

(2) **Exhibits**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number (such as Plaintiff's #1 or Defendant's A) and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need more space to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-110, item 4a(2)."*

Print

Trial Court Case Name: _____

Trial Court Case Number:

4 (continued)

b. ☐ **Copy of clerk's transcript.** I request a copy of the clerk's transcript. *(Check (1) or (2).)*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript.

(2) ☐ I am asking that a copy of the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (i) or (ii) and attach the checked document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 (*use* Request to Waive Court Fees *(form FW-001)). The court will review this form to decide if you are eligible for a fee waiver.).*

Record of Oral Proceedings in the Trial Court

5 The appellant elected to use the following record of what was said in the trial court proceedings *(check and complete **only one** of the following below—a, b, or c):*

a. ☐ **Reporter's Transcript.** The appellant elected to use a reporter's transcript under rule 8.834 as the record of the oral proceedings in the trial court.

(1) ☐ **Designation of additional proceedings to be included in the reporter's transcript.** *(If you want any proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*

In addition to the proceedings designated by the appellant, I request that the following proceedings in the trial court be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), and, if you know it, the name of the court reporter who recorded the proceedings.*)

Date	Department	Description	Court Reporter's Name
(a)			
(b)			
(c)			
(d)			
(e)			
(f)			
(g)			

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-110, item 5a(1)."*

Print

Trial Court Case Name: _____

Trial Court Case Number:

5 a. (continued)

(2) **Copy of reporter's transcript.**

(a) ☐ I request receive a copy of the reporter's transcript. I will pay for this transcript myself when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay the trial court clerk's office for this transcript or file with the court a waiver of this deposit signed by the court reporter, I will not receive a copy.

(b) ☐ I request that the reporters provide:

(i) ☐ My copy of the reporter's transcript in paper format.

(ii) ☐ My copy of the reporter's transcript in computer-readable format.

(iii) ☐ My copy of the reporter's transcript in paper format and a second copy of the reporter's transcript in computer-readable format.

OR

b. ☐ **Transcript From Official Electronic Recording.** The appellant elected to use the transcript from an official electronic recording as the record of the oral proceedings in the trial court under rule 8.835(b). I request a copy of this transcript. *(Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.).*

OR

c. ☐ **Copy of Official Electronic Recording.** The appellant and I have agreed to use the official electronic recording itself as the record of the oral proceedings in the trial court under rule 8.835(a). I request a copy of this recording. *(Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the costs of this copy.

(2) ☐ I am asking that a copy of the recording be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.).*

Date:_____

_____ ▶ _____

Type or print your name *Signature of respondent or attorney*

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.195 E. Form: Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-104)

§10.195 E. Form: Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-104)



APP-104 Proposed Statement on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for preparing a proposed statement on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be attached to your *Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103). If it is not attached to that notice, this form must be filed **no later than 20 days after you file that notice. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of appellant (the party who is filing this appeal):

_____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____
Street City State Zip

Mailing address *(if different):* _____
Street City State Zip

Phone: ( ) _____ E-mail *(optional):* _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____
Street City State Zip

Mailing address *(if different):* _____
Street City State Zip

Phone: ( ) _____ E-mail *(optional):* _____

Fax *(optional):* ( ) _____

Print

Trial Court Case Name: _____

Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):* _____ I/My client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

(3) On *(fill in the date):* _____ I/My client filed a notice designating the record on appeal, electing to use a statement on appeal.

Proposed Statement

(4) The Dispute

a. In the trial court, I/my client was the *(check one):*

☐ plaintiff (the party who filed the complaint in the case).

☐ defendant (the party against whom the complaint was filed).

b. The plaintiff's complaint in this case was about *(briefly describe what was claimed in the complaint filed with the trial court):* _____

c. The defendant's response to this complaint was *(briefly describe how the defendant responded to the complaint filed with the trial court):* _____

☐ *Check here if you need more space to describe the dispute and attach a separate page or pages describing it. At the top of each page, write "APP-104, Item 4."*

(5) Summary of Any Motions

a. Were any motions (requests for the trial court to issue an order) filed in this case?

☐ Yes *(fill out b)*

☐ No *(skip to (6)).*

b. *In the spaces below, please describe the motions (requests for orders) that were made in the trial court. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions.*

(1) *Describe the first motion:* _____

Print

Trial Court Case Name: _____ | Trial Court Case Number:

5 b.(1) (continued)

The motion was filed by the ☐ plaintiff. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

(If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing): _____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-104, Item 5b(1)."*

(2) *Describe the second motion:* _____

The motion was filed by the ☐ plaintiff. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

(If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing): _____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-104, Item 5b(2)."*

☐ *Check here if any other motions were filed and attach a separate page or pages describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write "APP-104, Item 5b(3)."*

Print

Trial Court Case Name: _____

Trial Court Case Number:

6 Summary of Testimony

a. Was there a trial in your case?

No ☐ *(skip items b, c, and d and go to item 7)*

Yes ☐ *(check (1) or (2) and complete items b, c, and d)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you/your client testify at the trial?

No ☐

Yes ☐ *(Write a complete and accurate summary of the testimony you/your client gave. Include only what you actually said; do not comment or give your opinion about what was said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-104, Item 6b."*

c. Did anyone else testify at the trial?

No ☐

Yes ☐ *(complete items (1), (2), and (3)):*

(1) The witness's name is *(fill in the witness's name):* _____

(2) The witness testified on behalf of the *(check one):* ☐ plaintiff. ☐ defendant.

(3) This witness testified that *(write a complete and accurate summary of the witness's testimony. Include only what the witness actually said; do not comment on or give your opinion about what the witness said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-104, Item 6c."*

☐ *Check here if any other witnesses testified at the trial and attach a separate page or pages identifying each witness, who the witness testified for, and summarizing what that witness said in his or her testimony. At the top of each page, write "APP-104, Item 6d."*

Print

Tiral Court Case Name: _____

Trial Court Case Number:

7 The Trial Court's Findings

Did the trial court make findings in the case?

No ☐

Yes ☐ *(describe the findings made by the trial court):*

_____

_____

_____

_____

_____

☐ *Check here if you need more space to describe the trial court's findings and attach a separate page or pages describing these findings. At the top of each page, write "APP-104, Item 7."*

8 The Trial Court's Judgment or Order

The trial court issued the following judgment or order *(check all that apply and fill in any required information):*

a. I/My client was required to:

☐ pay the other party damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what you were ordered to do):* _____

_____

b. The other party was required to:

☐ pay me/my client damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what the other party was ordered to do):* _____

_____

c. ☐ Other *(describe):* _____

_____

_____

☐ *Check here if you need more space to describe the trial court's judgment or order and attach a separate page or pages describing this judgment or order. At the top of each page, write "APP-104, Item 8."*

9 Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made (read form APP–101-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence*
- *Cannot consider whether witnesses were telling the truth or lying*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision.*

Print

Tiral Court Case Name: _____

Trial Court Case Number:

9 (continued)

(Check all that apply and describe in detail the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision I am appealing in this case *(explain why you think the decision was not supported by substantial evidence):*

_____

_____

_____

_____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(describe each error and how you/your client were harmed by that error):*

(1) *Describe the error:* _____

_____

_____

Describe how you were/your client was harmed by the error: _____

_____

_____

(2) *Describe the error:* _____

_____

_____

Describe how you were/your client was harmed by the error: _____

_____

_____

(3) *Describe the error:* _____

_____

_____

Describe how you were/your client was harmed by the error: _____

_____

_____

☐ *Check here if you need more space to describe these or other errors and attach a separate page or pages describing the errors. At the top of each page, write "APP-104, item 9."*

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.196 F. Form: Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-105)

§10.196 F. Form: Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case) (Judicial Council Form APP-105)



APP-105 Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

(1) The court has received and reviewed the *Proposed Statement on Appeal* (form APP-104) filed by the appellant on *(fill in date):*_____

(2) The court makes the following order:

a. ☐ The court certifies that parts (4) through (8) of the statement as proposed by the appellant are a complete and accurate summary of the trial court proceedings. This statement is ready to be sent to the appellate division.

b. ☐ The following corrections are needed in order for parts (4) through (8) of the statement proposed by the appellant to be a complete and accurate summary of the trial court proceedings.

(1)_____

(2)_____

(3)_____

This modified statement must be sent to the parties.

Clerk fills in the name and street address of the court:

Superior Court of California, County of

Clerk fills in the number and name of the case:

Trial Court Case Number:

Trial Court Case Name:

Clerk fills in the number below:

Appellate Division Case Number:

c. ☐ More corrections than could be listed above were needed in order for parts (4) through (8) of the statement proposed by the appellant to be a complete and accurate summary of the trial court proceedings. A corrected statement is attached to this order. This modified statement must be sent to the parties.

d. ☐ The trial court proceedings in this case were reported by a court reporter or officially recorded electronically under Government Code section 69957. Instead of correcting this statement, the court orders under rule 8.837(d)(6)(B) that a transcript be prepared as the record of these proceedings. *(Check the court's local rules to make sure the court has not adopted a rule providing that this option is not available.)*

e. ☐ This superior court has a local rule for the appellate division authorizing the use of an official electronic recording as the record of the oral proceedings. The trial court proceedings in this case were officially electronically recorded. Instead of correcting this statement, the court orders that a copy of that electronic recording be prepared as the record of these proceedings at the court's expense.

Date:_____

_____
Signature of trial court judicial officer

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.197 G. Form: Abandonment of Appeal (Limited Civil Case) (Judicial Council Form APP-106)

§10.197 G. Form: Abandonment of Appeal (Limited Civil Case) (Judicial Council Form APP-106)



APP-106 Abandonment of Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for abandoning (giving up) an appeal in **a limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the completed form and proof of service on the other parties to the appellate division clerk's office. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of appellant (the party who filed this appeal):

_____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street* / *City* / *State* / *Zip*)

Mailing address *(if different):* _____ (*Street* / *City* / *State* / *Zip*)

Phone: ( ) _____ E-mail *(optional):* _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street* / *City* / *State* / *Zip*)

Mailing address *(if different):* _____ (*Street* / *City* / *State* / *Zip*)

Phone: ( ) _____ E-mail *(optional):* _____

Fax *(optional):* ( ) _____

Print

Appellate Division Case Name: _____

Appellate Division Case Number:

2 On *(fill in the date)* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

3 By signing and filing this form, I abandon/my client abandons that appeal.

Date: _____

_____
Type or print your name

▶ _____
Signature of appellant or attorney

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Source: Civil Litigation/California Civil Appellate Practice/10 Appeals in Limited Civil and Small Claims Cases/§10.198 H. Form: Notice of Motion to Vacate Judgment and Declaration (Judicial Council Form SC-135)

§10.198 H. Form: Notice of Motion to Vacate Judgment and Declaration (Judicial Council Form SC-135)



Name and Address of Court:

SC-135

SMALL CLAIMS CASE NO.:

PLAINTIFF/DEMANDANTE *(Name, street address, and telephone number of each):*

DEFENDANT/DEMANDADO *(Name, street address, and telephone number of each):*

Telephone No.:

Telephone No.:

Telephone No.:

Telephone No.:

☐ See attached sheet for additional plaintiffs and defendants.

NOTICE TO (Name):

One of the parties has asked the court to CANCEL the small claims judgment in your case. If you disagree with this request, you should appear in this court on the hearing date shown below. If the request is granted, ANOTHER TRIAL may immediately be held. Bring all witnesses, books, receipts, and other papers or things with you to support your case.	*Una de las partes en el caso le ha solicitado a la corte que DEJE SIN EFECTO la decisión tomada en su caso por la corte para reclamos judiciales menores. Si usted esta en desacuerdo con esta solicitud, debe presentarse en esta corte en la fecha de la audiencia indicada a continuación. Si se concede esta solicitud, es posible que se efec- túe otro juicio inmediatamente. Traiga a todos sus testigos, libros, recibos, y otros documentos o cosas para presentarlos en apoyo de su caso.*

NOTICE OF MOTION TO VACATE (CANCEL) JUDGMENT

1. A hearing will be held in this court at which I will ask the court to cancel the judgment entered against me in this case.
   If you wish to oppose the motion you should appear at the court on

HEARING DATE / FECHA DEL JUICIO

DATE	DAY	TIME	PLACE	COURT USE
1.				
2.				
3.				

2. I am asking the court to cancel the judgment for the reasons stated in item 5 below. My request is based on this notice of motion and declaration, the records on file with the court, and any evidence that may be presented at the hearing.

DECLARATION FOR MOTION TO VACATE (CANCEL) JUDGMENT

3. Judgment was entered against me in this case on *(date):*
4. I first learned of the entry of judgment against me on *(date):*
5. I am asking the court to cancel the judgment for the following reason:
   a. ☐ I did not appear at the trial of this claim because *(specify facts):*
   b. ☐ Other *(specify facts):*
6. I understand that I must bring with me to the hearing on this motion all witnesses, books, receipts, and other papers or things to support my case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE)

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this action. This Notice of Motion to Vacate Judgment and Declaration was mailed first class, postage prepaid, in a sealed envelope to the responding party at the address shown above. The mailing and this certification occurred at *(place):* , California,

on *(date):* Clerk, by _____, Deputy

- The county provides small claims advisor services free of charge. -

Form Approved for Optional Use
Judicial Council of California
SC-135 [Rev. January 1, 2007]

NOTICE OF MOTION TO VACATE JUDGMENT AND DECLARATION (Small Claims)

Code of Civil Procedure §§ 116.720, 116.730,116.740
www.courtinfo.ca.gov

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11

Applications and Motions

Honorable Elihu M. Berle

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I. INTRODUCTION

§11.1 A. Scope of Chapter

The discussion in this chapter will encompass requests for relief from the appellate courts on matters other than decisions on the merits after full briefing. Depending on the issue, these requests are made in formal motions or in informal, routine applications.

For further discussion of specific motions in the reviewing courts, refer to the index.

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§11.2 B. Deciding Between Application and Motion

No single rule covers subject matter of applications or motions. Motions before the appellate court generally involve serious substantive issues, such as dismissal of appeal (*Ferraro v Southern Cal. Gas Co.* (1980) 102 CA3d 33, 162 CR 238), augmenting or correcting the record (*Averill v Lincoln* (1942) 52 CA2d 398, 126 P2d 398), striking a defective brief (*Smith v Smith* (1961) 188 CA2d 318, 10 CR 279), making factual determinations (*Tyrone v Kelley* (1973) 9 C3d 1, 106 CR 761), or taking additional evidence (*Addison v Susanville Lumber, Inc.* (1975) 47 CA3d 394, 120 CR 737). On the other hand, applications to the reviewing court usually concern more mundane or routine matters, such as extension of time to file a record on appeal or brief (Cal Rules of Ct 8.60, 8.63) or permission to file amicus curiae brief (Cal Rules of Ct 8.200(c)(1)). However, no single rule lists matters governed by an application and matters requiring a motion. In general, Cal Rules of Ct 8.50 governs applications (see §§11.4-11.8) and Cal Rules of Ct 8.54-8.57 (see §§11.9-11.13) cover motions. Provisions on the form, number of copies, and cover requirements for all documents filed in the reviewing court, whether applications or motions, are covered by Cal Rules of Ct 8.40, 8.44. This chapter will discuss the established practices to use in each procedure and for particular issues and circumstances.

NOTE: The Judicial Council made extensive revisions to Cal Rules of Ct 8.54 and 8.50. Practitioners should consult the rules and Advisory Committee Comments before filing a motion or application to ensure that the papers conform to the revised requirements.

Terms sometimes used interchangeably. Many attorneys use the terms "application" and "motion" interchangeably. Note that CCP §1003 states that an "application for an order is a motion." This chapter uses the terms as they are used in the appropriate statute or court rule.

Check court rules and local procedure. Even though a statute or rule may use the term "application," "motion," or "request," the appropriate procedure to use will not be clear unless that authority specifies whether Cal Rules of Ct 8.54 or 8.50 applies. When in doubt, it is generally best to use the motion procedure. Counsel may also wish to consult the local appellate court rules or contact the clerk of the court in which the appeal is pending to learn the local procedures. See §11.3.

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§11.3 C. Reliance on Rules

Rules of court are usually principal authority. Because applications and motions before the appellate courts are usually decided without a written court opinion, case law in this area is limited. Consequently, in handling a motion in the appellate courts, specific attention and emphasis must be placed on the California Rules of Court. The rules cover most applications and motions in the reviewing courts and should be specifically consulted.

Check local rules; rules of court prevail. In addition to the statewide rules of court, the various district courts of appeal have local rules on affecting application and motion practice. Note, however, that a motion prepared in accordance with the California Rules of Court must be accepted for filing despite any local court rules having other requirements. Cal Rules of Ct 8.20.

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II. GENERAL PROCEDURAL MATTERS PERTAINING TO APPLICATIONS AND MOTIONS

A. Applications on Routine Matters Under Cal Rules of Ct 8.50

§11.4 1. Required Showing

Under Cal Rules of Ct 8.50(b), the application must set forth facts showing:

- Good cause for granting the application (or "exceptional" good cause, when required); and
- Any previous applications granted or denied to any party after the filing of the notice of appeal.

Unless the court otherwise determines, the Chief Justice of the California Supreme Court or the presiding justices of the courts of appeal may grant or deny the application. Cal Rules of Ct 8.50(d).

In addition, Cal Rules of Ct 8.60(c) requires that an application for an extension of time be made by a declaration stating specific facts, not mere conclusions. See §§11.14-11.15.

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§11.5 2. Service and Notice

Basic requirements. Applications on routine issues, such as applications to extend time for filing of record and briefs, to shorten time, or other routine matters must be served on opposing counsel and filed with the court. However, for good cause the chief justice (if application relates to case before supreme court) or presiding justice (if case is before court of appeal) may excuse advance service. Cal Rules of Ct 8.50(a). An original and one copy of any application or stipulation must be filed in the reviewing court. Cal Rules of Ct 8.44(a)(6) (supreme court), 8.44(b)(6) (court of appeal). In addition, an application to a court of appeal must include addressed, postage-prepaid envelopes for the clerk's use in mailing copies to all parties of the order granting or denying the application. Envelopes need not be submitted with applications to the supreme court. See Cal Rules of Ct 8.50(c).

Stipulations and applications for additional time for preparation of record or filing of briefs. In addition to serving opposing counsel with the application, counsel in civil cases must mail or otherwise deliver to his or her client or clients a copy of each stipulation or application for additional time to prepare the record or file the briefs. The application or stipulation filed with the court must be accompanied by proof of such service, which need not include the address of the party. Cal Rules of Ct 8.60(f).

Class actions. In a class action, service of a copy of the application or stipulation on one representative is sufficient. The proof of service need not state the address of the party to whom copies were sent. Cal Rules of Ct 8.60(f)(2)-(3).

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§11.6 3. Format of Papers; Copies

Papers filed in the reviewing court may be typewritten or produced on a computer ("proportionally spaced"), and must comply with the relevant provisions of Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). Recycled paper must be used, and all copies must be clear and "of letter quality." Cal Rules of Ct 8.204(b)(1). Special format requirements also exist for typewritten briefs, which will ordinarily be filed by unrepresented parties. Cal Rules of Ct 8.204(b)(11). For discussion of requirements applicable to typewritten, monospaced, and proportionally spaced briefs, see §§12.19-12.24.

Although Cal Rules of Ct 8.204(b)(10) refers to a cover only with regard to briefs, some courts require covers on all applications and motions. See, for example, 4th App Dist R 2. Thus, it is advisable to check local rules with respect to such covers. See Cal Rules of Ct 8.40(b) for the color of the cover for specific documents. In addition, every paper filed in a reviewing court must show on the cover (or on the first page, if there is no cover) the name, address, telephone number, and California State Bar number of each attorney filing or joining in the paper (although the cover need not state the bar number of any supervisor of the attorney responsible for the brief). Cal Rules of Ct 8.40(c), 8.204(b)(10)(D).

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.6A 4. Certificate of Interested Entities or Persons

§11.6A 4. Certificate of Interested Entities or Persons

If a party files an application or motion before its principal brief in an appeal, that party must serve and file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008). Cal Rules of Ct 8.208(d). See App D.

Every party must file a certificate with its principal brief or its first application, motion, or opposition. Failure to comply may subject that party to sanctions, including striking the document, dismissing the appeal, or deciding the appeal based on the record or appellant's filings. Cal Rules of Ct 8.208(d). The certificate must list entities or persons interested in the proceedings. Cal Rules of Ct 8.208(e). Each party has a continuing duty to update the information by way of a supplemental filing. Cal Rules of Ct 8.208(f).

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§11.7 5. Opposition

California Rules of Court 8.50 does not provide a procedure for filing opposition to routine applications. However, a party who wishes to oppose an application should call the court clerk *immediately* on receipt of the application to advise of the forthcoming opposition and file it as soon as possible, because the court has no waiting period to rule on the application.

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§11.8 6. Stipulation

Always try to obtain a stipulation first. When preparing an application on a routine matter, or even on a motion, the better practice is to seek a stipulation from opposing counsel on the subject matter of the application or motion before presenting it to the reviewing court. If the request is for a routine matter, and not for delay or hindrance, most practitioners accommodate opposing counsel and stipulate to the relief requested. A stipulation generally eliminates any question about the application's propriety and expedites the reviewing court's response. If the adverse party refuses to stipulate, the applicant should mention in the application its efforts to obtain a stipulation. For forms for a stipulation to extend time, see §§11.19, 11.26.

Limitations on stipulations. Under Cal Rules of Ct 8.212(b)(1), parties may not extend the time for filing briefs for more than 60 days for each brief. See §11.20. Additionally, the times for filing briefs in the supreme court may not be extended by stipulation. Cal Rules of Ct 8.520(a)(5). On notice and service requirements on stipulations for additional time for a step in the preparation of the record or for filing briefs, see §11.5.

JUDICIAL PERSPECTIVE: It is especially important to try to obtain stipulations to extend time. California Rules of Court 8.212(b) provides that the parties may stipulate, and thereafter the time may be extended by the Chief Justice or the Presiding Justice. Cal Rules of Ct 8.212(b)(3). In our court (first appellate district), we do not consider the request unless either the parties have exhausted the time for the stipulation or a party was unable to obtain a stipulation.

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B. Motions Under Cal Rules of Ct 8.54

§11.9 1. Required Showing

Motion papers in the reviewing court must state:

- The grounds of the motion;
- The papers on which the motion is based; and
- The order or other relief requested.

The motion must be accompanied by a supporting memorandum. If the motion relies on matters not in the record, affidavits or declarations and other evidence in support of the motion must be supplied. Cal Rules of Ct 8.54(a)(1)-(2).

A motion to dismiss an appeal filed before the record on appeal is filed with the reviewing court has additional requirements. See Cal Rules of Ct 8.57; §11.43.

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§11.10 2. Notice; Format of Papers; Copies

Proof of service. The motion must be accompanied by a proof of service showing service on all other required persons or entities. Cal Rules of Ct 8.25(a), 8.54(a)(1).

Format of papers. All motions filed in the reviewing court, except as otherwise provided in the California Rules of Court, may be typewritten or produced on a computer and must comply with the requirements of Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a).

Special format requirements also exist for typewritten briefs, which will ordinarily be filed by unrepresented parties. See Cal Rules of Ct 8.204(b)(11).

Covers. Unless required by local rule (see 4th App Dist R 2) or certain unfair competition cases, a manuscript cover is not required, although the better practice is to use one, especially if the motion is voluminous. Recycled paper for covers is preferred. Cal Rules of Ct 8.204(b)(10). Counsel should consult the clerk's office for format and other local requirements.

Certificate of Interested Entities or Persons. If the motion is a party's first appearance in the matter, the party should file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008). Cal Rules of Ct 8.208(d). See App D; §11.6A.

Copies. If the motion is filed in the supreme court, an original and eight copies of moving and opposing papers are required. Cal Rules of Ct 8.44(a)(5). Motions in the court of appeal require an original and three copies. Cal Rules of Ct 8.44(b)(4). If a motion in the court of appeal includes separately bound supporting documents, only one set of such documents need be filed. Cal Rules of Ct 8.44(b)(5).

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§11.11 3. Opposition

Basic rule. A party wishing to file an opposition to a motion must file and serve the opposition on all parties within 15 days after the motion is filed. Cal Rules of Ct 8.54(a)(3).

Additional time to respond if served by mail. Under Cal Rules of Ct 8.60(a), the time for doing any act required or permitted under the rules is to be computed and extended as provided by the Code of Civil Procedure. Code of Civil Procedure §1013 grants an extension of time to respond to a motion as follows: 5 calendar days if the place of address and place of mailing is within California; 2 calendar days if either the place of mailing or place of address is outside California, but within the United States; and 20 calendar days if either the place of mailing or place of address is outside the United States. Service of a motion by express mail or other overnight delivery adds 2 *court* (not calendar) days to the notice period. CCP §1013(c).

Certificate of Interested Entities or Persons. If the motion is a party's first appearance in the matter, the party should file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008). Cal Rules of Ct 8.208(d). See App D; §11.6A.

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§11.12 4. Failure to File Opposition

The failure of an adverse party to serve and file a written opposition to a motion may be deemed consent to the granting of that motion. Cal Rules of Ct 8.54(c). See also §11.48 on appellant's failure to file opposition to a motion to dismiss.

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§11.13 5. Disposition of Motions; Hearing

Motions are generally considered without a hearing. The reviewing court may dispose of motions after an opposition has been filed or the time for filing an opposition has expired. Cal Rules of Ct 8.54(b)(1). Ordinarily, motions are decided without argument. In fact, hearings on motions in the appellate court are extremely rare. If there is an important and contested request for judicial notice or a motion to augment the record, the court of appeal will often enter an order deferring the matter "to the panel." Such orders mean that the request or motion will be heard at the time of oral argument, by the panel assigned to decide the case. In such situations, the motion comes up as part of oral argument, not as a separate matter. However, on request of a party or by order of the Presiding Justice or Chief Justice, a hearing *might* be held on a motion. Cal Rules of Ct 8.54(b)(2). If the court sets the matter for hearing, the clerk will mail each party a notice of the date and time of hearing. Cal Rules of Ct 8.54(b)(2).

When a hearing is considered necessary. If a matter is of such unusual importance or urgency that a hearing is necessary, counsel should request a hearing in the moving or opposition papers and show good cause for the hearing.

JUDICIAL PERSPECTIVE: In 12 years on the appellate bench, I have never heard oral argument on a motion. An example of a motion that might have a chance of having oral argument would be a motion to dismiss the appeal.

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III. ROUTINE APPLICATIONS IN REVIEWING COURT

A. Extensions of Time

1. Generally

§11.14 a. Procedure

Application must be made to Chief Justice or Presiding Justice. An application to extend time to do any act must be made to the chief justice or presiding justice within the time period sought to be extended, as provided in Cal Rules of Ct 8.50. Cal Rules of Ct 8.60(b), (e). A superior court judge may not extend the time for doing any act involved in the preparation of the record on appeal. Cal Rules of Ct 8.60(e).

Limitations on extensions of time. No extensions are allowed for the following acts: filing of a notice of appeal (Cal Rules of Ct 8.104(b)), filing a petition for supreme court review of a court of appeal decision (Cal Rules of Ct 8.500(e)(2)), filing a petition for rehearing in the court of appeal (Cal Rules of Ct 8.268(a)), or for the court of appeal to grant or deny a petition for rehearing (Cal Rules of Ct 8.268(c)).

The time for the supreme court to grant or deny review of a decision of the court of appeal may be extended only in accordance with Cal Rules of Ct 8.500(e)(2) (chief justice may relieve party of its failure to file petition for review if time for court to order review on its own motion has not yet expired). The time for a party to file a petition for rehearing in the supreme court may be extended only by the chief justice before the supreme court decision is final and for good cause shown. Cal Rules of Ct 8.536(b). Any extension of time for the supreme court to grant or deny a rehearing may be made only under Cal Rules of Ct 8.536(b). The time for ordering a case transferred from the appellate division of a superior court to the court of appeal, as provided by Cal Rules of Ct 8.1002, may not be extended. Cal Rules of Ct 8.1008(e). The time for a superior court to certify the transfer of a case to the court of appeal may not be extended. Cal Rules of Ct 8.1005(d).

NOTE: On application, with a showing of good cause (or an "exceptional" showing of good cause, when required by the Rules), the chief justice or presiding justice may extend the time for doing any other act required or permitted by the California Rules of Court. Cal Rules of Ct 8.60(b). The reviewing court may, for good cause shown, relieve a party from default for failing to timely file any documents as required by the California Rules of Court, except for the failure to timely file a notice of appeal. Cal Rules of Ct 8.60(d).

Basic requirements of application. The application for extension is made by declaration, served on all parties to the appellate proceeding, and must contain specific facts, not mere conclusions. Cal Rules of Ct 8.60(c). Under Rule 8.60(c), the application must state:

- When the document is due;
- The length of the requested extension;
- Whether any prior extensions have been granted, and, if so, their length and whether granted by stipulation or by the court; and
- Good cause, or an exceptional showing of good cause when required by the Rules, for granting the extension (see Cal Rules of Ct 8.63(b) for factors constituting "good cause").

Proof of service for applications for additional time to prepare record or file briefs. Counsel must deliver to his or her client or clients or to one represented party in a class action a copy of each application for additional time in the preparation of the record or for filing briefs. Evidence of such service, which need not state the address of the party, must be attached to the application. Cal Rules of Ct 8.60(f).

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§11.15 b. Standards for Granting Extensions

Policy in granting extensions. The reviewing courts' bases for granting extensions are found in Cal Rules of Ct 8.63. Essentially, the court is required to balance the need for expeditious and efficient judicial administration with the parties' need for adequate time to prepare the appeal or response.

Factors to be considered. In deciding whether good cause exists to grant an extension, the court considers the following factors, if applicable, as required by Cal Rules of Ct 8.63(b):

- The degree of prejudice, if any, the extension will impose on any party. Thus the applicant must include in the request a sufficient description of the judgment or order from which the appeal is taken for the court to determine whether significant prejudice to any party would result from granting or denying the request.
- The respective positions of the client and the adverse parties concerning the extension.
- The length of the record, including the number of relevant trial exhibits.

NOTE: California Rules of Court 8.63(b)(3) notes that a record containing one volume of the clerk's transcript or appendix and two volumes of the reporter's transcript is considered an "average-length record." An application for extension of time based on the length of the record should specify that the record is longer than this "average" length.

- The number and complexity of issues on appeal, including a description of the issues.
- Status of settlement negotiations.
- Whether the case is entitled to priority on the court calendar.
- Whether appellate counsel responsible for preparing the record is new to the case.
- Whether other counsel or the client need additional time to review the documents.
- Whether applicant's counsel has other time-limited commitments during the relevant period. To support such a claim, counsel must make a specific showing establishing other obligations that (1) have deadlines that as a practical matter preclude filing of the document by the due date without impairing its quality or (2) are in cases entitled to priority.
- Counsel's illness, personal emergency, or planned vacation, which was not reasonably anticipated to conflict with the due date and which cannot be reasonably rearranged.
- Any other factor constituting good cause in the context of the case.

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§11.16 c. Extensions After Expiration of Time Period

When the time to comply with any of the appellate rules has expired, the party is considered in default. To cure the default, the party must file with the appellate court a motion for relief from default and an application to extend the time to comply with the rule. Cal Rules of Ct 8.60(b), (d). See Cal Rules of Ct 8.140(a) for the procedure in a default for procurement of record, and discussion in §11.61 on relief from default. The failure, however, to give timely notice of appeal is not curable. Cal Rules of Ct 8.104(b), 8.60(b), (d).

JUDICIAL PERSPECTIVE: Note that counsel is not in default if the clerk has issued notice under Cal Rules of Ct 8.220(a) for failure to timely file a brief and the time provided in the notice has not expired. In our court, we encourage counsel *not* to file requests for extensions if the brief will be filed within that time. We consider requests for extensions made during that time period if unforeseen circumstances occur, that is, for good cause.

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2. Preparation of Record

§11.17 a. Procedure

If necessary, apply for extension of time to prepare record. Generally, if a delay occurs in preparing and filing the reporter's or clerk's transcript on appeal, the reporter or clerk will apply for an extension. However, diligent counsel should not rely on others to file appropriate applications but should periodically check with the reporter, the clerk, or both to confirm the status of the record and any necessary applications for an extension. Counsel may also want to consult the supervising judge in the superior court. In many districts, when substantial delay in preparing the record on appeal is common knowledge, an application for an extension may not be necessary or customary. Note that Cal Rules of Ct 8.140(a), providing for dismissal of appeal for failure to procure the record, refers to "failure" that is "the fault of appellant and not of any court officer or other party." When in doubt, however, consult the appellate court clerk to ensure that no default will occur because of the delay. If local rules or policies indicate, file an application for an extension of time to file the record on appeal. For a more extensive discussion on preparation of the record, see chap 9.

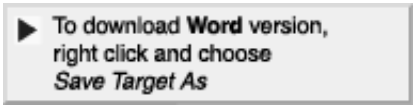
Requirements of application. The application to extend time to prepare the record, if required, must be made to the chief justice or presiding justice, as provided in Cal Rules of Ct 8.50, and in compliance with Cal Rules of Ct 8.40, 8.44-8.60, and 8.63. See §11.14. If the extension is needed because of a delay in the preparation of the reporter's or clerk's transcript owing to a backlog of a large number of pending appeals from the superior court, a simple statement to that effect should suffice. See chart in §9.144 (Procedures for Designating Record; Time Limits). For a form of application, see §11.18.

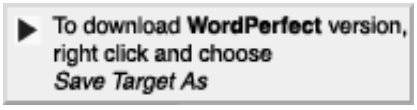
Motion for relief from default after expiration of deadline. When the time to prepare the record has expired, thus signifying a default, a motion for relief from default and an application to extend the time for filing the record must be presented to the appellate court. Cal Rules of Ct 8.60(d)-(e). See also Cal Rules of Ct 8.140(a) on default in procurement of the record, and §11.61.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.18 b. Form: Application for Extension of Time to Prepare Record on Appeal; Order

§11.18 b. Form: Application for Extension of Time to Prepare Record on Appeal; Order





11.18-1 Application for extension of time to prepare record on appeal; order

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

APPLICATION FOR EXTENSION OF TIME TO PREPARE RECORD ON APPEAL; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **of the** _ _[*name of court*]_ _**:**

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record for _ _[*appellant/respondent*]_ _**.**

2. Notice of appeal in this action was filed on _ _[*date*]_ _**.**

3. Under California Rules of Court 8.122, the time for _ _[*specify act to be performed, e.g., preparation of clerk's transcript*]_ _ **will expire on** _ _[*date*]_ _**.**

4. I have proceeded with due diligence in requesting preparation of the record on appeal. However, _ _[*specify act, e.g., preparation of clerk's transcript*]_ _ **will not be completed in time, because** _ _[*e.g., the clerk's transcript is too voluminous to complete within 30 days*]_ _**.**

5. The delay in _ _[*specify act, e.g., preparation of clerk's transcript*]_ _ **results from** _ _[*specify reason, e.g., backlog of cases on appeal from superior court*]_ _**.**

6. There _ _[*has/have*]_ _ **been** _ _[*no/one/two*]_ _ **prior extension(s) of time to prepare the record on appeal.**

7. _ _[*Appellant/Respondent*]_ _ **respectfully requests that the time for** _ _[*specify, e.g., filing of the record on appeal*]_ _ **be extended to and including** _ _[*date*]_ _**.**

8. Good cause exists to grant this motion in that _ _[*state facts establishing good cause*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

ORDER

Based on the application of _ _[*appellant/respondent*]_ _**, and good cause appearing,**

IT IS ORDERED that _ _[*appellant/respondent*]_ _ have an extension of time to and including _ _[*date*]_ _, within which to _ _[*specify act, e.g., procure clerk's transcript*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Presiding*]_ _
Justice

Copies: Original and one copy to file with the presiding justice. Cal Rules of Ct 8.44(b)(6). Unless the court orders otherwise, only one set of any separately bound supporting documents accompanying an application to a court of appeal need be filed. Cal Rules of Ct 8.44(b)(5). A copy must be served on the attorney of record for each party and on the party represented. Cal Rules of Ct 8.50(a), 8.60(f). Proof of service on the party or parties need not state the party's or parties' address(es) and must be attached to the application. In addition, an application to a court of appeal must provide the court clerk with addressed, postage-prepaid envelopes to mail to all other parties the order granting or denying the application. Cal Rules of Ct 8.50(c).

Comment: For a list of factors constituting good cause, see Cal Rules of Ct 8.63(b).

For discussion of the proper form for papers filed in the appellate courts, see Cal Rules of Ct 8.204(b) and 8.40(a). Although Cal Rules of Ct 8.204(b)(10) and 8.40(b) refer to an appropriate manuscript cover only with regard to briefs and petitions, it is considered by some to be good practice, and in some districts mandatory, to use a cover even for routine applications. Counsel should check with the clerk's office to ascertain format or filing requirements. For format of caption and cover for appellate court use, see §§12.29-12.32; for format of caption and cover for supreme court use, see §22.73.

Although a proposed order is not required, the better practice is to submit a proposed order for the convenience of the court. The proposed order may be attached to the application on a separate page, or it may follow the text of the application as shown above. In either case, it does not require a separate caption.

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§11.19 c. Form: Stipulation for Extension of Time to Prepare Record on Appeal; Order

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11.19-1 Stipulation for extension of time to prepare record on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR EXTENSION OF TIME TO PREPARE RECORD ON APPEAL; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **of the** _ _[*name of court*]_ _**:**

IT IS STIPULATED AND AGREED by and between appellant and respondent, through their respective attorneys of record, and subject to court order, that _ _[*appellant/respondent*]_ _ **have an extension of time to and including** _ _[*date*]_ _**, within which to** _ _[*specify act*]_ _**. This stipulation is entered into because** _ _[*specify reason and good cause with reference to factors under Cal Rules of Ct 8.63(b) and accompanying declaration(s)*]_ _**. No prior extensions have been requested or granted for preparing and filing the record on appeal.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

ORDER

Based on the stipulation of the parties and good cause appearing,

IT IS ORDERED that _ _[*appellant/respondent*]_ _ **have an extension of time to and including** _ _[*date*]_ _**, in which to** _ _[*specify act*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Presiding*]_ _
Justice

Copies: See §11.18.

Comment: On caption and cover, see Comment in §11.18.

Despite the stipulation, the request for an extension must be accompanied by a declaration in compliance with Cal Rules of Ct 8.50, 8.60, and 8.63, demonstrating good cause for the extension, and by proof of service of the stipulation on all parties or on one represented party in the case of a class action. The proof of service need not state the address(es) of the party or parties served. Cal Rules of Ct 8.60(f)(3).

An application to a court of appeal must provide the court clerk with addressed, postage-prepaid envelopes to mail to all other parties the order granting or denying the application. Cal Rules of Ct 8.50(c). In some courts, such as the second appellate district, the court reporter and or the county clerk must file an application and affidavit setting forth good cause and the appeals supervising judge of the superior court must recommend approval. Consult local rules and policies on the appropriate procedure.

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3. Filing Appellate Briefs

§11.20 a. Generally

Extension by stipulation or application. By stipulation, the parties may extend the time to file any brief in the court of appeal for no more than 60 days. Cal Rules of Ct 8.212(b)(1). A stipulation is effective only if it is filed before expiration of the period to be extended. Cal Rules of Ct 8.212(b)(2). Applications for extensions of time must be made before the brief is due and must show good cause and either failure to obtain a stipulation or an application for additional extension of time past the 60-day limit imposed by Cal Rules of Ct 8.212(b). Cal Rules of Ct 8.212(b)(3). Applications for extensions usually contain requests for extensions in increments of 30-day periods. If "good cause" only justifies a week's extension, however, the court is likely to grant an extension for that period only.

JUDICIAL PERSPECTIVE: In our court, we are particularly receptive to reasons that are not foreseeable, *e.g.,* the filing of an opinion that necessitates immediate consideration of whether to file a petition for rehearing or a petition for review in the supreme court.

Stipulations may be used with court of appeal only. Stipulations for extensions of time to file the brief apply *only* to the court of appeal. Extensions of time to file a brief in the supreme court may be obtained only by order of the chief justice under Cal Rules of Ct 8.60 and not by stipulation. Cal Rules of Ct 8.520(a)(5).

Service to all represented parties. Counsel in civil cases must give to each represented party (or to one represented party in a class action) a copy of each stipulation or application for additional time for filing briefs. Evidence of such notification must be submitted with the stipulation or application filed with the court, though the proof of service need not state the address(es) of the party or parties served. Cal Rules of Ct 8.60(f).

Extensions beyond 60 days. Extensions beyond 60 days may be granted by the chief justice or presiding justice on a specific showing of good cause. Cal Rules of Ct 8.212(b), 8.60(b). Some appellate courts provide in the order granting the extension that such extension is the last, and no further applications may be filed.

Forms. Forms for applications and stipulations to extend the time in which a brief can be filed are in §§11.25-11.26. Note that the first appellate district provides its own forms. See §11.23.

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§11.21 b. Appellant's Brief

If appellant's brief is not filed within the time required by Cal Rules of Ct 8.212(a), the clerk will send notice that if the brief is not filed within 15 days, the appeal may be dismissed, unless appellant shows good cause for relief. Cal Rules of Ct 8.220(a). The presiding justice may grant additional time to file the brief, subject to appropriate conditions, if a sufficient written excuse is submitted within the 15-day period. Cal Rules of Ct 8.220(d). In providing such excuse, appellant must comply with Cal Rules of Ct 8.50, 8.60, and 8.63 concerning extensions. See §§11.14-11.15. The timing of filing briefs on the merits in the Supreme Court is found in Cal Rules of Ct 8.520(a). Under Cal Rules of Ct 8.68, extensions may be granted only by the chief justice. Cal Rules of Ct 8.520(a)(5).

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§11.22 c. Respondent's Brief

If respondent's brief is not filed in the court of appeal within the time required by Cal Rules of Ct 8.212(a), the clerk will send a notice that, if respondent's brief is not filed within 15 days, the case may be submitted for decision on the record and on appellant's opening brief, unless respondent shows good cause for relief. Cal Rules of Ct 8.220(a). The chief justice or presiding justice may grant additional time to file the brief. Cal Rules of Ct 8.220(d). The request for additional time must be made in accordance with Cal Rules of Ct 8.50, 8.60, and 8.63. See §§11.14-11.15. The timing of filing briefs on the merits in the Supreme Court is set forth in Cal Rules of Ct 8.520. Under Cal Rules of Ct 8.68, extensions may be granted only by the chief justice. Cal Rules of Ct 8.520(a)(5).

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d. Local Rules

§11.23 (1) First Appellate District

The court will not consider a motion to extend the time to file a brief without a showing that the moving party has either obtained an extension by stipulation under Cal Rules of Ct 8.212(b) or explained why a stipulation could not be obtained from the opposing party. 1st App Dist R 11(a).

Other specifics of the first appellate district are:

- A motion for extension of time is not necessary if the brief can be filed within the extra 15-day period provided by Cal Rules of Ct 8.220. 1st App Dist R 11(a).
- The first appellate district requires that an application for an extension of time be substantially in the form of Judicial Council Form APP-006 (for criminal and juvenile cases, see other Judicial Council forms). 1st App Dist R 11(b).
- A proposed order must be submitted to the clerk together with additional copies of the application, proposed order, and preaddressed, postage-paid envelopes for the clerk to mail the court's order to all parties. 1st App Dist R 11(c).

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.24 (2) Third Appellate District [Deleted]

§11.24 (2) Third Appellate District [Deleted]

The material formerly covered in this section is deleted because the third appellate district no longer has a local rule regarding extensions of time.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.25 e. Form: Application for Extension of Time to File Brief; Order

§11.25 e. Form: Application for Extension of Time to File Brief; Order

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11.25-1 Application for extension of time to file brief

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF; ORDER

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record for _ _[a*ppellant/respondent*]_ _**.**

2. _ _[*Appellant's/Respondent's*]_ _ _ _[*e.g., opening brief*]_ _ **in this court is currently due on** _ _[*date*]_ _**. There** _ _[*has/have*]_ _ **been** _ _[*no/one/two*]_ _ **prior extension(s) of time to file** _ _[*e.g., appellant's opening brief*]_ _ **by** _ _[*stipulation/order of the court*]_ _**.**

3. I have proceeded with due diligence in preparing _ _[*e.g., appellant's opening brief*]_ _**. However, I have not been able to file the brief, because** _ _[*e.g., of illness/complexity of issues (give details)/length of record (give details with reference to factors listed in Cal Rules of Ct 8.63(b))*]_ _**.**

4. This application is made in good faith for the reasons stated here and not for the purpose of delay.

5. _ _[*Appellant/Respondent*]_ _ **respectfully requests that the time for filing and serving** _ _[*e.g., the opening brief*]_ _ **be extended to and including** _ _[*date*]_ _**.**

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

ORDER

Based on the application of _ _[*appellant/respondent*]_ _ **and good cause appearing,**

IT IS ORDERED that _ _[*appellant/respondent*]_ _ **have an extension of time to and including** _ _[*date*]_ _**, within which to file** _ _[*e.g., an opening brief*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Chief/Presiding*]_ _ **Justice**

Copies: Original and one copy to file with the chief justice (for a supreme court application) (Cal Rules of Ct 8.44(a)(6)) or with the presiding justice (for a court of appeal application) (Cal Rules of Ct 8.44(a)(6)). Unless the court

orders otherwise, only one set of any separately bound supporting documents need be filed with the application in a court of appeal. Cal Rules of Ct 8.44(b)(5). A courtesy copy must be served on the attorney of record for each party and on the party represented and proof of such service must be attached to the application. Cal Rules of Ct 8.60(f). An application to a court of appeal must also provide the court clerk with addressed, postage-prepaid envelopes to mail to all other parties the order granting or denying the application. Such envelopes are not required for an application to the supreme court. Cal Rules of Ct 8.50(c).

Comment: The order may be attached to the application as a separate page, or it may follow the text of the application. In either case, it does not require a separate caption. For caption and cover requirements, see §11.6.

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§11.26 f. Form: Stipulation for Extension of Time to File Brief

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11.26-1 Stipulation for extension of time to file brief

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR EXTENSION OF TIME TO FILE BRIEF; ORDER

IT IS STIPULATED AND AGREED by and between appellant and respondent, through their respective attorneys of record, and subject to court order, that _ _[*appellant/respondent*]_ _ **have an extension of time to and including** _ _[*date*]_ _**, within which to file** _ _[*appellant's/respondent's*]_ _ **brief. This stipulation is entered into because** _ _[*specify good cause*]_ _**. No prior extensions of time have been requested or granted for filing this brief.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: Original and one copy to file with the presiding justice. Cal Rules of Ct 8.44(b)(6). Unless the court orders otherwise, only one set of any separately bound supporting documents must be filed with an application to a court of appeal. Cal Rules of Ct 8.44(b)(5). A courtesy copy should be served on the attorney of record for each party and on the party represented, and proof of such service must be attached to the application. Cal Rules of Ct 8.60(f). An application to a court of appeal must also provide the court clerk with addressed, postage-prepaid envelopes to mail to all other parties the order granting or denying the application. Cal Rules of Ct 8.50(c).

Comment: Extensions of time to file a brief in the supreme court may be obtained only by order of the Chief Justice under Cal Rules of Ct 8.60 and not by stipulation. Cal Rules of Ct 8.520(a)(5).

JUDICIAL PERSPECTIVE: Presiding justices do not sign an order based on a stipulation. Thus, the stipulation need not be accompanied by a proposed order. The stipulation is effective when filed with the court. The clerk enters the due date in the computer based on the stipulation. Because the parties are entitled to extension by stipulation under Cal Rules of Ct 8.212(b) (see §11.20), the extension does not need the approval of the presiding justice.

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4. Filing Petition for Rehearing

§11.27 a. Appellate Court's Jurisdiction to Grant Rehearing

A petition for rehearing in the supreme court or court of appeal must be filed within 15 days after the filing of the decision by that court. Cal Rules of Ct 8.268(b)(1), 8.536(b). A rehearing may be granted on a petition or on the court's own motion at any time before the decision becomes final. Cal Rules of Ct 8.268(a)(1). Once the decision is final, the court's jurisdiction to modify its opinion or to grant or deny a rehearing is extinguished. Cal Rules of Ct 8.268(c). For discussion of when a decision becomes final, see §11.28. For further discussion of filing petitions for rehearing, see chap 19.

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§11.28 b. When Appellate Decision Is Final

A decision of the supreme court becomes final 30 days after the decision is filed. Cal Rules of Ct 8.532(b)(1). Before the 30-day period expires, or before any extension of that period, the supreme court may order additional time, not to exceed a total of 60 additional days, before its decision becomes final. Cal Rules of Ct 8.532(b)(1)(B). When the date of finality falls on a holiday or another day that the clerk's office is closed, the reviewing court may modify its decision or grant or deny rehearing until the close of business on the next day the clerk's office is open. If the opinion is modified during the time allowed for rehearing, without change in the judgment, the modification shall not postpone the time for the decision to become final. Cal Rules of Ct 8.264(c), 8.532(c). However, if the modification of judgment changes the judgment, then the time for the decision to become final begins to run again from the date of modification. Cal Rules of Ct 8.264(c)(2). A supreme court order denying a petition for review of a court of appeal decision becomes final when filed. Additionally, a dismissal of review, a transfer without a decision, and a retransfer without a decision are also final when filed. Cal Rules of Ct 8.532(b)(2).

A decision of the court of appeal in a civil appeal, including an order dismissing an appeal involuntarily, becomes final 30 days after the decision is filed. Cal Rules of Ct 8.264(b)(1). Court of appeal decisions that are final on filing include (Cal Rules of Ct 8.264(b)(2)):

- Denial of a petition for writ of supersedeas; and
- Dismissal of an appeal on request or stipulation.

Modification of a decision in the court of appeal follows the same procedures as in the supreme court under Cal Rules of Ct 8.532. See Cal Rules of Ct 8.264(c).

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§11.29 c. Application for Extension of Time in Which to File Petition for Rehearing

California Rules of Court 8.268(a) allows the reviewing court to grant a rehearing on petition or on its own motion before the decision becomes final. Thus, if the 15-day deadline to file a petition for rehearing has expired, but the court's decision is not yet final, the chief justice or presiding justice may allow a late filing of a petition for rehearing on an application for extension of time to file the petition based on a showing of good cause. Cal Rules of Ct 8.268(b)(4) (court of appeals), 8.500(e)(2), 8.536(b) (supreme court), 8.60(b). Although some courts accept petitions for rehearing filed after the 15-day period has expired but before the decision becomes final, many will not. If the court allows an extension, the petition must be filed before expiration of the time within which the court could order rehearing on its own motion. See Cal Rules of Ct 8.60(c). The application for extension must comply with Cal Rules of Ct 8.50.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.30 d. Extensions Rarely Granted

§11.30 d. Extensions Rarely Granted

An application for an extension of time in which to file a petition for review or rehearing is rarely granted because the time in which the respective courts may grant review or rehearings is very short, jurisdictionally limited, and calculated from the date of the decision. The application for an extension should accompany the petition.

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§11.31 B. Shortening Time

Good cause necessary for order shortening time. On a showing of good cause, the chief justice of the supreme court or the presiding justice of the court of appeal, as the case may be, may shorten the time to serve or file a motion or other paper concerning an appeal or an original proceeding in the reviewing court. Cal Rules of Ct 8.68. An application for an order shortening time must comply with Cal Rules of Ct 8.50. See §§11.14-11.15 on the required showing and service of such applications.

Need for order shortening time is rare. The need to obtain an order shortening time rarely occurs in the appellate courts. Instances in which the procedure can be used are:

- When it is important to notice a countermotion, such as a motion for relief from default, in opposition to a pending motion previously noticed by the other party; or
- When it is necessary to move expeditiously for relief from default or for other relief before the next motion calendar of the reviewing court.

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§11.32 C. Substitution of Parties

Motion made in reviewing court. When parties must be substituted in a pending appeal, as in death (CCP §§377.31, 377.41), disability (CCP §375), or transfer of an interest in the litigation (CCP §368.5), a motion for substitution of parties must be made in the reviewing court. Cal Rules of Ct 8.36(a). The motion must comply with the requirements of Cal Rules of Ct 8.54-8.57, 8.40, and 8.44. The clerk of the reviewing court must notify the superior court of any ruling on the motion. Cal Rules of Ct 8.36(a).

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D. Briefs in Excess of Length Limit

§11.33 1. Brief Lengths

General rule. Absent permission by the Chief Justice or presiding justice, appellate briefs may not be more than 14,000 words, including footnotes but excluding tables, certificates, and indexes. Cal Rules of Ct 8.40(a), 8.204(c)(1), (3), 8.520(c)(1), (3). Such a brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief. Cal Rules of Ct 8.204(c)(1), 8.520(c)(1). A brief produced on a typewriter may not exceed 50 pages. Cal Rules of Ct 8.40(a), 8.204(c)(2), 8.520(c)(2). Unless otherwise ordered, a reply brief on the merits in the supreme court may not exceed 8400 words or 30 pages, excluding tables, indexes, and quotation of issues. Cal Rules of Ct 8.520(c). A reply brief in the court of appeal may not exceed 14,000 words or 50 pages. Cal Rules of Ct 8.40(a), 8.204(c).

A petition for review and answer to the petition in the supreme court may not exceed 8400 words, including footnotes, or 30 pages, excluding tables, indexes, and the appellate court opinion. A reply is limited to 4200 words, including footnotes, or 15 pages, excluding table of contents and table of authorities. Cal Rules of Ct 8.504(d).

Rules provide for longer briefs on written application. The chief justice or presiding justice may permit longer briefs (Cal Rules of Ct 8.204(c)(5), 8.504(d)(4), 8.520(c)(4)) on written application, which presumably must show good cause in compliance with Cal Rules of Ct 8.50. See §§11.14-11.15. For a form for this application, see §11.34.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.34 2. Form: Application for Permission to File Nonprinted Brief in Excess of 50 Pages

§11.34 2. Form: Application for Permission to File Nonprinted Brief in Excess of 50 Pages

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11.34-1 Application for permission to file nonprinted brief in excess of 50 pages

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

APPLICATION FOR PERMISSION TO FILE NONPRINTED BRIEF IN EXCESS OF 50 PAGES; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **of the** _ _[*name of court*]_ _**:**

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts and am the attorney of record for _ _[a*ppellant/respondent*]_ _**. I am applying on behalf of** _ _[a*ppellant/respondent*]_ _ **for an order permitting the filing of** _ _[*e.g., an opening brief*]_ _ **to be prepared by a process of duplication other than printing, namely by** _ _[*state proposed method of duplication*]_ _**, of a length in excess of** _ _[*50 pages/14,000 words*]_ _**, provided that the brief not exceed** _ _[*number*]_ _ _ _[*pages/words*]_ _**.**

2. This application is made on the ground that good cause exists for permitting _ _[*e.g., an opening brief*]_ _ **in excess of** _ _[*50 pages/14,000 words*]_ _ **produced in the above-described manner because of the following facts:** _ _[*Recite facts to justify exceeding 50-page/14,000-word limit (e.g., complexity of issues, length of record)*]_ _**.**

3. _ _[*No previous application has been made to the court/The court has previously granted* _ _[*appellant/respondent*]_ _ *permission*]_ _ **to file a brief in excess of** _ _[*50 pages/14,000 words*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

ORDER

Based on the application of _ _[*appellant/respondent*]_ _ **and good cause appearing,**

IT IS ORDERED that _ _[*appellant/respondent*]_ _ **may file** _ _[*e.g., an opening*]_ _ **brief prepared by a process of duplication other than printing, namely by** _ _[*state proposed method of duplication*]_ _**, of a length in excess of** _ _[*50 pages/14,000 words*]_ _**, provided that the brief not exceed** _ _[*number of pages or words*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Presiding Judge

Copies: Original and one copy to file with the chief justice (for a supreme court application) (Cal Rules of Ct

8.44(a)(6)) or the presiding justice (for a court of appeal application) (Cal Rules of Ct 8.44(b)(6)). Unless the court orders otherwise, only one set of any separately bound supporting documents must be filed with an application to a court of appeals. Cal Rules of Ct 8.44(b)(5). A courtesy copy should be served on the attorney of record for each party. Cal Rules of Ct 8.50(a). An application to a court of appeal must also provide the court clerk with addressed, postage-prepaid envelopes to mail to all other parties the order granting or denying the application. Cal Rules of Ct 8.50(c). Applications to the supreme court need not include envelopes. See Cal Rules of Ct 8.50(c).

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.35 E. Permission to File Amicus Curiae Brief

§11.35 E. Permission to File Amicus Curiae Brief

Nonparty may apply to file a brief. An individual or entity, who is not a party but interested in an appeal, may seek permission from the chief justice or presiding justice to file an amicus curiae brief in the matter by submitting an appropriate application to the reviewing court. Cal Rules of Ct 8.200(c), 8.520(f). The application to file an amicus brief should comply with Cal Rules of Ct 8.50. For a more extensive discussion of amicus curiae, see chap 14.

Application in court of appeal. Under Cal Rules of Ct 8.200(c), in the court of appeal, the application must:

- State the applicant's interest;
- Explain how the proposed amicus curiae brief will assist the court in deciding the matter;
- Identify any party or any counsel for any party in the appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief; and
- Identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the amicus curiae brief, other than the amicus curiae, its members, or its counsel.

The proposed brief must be served and must accompany the application and may be combined with it. Cal Rules of Ct 8.200(c)(4). The covers of the application and proposed brief must identify the party the applicant supports, if any. Cal Rules of Ct 8.200(c)(5). If the presiding judge grants the application, the order will specify the time within which the brief may be filed and the time within which any party to the appeal may file an answer. Cal Rules of Ct 8.200(c)(6). Before the answer is due, the party may apply to the presiding justice for an extension of time. Cal Rules of Ct 8.212(b)(3). On extensions of time generally, see §§12.109-12.111.

Application in supreme court; petition for review and original writ. An individual or entity wishing to be heard on the grant or denial of a petition for review or on the original writ in the supreme court must submit a letter to the court and serve the letter on all parties in accordance with Cal Rules of Ct 8.500(g).

Application in supreme court; brief on the merits. To obtain permission for the filing of an amicus curiae brief on *the merits* in the supreme court, the applicant must file with the clerk of the court a signed request, accompanied by the proposed brief, that provides all of the following information (Cal Rules of Ct 8.520(f)(3)-(4)):

- The nature of applicant's interest and how the proposed brief will help the court decide the matter;
- The identity of any party or any counsel for a party in the pending appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief; and
- The identity of every person or entity who made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

The request and proposed brief may be filed any time after the court grants review and must be filed no later than 30 days after all briefs have been filed or the time to do so has expired. Cal Rules of Ct 8.520(f)(1)-(2). For good cause, the Chief Justice may allow later filing of the application. Cal Rules of Ct 8.520(f)(2).

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.36 F. Permission to File Supplemental Briefs

§11.36 F. Permission to File Supplemental Briefs

The only briefs allowed to be filed on appeal are appellant's opening brief, respondent's brief and appellant's reply brief. Generally, an additional or supplementary brief may be filed only with permission of the chief justice or presiding justice. Any application to file such brief should be in compliance with Cal Rules of Ct 8.50. Cal Rules of Ct 8.200(a), 8.520. Consult local court rules and policies.

JUDICIAL PERSPECTIVE: We often accept letters bringing newly decided cases to our attention between the time the case is fully briefed and oral argument is calendared without the necessity of formal motions to file supplemental briefs.

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§11.37 G. Immediate Issuance or Stay of Remittitur

California Rules of Court 8.272, 8.386, and 8.499 (court of appeal) and 8.540 (supreme court) provide the time periods for issuance of the remittitur on the finality of a proceeding in the reviewing court. On application with good cause shown or on stipulation of the parties, the supreme court may direct the immediate issuance of a remittitur. Cal Rules of Ct 8.540(c)(1). However, the court of appeal may direct the immediate issuance of remittitur only on stipulation or dismissal of appeal. Cal Rules of Ct 8.272(c)(1). The court of appeal may stay the issuance of remittitur for a reasonable period on its own or a party's motion or on stipulation. Cal Rules of Ct 8.540(c)(2). The supreme court, however, may not stay the issuance of remittitur on stipulation. Such a stay may only be granted on a party's or its own motion under an application showing good cause. Cal Rules of Ct 8.272(c)(2). The procedure of Cal Rules of Ct 8.50 should be followed in connection with any such application. For a more extensive discussion of remittitur, see chap 18.

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H. Publication or Depublication of Court Opinion

§11.38 1. Request for Publication

Anyone may request court of appeal to publish opinion not certified for publication. All supreme court opinions are published. Cal Rules of Ct 8.1105(a). However, opinions of the court of appeal or superior court appellate division are published only if they meet the criteria set forth in Cal Rules of Ct 8.1105(c). Anyone may request of the court rendering a decision not certified for publication that the opinion be published. The request must be delivered to the court of appeal within 20 days after the opinion is filed, in the form of a letter, concisely stating how the nonpublished opinion meets one or more of the publication standards in Cal Rules of Ct 8.1105(c). The letter must be served on all parties to the proceeding. Cal Rules of Ct 8.1120(a). For a more extensive discussion of requests for publication, see chap 21.

JUDICIAL PERSPECTIVE: Many times we err on the side of nonpublication and wait for counsel to convince us that publication would be helpful to bench and bar.

Request to supreme court. If the court receiving the request for publication is unable to rule on the issue because of the finality of the decision as to that court, it must transmit to the supreme court the request, a copy of the court's unpublished opinion, its recommendation for disposition, and a brief statement of reasons for its recommendation. A copy of the recommendations and statement of reasons must be sent to all parties and to the person requesting publication. Cal Rules of Ct 8.1120(b).

Comply with Cal Rules of Ct 8.50. Aside from complying with Cal Rules of Ct 8.1120(a), an application seeking publication should also comply with Cal Rules of Ct 8.50, covering applications on routine matters.

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§11.39 2. Request for Depublication

Anyone may request depublication. Within 30 days after a decision becomes final as to the court of appeal, anyone may request the supreme court to order that an opinion certified for publication be depublished. The request should be in the form of a letter, not exceeding 10 pages, stating the reasons the opinion should not remain published. The letter must be served on all parties and the court of appeal. Cal Rules of Ct 8.1125(a). For a more extensive discussion of depublication, see chap 21.

Anyone may submit a response to the request. A response, either joining in the request or concisely stating why the opinion should remain published, may be submitted by the court of appeal or by any person within 10 days after receipt by the supreme court of the request for depublication. The response should be no longer than 10 pages and must be served on all parties, the court of appeal, and the person requesting depublication. Cal Rules of Ct 8.1125(b).

Supreme court order. The supreme court may order the opinion depublished or deny the request. Notice of the supreme court order must be sent to all parties, the court of appeal, and the person requesting depublication. Cal Rules of Ct 8.1125(c)(1).

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IV. MOTIONS IN REVIEWING COURT

A. Involuntary Dismissal of Appeal

§11.40 1. Appellate Court's Power to Dismiss

The reviewing court has the power to dismiss an appeal on motion of a party or on its own motion on certain procedural or jurisdictional grounds. See §11.41. Once the notice of appeal is filed, the trial court loses jurisdiction over the subject matter of the appeal, and only the reviewing court, not the trial court, has jurisdiction to hear a motion for dismissal on an appeal. *Hollaway v Scripps Mem. Hosp.* (1980) 111 CA3d 719, 723, 168 CR 782; *Associated Lumber & Box Co. v Superior Court* (1947) 79 CA2d 577, 581, 180 P2d 389.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.41 2. Grounds for Motion to Dismiss

§11.41 2. Grounds for Motion to Dismiss

The bases for a motion to dismiss an appeal fall generally into three categories:

- The lack of appellate court jurisdiction;
- The lack of ripe, justiciable issues for appellate decision (*e.g.,* when issues are moot or frivolous, or when claims have been abandoned or waived); or
- Failure to comply with procedural rules on appeal (*e.g.,* delay or default in filing the record, failure to pay filing or transfer fees, failure to file a brief, or failure to oppose the motion to dismiss).

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§11.42 3. Timing of Motion to Dismiss

Motion to dismiss for lack of jurisdiction. If the basis for a motion to dismiss is lack of jurisdiction, the motion may be made at any time. A respondent need not wait until the record is prepared and thus incur costs, but should file the motion to dismiss with the reviewing court before the record on appeal is filed. A motion made before the record is prepared must be accompanied by a declaration or a clerk's certificate under Cal Rules of Ct 8.57(a), as discussed in §11.43. For further discussion of dismissal for lack of jurisdiction, see §11.49.

Appellate courts are reluctant to consider motions for dismissal. Because it is judicial policy to dispose of appeals on the merits, unless there are clearly appropriate grounds for dismissal, appellate courts are cautious in granting a motion for dismissal. *Bailey v Fosca Oil Co.* (1962) 211 CA2d 307, 27 CR 454. As a practical matter, when the reviewing court needs to review the record to evaluate the merits of an appeal before considering a motion to dismiss, it generally defers considering the motion until the time set for determining the appeal on its merits (*Stockton Theaters, Inc. v Palermo* (1952) 109 CA2d 616, 241 P2d 54, disapproved in part on other grounds in *Stockton Theatres, Inc. v Palermo* (1956) 47 C2d 469, 475, 304 P2d 7) or it will deny the motion (*Reed v Norman* (1957) 48 C2d 338, 309 P2d 809). See also *Keyes v Hurlbert* (1941) 42 CA2d 532, 109 P2d 364.

Dismissal with or without prejudice. The court may deny a motion to dismiss without prejudice, allowing the motion to be renewed at a later date. If, however, the court grants the motion to dismiss without expressly indicating that it is without prejudice, the dismissal is with prejudice to the right to file another appeal within the time permitted. CCP §913.

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§11.43 4. Motion to Dismiss Before Record Is Filed

Contents of affidavit or clerk's certificate. If a motion to dismiss an appeal is filed before the record on appeal is filed in the reviewing court, an affidavit or superior court clerk's certificate must accompany the motion setting forth the following (Cal Rules of Ct 8.57(a)):

- The nature of the action and the relief demanded by the complaint and any cross-complaint or complaint in intervention;
- The names, addresses, and telephone numbers of all attorneys of record, stating whom each represents, and of unrepresented persons;
- A description of the judgment or order appealed from, the date of its entry, and the service date of written notice of its entry;
- The factual basis of any extension of time to appeal under Cal Rules of Ct 8.108, including but not limited to the fact and date of filing of notice of intention to move for a new trial, or the absence of such filing;
- The filing dates of all notices of appeal and the courts in which they were filed;
- The filing date of any document necessary to procure the record on appeal; and
- The status of the record preparation process, including any order extending the time to prepare the record.

Consider adding other relevant matters. Any additional matters of record that counsel believes are important and relevant to the motion should be included in the affidavit or clerk's certificate.

Declaration is preferred procedure. The preparation of an affidavit or declaration (CCP §2015.5), attesting to the matters required in Cal Rules of Ct 8.57(a), by someone with first-hand knowledge of the facts, usually the attorney, is much simpler and more expeditious than the seeking of a clerk's certificate. Thus, a declaration is preferable to a clerk's certificate. For a form for the declaration, see §11.44.

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§11.44 5. Form: Declaration Under Cal Rules of Ct 8.57(a) in Support of Motion to Dismiss

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11.44-1 Declaration under Cal Rules of Ct 8.57(a) in support of motion to dismiss

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

DECLARATION IN COMPLIANCE WITH CALIFORNIA RULES OF COURT 8.57(a) IN SUPPORT OF MOTION TO DISMISS

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before this court and am the attorney of record for _ _[*respondent*]_ _**.**

2. I submit this declaration on _ _[*his/her/its*]_ _ **behalf under California Rules of Court 8.57(a), in support of** _ _[*his/her/its*]_ _ **Motion to Dismiss Appeal of** _ _[*appellant*]_ _**.**

3. The complaint in this matter for _ _[*e.g., breach of contract, negligence*]_ _ **was filed by plaintiff,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, and demanded damages in the amount of** _ _[*dollar amount*]_ _**. A cross-complaint for** _ _[*e.g., injunction, fraud, unfair competition*]_ _ **was filed by defendant,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, which demanded** _ _[*dollar amount*]_ _ **as relief.**

4. _ _[*Name, address, telephone number*]_ _ **is the attorney of record for plaintiff;** _ _[*name, address, telephone number*]_ _ **is the attorney of record for defendant; and** _ _[*name, address, telephone number*]_ _ **is the attorney of record for intervenor.**

5. On _ _[*date*]_ _**, the Superior Court of the State of California for the County of** _ _ _ _ _ _ **entered judgment in favor of plaintiff and against defendant for** _ _[*dollar amount*]_ _**; and in favor of intervenor** _ _[*name*]_ _ **and against plaintiff for** _ _[*dollar amount*]_ _**. Notice of entry of judgment was filed on** _ _[*date*]_ _**, and served by mail on** _ _[*all parties/counsel of record for all parties*]_ _ **on** _ _[*date*]_ _**.**

7. On _ _[*date*]_ _**, notice of motion for a new trial was filed by defendant and served by mail on all parties.**

8. On _ _[*date*]_ _**, defendant's motion for new trial was denied by the Superior Court. On** _ _[*date*]_ _**, written notice of denial by the Superior Court of defendant's motion for new trial was served by mail on all parties.**

9. On _ _[*date*]_ _**, defendant filed a notice of appeal to the** _ _[*name of court to which appeal taken*]_ _ **from the Superior Court judgment.**

[*Add if necessary*]

10. The factual basis for the extension of time to appeal under Cal Rules of Court 8.108 is: _ _[*describe factual basis*]_ _**.**

[11.] On _ _[*date*]_ _**, defendant filed a notice to prepare reporter's transcript and a notice designating the**

papers, records, and exhibits to be included in the clerk's transcript.

[12.] The record on appeal has not yet been completed or certified. There _ _[*have/have not*]**_ _ been any orders extending the time in which to prepare the record. _ _**[*Add, if necessary, information about any orders extending time.*]**_ _**

[*Continue*]

If called as a witness I could and would testify competently to all of the foregoing of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _ _[*date*]**_ _, at _ _**[*city*]**_ _, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Copies: See §11.10.

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§11.45 6. Motion to Dismiss After Record Is Filed

A respondent filing a motion to dismiss after the appellate record has been filed with the reviewing court must comply with the general rules on motions (Cal Rules of Ct 8.54-8.57, 8.40, and 8.44). If the appellate court needs to consider the record before ruling on the motion, it may defer ruling until the hearing on the merits. *Ferraro v Southern Cal. Gas Co.* (1980) 102 CA3d 33, 40, 162 CR 238. See also *Chino Land & Water Co. v Hamaker* (1916) 171 C 689, 690, 154 P 850; *Stockton Theaters, Inc. v Palermo* (1952) 109 CA2d 616, 241 P2d 54, disapproved in part on other grounds in *Stockton Theatres, Inc. v Palermo* (1956) 47 C2d 469, 475, 304 P2d 7. For a form for this motion, see §11.46.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.46 7. Form: Motion to Dismiss Appeal

§11.46 7. Form: Motion to Dismiss Appeal

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11.46-1 Motion to dismiss appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION TO DISMISS APPEAL;
SUPPORTING MEMORANDUM; DECLARATION IN SUPPORT OF MOTION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of** _ _[*name of court*]_ _**:**

Respondent, _ _[*name*]_ _**, moves this court for an order dismissing the appeal in this action. This motion is made on the following ground(s):** _ _[*Insert ground(s) for dismissal*]_ _**.**

[*Add if notice of appeal not timely filed*]

1. The notice of appeal was not filed within the time prescribed by California Rules of Court _ _[*identify rule*]_ _**, and therefore this court has no jurisdiction over this appeal.**

[*Add if order or judgment not appealable*]

[2]. Appellant appealed from the _ _[*order/judgment*]_ _ **of the superior court** _ _[*date*]_ _**. However, because this** _ _[*order/judgment*]_ _ **is nonappealable, this court has no jurisdiction over this appeal.**

[*Add if no standing*]

[3]. Appellant appealed from the judgment of the court on _ _[*date*]_ _**. However, appellant was not a party to the judgment, nor has appellant appeared on the record. Thus appellant does not have standing to raise any issue on appeal.**

[*Add if appeal moot*]

[4]. The material issues raised by this appeal are moot because _ _[*e.g., appellant no longer has any interest in the property subject to this appeal, which raises only abstract and academic questions not of general public interest or importance*]_ _**.**

[*Add if frivolous appeal*]

[5]. A mere _ _[*inspection of the record on appeal/examination of the judgment roll*]_ _ **discloses that the ground(s) on which the appeal is based** _ _[*is/are*]_ _ **totally frivolous and without merit, and that the appeal is taken solely** _ _[*for the purpose of delay/to harass respondent*]_ _**.**

[*Option 1: If appellant failed to comply with court rules*]

[6]. Appellant has been unreasonably dilatory in prosecuting this appeal and has not complied with California Rules of Court _ _[*e.g., 8.121(a), 8.130(a), 8.122(a), 8.140(a), 8.212*]_ _**, in that appellant has failed to** _ _[*e.g., pay the cost of the reporter's transcript/timely file the record on appeal/file an opening brief*]_ _**. Appellant's delay has resulted in manifest prejudice to respondent in that** _ _[*set forth specific facts*]_ _**.**

[*Option 2: If appellant abandoned or waived appeal*]

[6]. Appellant has abandoned or waived this appeal by failing to _ _[*set forth specific facts; see §§11.57-11.59*]**_ _.**

[*Continue*]

[7]. This motion is based on this notice, the attached declaration(s) of _ _[*name(s)*]**_ _, the attached memorandum in support of motion to dismiss appeal and _ _**[*other necessary papers*]**_ _.**

_ _[*In connection with this motion, respondent requests oral argument*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: See §11.10.

Comment: Under Cal Rules of Ct 8.54(b)(1), a party has no right to set a hearing date for oral argument on a motion. The reviewing court, on request of a party or its own motion, may exercise its discretion and place a motion on the calendar for hearing, or it may dispose of the motion without a hearing. Cal Rules of Ct 8.54(b)(2). Such a hearing, though, is extremely rare. See §11.13.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

For a form for a declaration in support of this motion, see §11.47.

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§11.47 8. Form: Declaration in Support of Motion for Order to Dismiss Appeal

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11.47-1 Declaration in support of motion for order to dismiss appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

DECLARATION OF _ _[*NAME*]_ _
IN SUPPORT OF MOTION TO DISMISS APPEAL

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record for respondent.

2. Respondent's motion to dismiss the appeal is made on the grounds that _ _[*e.g., appellant failed to timely file an opening brief*]_ _**.**

3. _ _[*Set out specific facts and dates establishing procedural violation: e.g.: Appellant's opening brief was due on* _ _[*date*]_ _**,** *but not filed. On* _ _[*date*]_ _*, the clerk of the court gave the 15-day notice under California Rules of Court 8.220(a). On* _ _[*date*]_ _*, the 15-day period expired and appellant failed to file the brief within that time or to obtain an extension of time*]_ _**.**

If called as a witness I could and would competently testify to all of the foregoing of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: See §11.10.

Comment: The declaration in compliance with Cal Rules of Ct 8.57(a) (see §11.44) may be combined with this substantive declaration on the specific facts in support of the motion to dismiss.

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§11.48 9. Failure to File Opposition to Motion to Dismiss

If appellant fails to file a written opposition to a motion to dismiss, or fails to appear and oppose the motion at a noticed hearing on the motion, the court may consider the appeal abandoned and order its dismissed. Cal Rules of Ct 8.54(c).

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10. Specific Grounds for Motion to Dismiss

§11.49 a. Lack of Jurisdiction

Appellate court's lack of jurisdiction precludes consideration of appeal. When the reviewing court does not have jurisdiction, it cannot consider the merits of the appeal, and the appeal must be dismissed. *Estate of Hanley* (1943) 23 C2d 120, 142 P2d 423; *Estate of Welch* (1956) 146 CA2d 534, 304 P2d 57. Even if respondent does not raise the issue, lack of jurisdiction requires the appellate court to dismiss the appeal on its own motion. *Estate of Hanley, supra*; *City of Los Angeles v Schweitzer* (1962) 200 CA2d 448, 19 CR 429. If jurisdiction is lacking, *e.g.,* because the attempted appeal is from a nonappealable order, an attempted appeal cannot divest the trial court of its jurisdiction. *Davis v Taliaferro* (1963) 218 CA2d 120, 32 CR 208.

Major grounds of dismissal for lack of jurisdiction. The specific grounds for motions to dismiss an appeal for lack of jurisdiction generally fall into five main categories:

- **Order or judgment is nonappealable.** *Collins v Corse* (1936) 8 C2d 123, 124, 64 P2d 137; *Steen v Fremont Cemetery Corp.* (1992) 9 CA4th 1221, 1226, 11 CR2d 780.
- **Notice of appeal is untimely.** *Estate of Hanley*, *supra; County of Los Angeles v Jamison* (1961) 189 CA2d 267, 11 CR 309; *Estate of Welch, supra*. See chap 7 on jurisdictional time requirements for filing notice of appeal.
- **Party lacks standing to appeal.** *Eggert v Pacific States Sav. & Loan Co.* (1942) 20 C2d 199, 124 P2d 815.
- **Subject matter jurisdiction is lacking** (*e.g.,* because appeal taken to wrong court). Note, however, that an appeal filed in the wrong court is not usually dismissed but is transferred to the appellate court.
- **Counsel lacks client authorization to appeal.** Because only the party/client has the right to appeal, an attorney may not file a notice of appeal unless authorized to do so by the client. An attempted appeal without the client's consent will be dismissed. *In re Steven H.* (2001) 86 CA4th 1023, 1029, 103 CR2d 649.

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b. Mootness

§11.50 (1) Determination of Mootness

Moot issues require dismissal of appeal. If, while an appeal is pending, events occur that make it impossible for the court to grant appellant effective relief, the appeal should be dismissed as moot. *Paul v Milk Depots, Inc.* (1964) 62 C2d 129, 41 CR 468; *Ebensteiner Co. v Chadmar Group* (2006) 143 CA4th 1174, 1178, 49 CR3d 825. Dismissal of an appeal as moot is also proper if the appeal presents only academic or abstract philosophical questions. *TG Oceanside, L.P. v City of Oceanside* (2007) 156 CA4th 1355, 1385, 68 CR3d 320. A full prejudgment settlement moots the issues on appeal, even if judgment is later entered inadvertently. *A.L.L. Roofing & Bldg. Materials Corp. v Community Bank* (1986) 182 CA3d 356, 359, 227 CR 308. However, an appeal in an unlawful detainer action is not moot even if appellant has surrendered possession during the pendency of the appeal, because the court on reversal can restore appellant to possession. *Old Nat'l Fin. Servs. v Seibert* (1987) 194 CA3d 460, 239 CR 728. If circumstances are such that dismissal of the appeal would in effect operate as an affirmance of an erroneous trial court judgment, the appropriate remedy is "reversal of the judgment with directions to the lower court to dismiss the action." *San Bernardino Valley Audubon Soc. v Metropolitan Water Dist*. (1999) 71 CA4th 382, 404, 83 CR2d 836.

When some controversy remains. If any controversy remains regarding an issue raised in the appeal, other than a question of liability for costs (*Paul v Milk Depots, Inc.*, *supra*), the motion to dismiss will be denied, and any contention that the question has become moot will be considered by the court when ruling on the merits. *Gogerty v Coachella Valley Jr. College Dist.* (1962) 57 C2d 727, 21 CR 806. See also *Kriebel v City Council* (1980) 112 CA3d 693, 169 CR 342.

Bringing the motion. A motion to dismiss an appeal on the ground of mootness may be made by any party, or by the court, at any time after the mootness has occurred. See, *e.g., Hild v Justice's Court* (1936) 11 CA2d 235, 55 P2d 198. Although dismissal for mootness is usually involuntary on motion of respondent or on the reviewing court's own motion, an appeal that raises only moot issues may be dismissed by the court on appellant's motion. Nevertheless, the court has discretion to deny the motion to dismiss for mootness if dismissal would be unjust to respondents or co-appellants in dealing with an issue of general importance. See *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 731 n5, 36 CR 468. For discussion of exceptions to mootness doctrine, see §11.52.

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§11.51 (2) Examples of Mootness of Issues

The following are some examples of events that render an appeal moot:

- Determination of issues by intervening judgment or order (*e.g., Guardianship of Thomas* (1954) 125 CA2d 135, 269 P2d 947) or by entry of final judgment (*e.g., Agnew v City of Los Angeles* (1958) 51 C2d 1, 330 P2d 385) or modified judgment (*e.g., Axe v Commercial Credit Corp.* (1964) 227 CA2d 216, 225, 38 CR 558).
- Voluntary full settlement of judgment, but only when there is a full compromise and settlement of all issues by all parties or under an agreement not to appeal any issues. *Reitano v Yankwich* (1951) 38 C2d 1, 237 P2d 6; *Ebensteiner Co. v Chadmar Group* (2006) 143 CA4th 1174, 49 CR3d 825.
- Relief granted by trial court expires before appeal can be heard. *Environmental Charter High Sch. v Centinela Valley Union High Sch. Dist.* (2004) 122 CA4th 139, 144, 18 CR3d 417 (appeal not dismissed as moot even though relief granted expired before appeal because dispute is likely to recur; see §11.52).
- Act sought to be enjoined has been performed, after appeal taken from order denying injunctive relief. *Lenahan v City of Los Angeles* (1939) 14 C2d 128, 92 P2d 1014; *Giles v Horn* (2002) 100 CA4th 206, 227, 123 CR2d 735. But when a material question remains undetermined, as when both declaratory and injunctive relief are sought, only the issue of injunctive relief is moot (*Bisno v Sax* (1959) 175 CA2d 714, 730, 346 P2d 814), and the appeal will not be dismissed (*Rees v Gardner* (1960) 185 CA2d 630, 8 CR 505).
- An amendment or repeal of the constitutional or statutory language questioned on appeal or the enactment of new legislation may render the entire issue moot. *Sagaser v McCarthy* (1986) 176 CA3d 288, 299, 221 CR 746.
- If, during the course of the appeal, a party with a nonsurvivable claim dies, the appeal will be dismissed as moot. *Estate of Henry* (1960) 181 CA2d 173, 178, 5 CR 582. Sometimes the courts base dismissal on the doctrine of abatement of the cause of action. *Guardianship of Crossley* (1934) 1 C2d 460, 35 P2d 513 (appeal dismissed when ward appealing incompetency died during pendency of appeal).

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§11.52 (3) Exceptions to Mootness Doctrine

There are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of public interest that is likely to recur; (2) when the controversy may recur between the parties; and (3) when a material question remains for the court's determination. *Cucamongans United for Reasonable Expansion v City of Rancho Cucamonga* (2000) 82 CA4th 473, 479, 98 CR2d 202.

Public interest; likelihood of repetition. There is an exception to the doctrine of dismissal for mootness, for issues of general public interest or importance, even if the issue between the particular parties before the court may be moot. If the nature of the issue is such that every case presenting it would become moot in the normal course of events before the appeal could be decided, and if the problem poses a public policy issue of broad interest that is likely to recur, the court may decide the issue even though it has become moot between the parties in the specific case before the court. *Edelstein v City & County of San Francisco* (2002) 29 C4th 164, 172, 126 CR2d 727; *Lundquist v Reusser* (1994) 7 C4th 1193, 1202 n8, 31 CR2d 776.

The following are examples of appellate courts finding an issue not moot under this exception:

- *Edelstein v City & County of San Francisco* (2002) 29 C4th 164, 172, 126 CR2d 727 (election issue);
- *Save Stanislaus Area Farm Economy v Board of Supervisors* (1993) 13 CA4th 141, 16 CR2d 408 (initiative issue);
- *In re Jody R.* (1990) 218 CA3d 1615, 1622, 267 CR 746 (dependency case involving live-in companion);
- *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 239 CR 626 (determination of good faith settlement);
- *In re Violet C.* (1989) 213 CA3d 86, 261 CR 470 (judicial commitment of developmentally disabled adult to state hospital);
- *Leeb v DeLong* (1988) 198 CA3d 47, 243 CR 494 (publication of edition of school newspaper);
- *Myers v Patterson* (1987) 196 CA3d 130, 241 CR 751 (notice provisions in city initiative petitions);
- *Conservatorship of Forsythe* (1987) 192 CA3d 1406, 238 CR 77 (order establishing conservatorship after conservatorship expired);
- *California Ins. Guar. Ass'n v Liemsakul* (1987) 193 CA3d 433, 238 CR 346 (proper amount by which uninsured motorist coverage reduces personal injury claim);
- *Diamond v Bland* (1970) 3 C3d 653, 657, 91 CR 501 (failed ballot initiative); and
- *Montalvo v Madera Unified Sch. Dist.* (1971) 21 CA3d 323, 329, 98 CR 593 (statute on which case turned was repealed pending appeal and then reenacted to similar effect).

For further discussion and case examples of the public interest exception to the mootness doctrine, see 9 Witkin, California Procedure, *Appeal* §§759-761 (5th ed 2008).

Likely recurrence between parties. When there is a likely recurrence of the controversy between the parties, the court may decide an otherwise moot appeal. *Environmental Charter High Sch. v Centinela Valley Union High Sch. Dist.* (2004) 122 CA4th 139, 144, 18 CR3d 417.

Material issue remains. A material question remains "when the judgment, if left unreversed, would preclude a party from litigating its liability on an issue still in controversy." *Viejo Bancorp, Inc. v Wood* (1989) 217 CA3d 200, 205, 265 CR 620. See also *Eye Dog Found. v State Bd. of Guide Dogs for the Blind* (1967) 67 C2d 536, 541, 63 CR 21 (material issue of right to declaratory relief remained).

NOTE: Court may also find an issue not moot and decide it when the issue is likely to evade appellate scrutiny perpetually. *Conservatorship of Forsythe* (1987) 192 CA3d 1406, 238 CR 77 (review of conservatorship that automatically expires by statute after 1 year).

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c. Frivolous Appeals and Appeals Taken Solely for Vexation, Harassment, or Delay

§11.53 (1) Court's Inherent Authority to Dismiss Abusive Appeal

Appellate court may dismiss abusive appeals. The appellate court has the inherent power to dismiss an obviously frivolous appeal, or an appeal taken to delay, vex, or harass the opposing party or the court. *Ferguson v Keays* (1971) 4 C3d 649, 658, 94 CR 398; *People ex rel Lockyer v Brar* (2004) 115 CA4th 1315, 1318, 9 CR3d 844; *Zimmerman v Drexel Burnham Lambert, Inc.* (1988) 205 CA3d 153, 252 CR 115.

Dismissal may be on court's or party's motion. The reviewing court may dismiss the appeal on motion by a party or on its own motion when, from a cursory inspection of the judgment roll or the record, the appeal appears to be patently frivolous. *Williams v Duffy* (1948) 32 C2d 578, 197 P2d 341. If, however, the court must read the entire record to determine whether an appeal is frivolous, the court will probably deny a motion to dismiss an allegedly meritless appeal and decide the case on its merits. *Gogerty v Coachella Valley Jr. College Dist.* (1962) 57 C2d 727, 729, 21 CR 806; *Baum v Baum* (1959) 51 C2d 610, 335 P2d 481; *Estate of Wunderle* (1947) 30 C2d 274, 181 P2d 874. See §11.56. On litigants' constitutional right to oral argument in both civil and criminal appeals, see *People v Pena* (2004) 32 C4th 389, 9 CR3d 107; *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557; *People v Brigham* (1979) 25 C3d 283, 157 CR 905.

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§11.54 (2) Sanctions

Appellate court may impose sanctions for abusive appeal. When granting a motion to dismiss a frivolous appeal or an appeal taken solely to delay, an appellate court has the power to impose penalties, such as costs and damages, on appellant and appellant's attorney. CCP §907; Cal Rules of Ct 8.276(a), 8.891(e). *Zimmerman v Drexel Burnham Lambert, Inc.* (1988) 205 CA3d 153, 162, 252 CR 115; *Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122. Sanctions may also be made payable to the court to compensate it for the additional expense of processing the appeal. *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 244 CR 581. Although the appellate court may deny a motion to dismiss and go on to decide the case on its merits, if the court then finds that the appeal is frivolous or was taken solely for delay or harassment, the court may affirm and impose a penalty on appellant and on counsel. See *Seidell v Tuxedo Land Co.* (1932) 216 C 165, 13 P2d 686; *Niiya v Goto* (1960) 181 CA2d 682, 690, 5 CR 642.

Determining whether appeal is frivolous for purpose of imposing sanctions. For discussion of the applicable standards in determining whether an appeal is frivolous for purposes of imposing sanctions under CCP §907, see *Marriage of Flaherty* (1982) 31 C3d 637, 646, 183 CR 508. For further discussion, see §§20.19-20.34.

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§11.55 (3) Sanction Procedures

California Rules of Court 8.276(a) sets forth the procedures for a party seeking sanctions for an appeal that is frivolous or taken solely for delay. A motion for sanctions must be served and filed before any order dismissing the appeal but no later than 10 days after the due date of appellant's reply brief or at the time of filing of the motion to dismiss. A party filing a motion to dismiss before filing a brief may make or renew a sanctions motion up to 10 days after the due date of appellant's reply brief. The motion papers must include a declaration supporting the amount of sanctions sought. If the court determines that it will consider imposing sanctions on its own motion or motion of a party, it will notify the party or attorney involved. Within 10 days after the court sends the notice, that party or attorney may serve and file a written opposition to the sanctions motion. Failure to file an opposition is not deemed consent to sanctions. Cal Rules of Ct 8.276(d). An opposition should not usually be filed unless the court has sent its notice of consideration of sanctions, or requests the party's or attorney's views on the sanctions issue. For further discussion, see §20.30.

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§11.56 (4) Affirmance With Sanctions

If the appellate court has to review the record before deciding on the frivolity of the appeal, the court may affirm the judgment or order appealed from on the merits, rather than dismiss the appeal, and order sanctions against the party or attorney responsible for the appeal. *Portola Hills Community Ass'n v James* (1992) 4 CA4th 289, 294, 5 CR2d 580, disapproved in part on other grounds in *Nahrstedt v Lakeside Village Condominium* (1994) 8 C4th 361, 33 CR2d 63; *Leslie v Board of Med. Quality Assur.* (1991) 234 CA3d 117, 121, 285 CR 501; *City of Bell Gardens v County of Los Angeles* (1991) 231 CA3d 1563, 283 CR 91.

JUDICIAL PERSPECTIVE: Usually, we do not affirm and order sanctions in the same opinion. We file the opinion and then issue an order to show cause why sanctions should not be imposed. Questions to counsel about this issue at the oral argument on the merits might create a conflict between counsel and client as to who insisted on pursuing a frivolous appeal.

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d. Failure to Comply With Procedural Rules

§11.57 (1) Delay or Default in Obtaining Record

Appellant's fault in causing late filing of record may prompt dismissal. If appellant is at fault in failing to perform any act necessary to obtain the filing of the record on appeal within the time allowed or any extension granted, the appeal may be dismissed on respondent's motion or on the reviewing court's own motion. Cal Rules Ct 8.140. Dismissal is proper only if the delay is specifically appellant's fault and not that of a court officer. See Cal Rules of Ct 8.140(a). Thus, if the delay appears to be deliberate or the result of appellant's own inexcusable neglect, dismissal may be warranted. *Bardeen v Langford* (1953) 120 CA2d 381, 260 P2d 1014; *Wilkins v Wilkins* (1951) 108 CA2d 12, 237 P2d 684.

Dismissal based on technicality is disfavored. In general, because judicial policy favors reaching a decision on the merits rather than disposing of a case on a technicality, if the delay in obtaining the record is slight and not prejudicial to respondent, the reviewing court will deny a motion to dismiss. See *Winkler v Southern Cal. Permanente Med. Group* (1955) 136 CA2d 356, 288 P2d 622. Even a substantial delay may not result in dismissal if the delay was excusable. See *Thornburg v Rais* (1950) 100 CA2d 735, 224 P2d 806. In *Frisk v Merrihew* (1974) 42 CA3d 319, 327, 116 CR 781, the court ruled that a motion to dismiss for the late filing of a settled statement will not be granted unless there is a showing that the delay "resulted in manifest injustice or prejudice to the moving party."

Procedure. The procedure for dismissal of appeal for failure to obtain the filing of the record is set forth in Cal Rules of Ct 8.140(a). If appellant is in default in obtaining the record, the superior court will mail a notice to appellant advising that, unless appellant performs all acts necessary to obtain the record within 15 days after the notice is mailed, the appeal will be dismissed. Appellant's failure to comply will result in a notice by the superior court to the appellate court of the noncompliance, which may result in dismissal of the appeal. Cal Rules of Ct 8.140(a), (b).

Dismissal for abandonment of appeal. If long periods have elapsed from the filing of notice of appeal without appellant's taking steps to perfect the appeal and if appellant fails to oppose a motion to dismiss, or appear at the hearing on the motion, the appeal may be dismissed as abandoned under Cal Rules of Ct 8.54(c). *Mondo v Schwartz* (1949) 92 CA2d 523, 207 P2d 60; *Gilmore v Placer County Bank* (1948) 88 CA2d 498, 198 P2d 910.

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§11.58 (2) Failure to Pay Fees for Filing Appeal or for Record

Failure to pay filing fees or deposit. The party filing notice of appeal is required to pay a filing fee with the superior court clerk and a deposit for the reporter's or clerk's transcript. Cal Rules of Ct 8.100(b), 8.122(c), 8.130(b). An indigent may be excused from paying the filing fee. Cal Rules of Ct 3.50-3.58. The clerk must file the notice of appeal even if the appellant does not present the filing fee, the deposit, or an application form or order granting a waiver under Cal Rules of Ct 3.50-3.58 (indigency). Cal Rules of Ct 8.100(b)(3).

Notice on failure to pay fees. If (a) the appellate court receives notice from the superior court that the filing of the appeal was not accompanied by the filing fee, a certificate that the fee has been paid, or an order granting a waiver under Cal Rules of Ct 3.50-3.58 (indigent appellant); (b) the check for the filing fee is dishonored; or (c) an application under Cal Rules of Ct 3.50-3.58 is denied, the court clerk will give notice to appellant that the appeal may be dismissed unless, within 15 days after the notice is sent, the appellant pays the fee or files an application for waiver under Cal Rules of Ct 3.50-3.58, if the appellant has not previously filed such an application. Cal Rules of Ct 8.100(c).

Notice on failure to make deposit. If appellant then fails to comply with Cal Rules of Ct 8.100(b) (deposit requirements), the superior court clerk must promptly notify the appellant in writing that the appeal may be dismissed unless, within 15 days after the notice is sent, the appellant either (a) makes the deposit or (b) files an application in the superior court for a waiver under Cal Rules of Ct 3.50-3.58 (indigency) if appellant has not previously filed such an application. Cal Rules of Ct 8.100(d)(1). If the appellant then fails to comply with the notice, the superior court clerk must notify the reviewing court of the default. Cal Rules of Ct 8.100(d)(2).

Dismissal. If the appellant fails to comply with a notice given under Cal Rules of Ct 8.100(c)(2) (failure to pay fees) or the superior court clerk notifies the reviewing court of a default under Cal Rules of Ct 8.100(d)(2) (deposit not paid), the reviewing court may dismiss the appeal but may vacate the dismissal for good cause. Cal Rules of Ct 8.100(c)(3), (d)(3). See §§11.40-11.41.

Slight delay seldom causes dismissal. A reviewing court will probably not dismiss an appeal if the fees are paid only slightly late. However, when there has been a lengthy delay without adequate excuse, the appeal may be dismissed. See, *e.g., Baron v Held* (1959) 176 CA2d 252, 1 CR 181; *McGinnis v Monjoy* (1959) 169 CA2d 519, 337 P2d 494.

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§11.59 e. Failure to File Opening Brief

Failure to file opening brief in timely manner can result in dismissal. If appellant fails to file its opening brief within the prescribed time (see Cal Rules of Ct 8.212(a)), the appellate court clerk must notify the parties that if the brief is not filed within 15 days, the appeal will be dismissed. Within the 15-day period, a party may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may impose the sanction under Cal Rules of Ct 8.220(c) without further notice. Cal Rules of Ct 8.220(d). Thus, if the brief is not filed within the time granted, the appeal may be dismissed. See Cal Rules of Ct 8.220(a), (c), (d).

Under the Rules of Court that existed prior to January 1, 2002, if the clerk failed to send out the notice or if the court does not dismiss the appeal on its own motion, respondent may move to dismiss the appeal. Former Cal Rules of Ct 8.220(a). See, *e.g., Estate of Doran* (1957) 154 CA2d 230, 316 P2d 83 (relief from default denied when no brief filed after eight extensions and clerk's notices properly given).

Rationale for dismissal. The appellate court may consider appellant's failure to file a brief in support of issues on appeal as an acknowledgment that the alleged grounds for reversal are insufficient and as abandonment of the appeal, justifying dismissal. *Doran v White* (1961) 196 CA2d 676, 16 CR 841; *Freitas v City of Atwater* (1961) 196 CA2d 289, 296, 16 CR 397.

Dismissal for technicality is disfavored. The reviewing courts' policy is "to hear appeals on their merits when that may be done without material detriment to the litigants and reasonable excuse for the delay appears." *O'Connell Gold Mines, Ltd. v Baker* (1943) 60 CA2d 777, 141 P2d 785. Without very unusual circumstances, therefore, a motion to dismiss an appeal for failure to file the opening brief in time is unlikely to succeed if appellant can offer the brief without further delay. Also, relief from default is usually granted when there is a reasonable excuse for the delay and when the brief is presented at the hearing on a motion to dismiss (*Peebler v Olds* (1945) 26 C2d 656, 658, 160 P2d 545) or when it can be filed shortly thereafter (*Strong v Mack* (1943) 58 CA2d 805, 137 P2d 748), although dismissal is still discretionary with the court (see *O'Connell Gold Mines, Ltd. v Baker, supra*; *Murphy v Krumm* (1943) 21 C2d 846, 136 P2d 8).

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§11.60 B. Motion to Vacate Order of Dismissal Before Remittitur Issues

If the appellate court orders a dismissal, any party to the appeal may file a motion in the reviewing court to vacate the order and reinstate the appeal. *In re Martin* (1962) 58 C2d 133, 23 CR 167; *Sanders v Warden* (1951) 106 CA2d 707, 236 P2d 19. The motion should comply with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57 and show good cause for vacating the dismissal. Pending the decision on the motion, the affected party should request the court to stay issuance of the remittitur, which is issued after the final determination of the appeal (Cal Rules of Ct 8.272(a)) and which revests the trial court with jurisdiction (*Riley v Superior Court* (1957) 49 C2d 305, 310, 316 P2d 956). See discussion in §11.37 on immediate issuance or stay of remittitur and recall of remittitur. The appellate court, for good cause shown, may stay issuance of the remittitur for a reasonable period, or it may recall the remittitur on its own motion, on noticed motion or petition of a party supported by affidavits (or declarations; see CCP §2015.5), or a stipulation setting forth facts justifying the granting of a motion. Cal Rules of Ct 8.272(c).

For a thorough discussion of the remittitur and sample forms, see chap 18.

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C. Motion for Relief From Default

§11.61 1. Grounds and Procedure

Party in default for failing to comply with procedural rules may move for relief from default. A party's failure to comply with the procedural rules in the appellate court places the party in default and may result in dismissal of the appeal on the court's own motion or on that of another party. See §§11.57-11.59. To prevent dismissal, the party may move for relief from default under Cal Rules of Ct 8.60(d), even if a motion for dismissal has not yet been filed by an opposing party. Alternatively, the party may oppose a motion to dismiss by responding with a motion seeking relief from the default. (See discussion below.) Under either method, on a showing of good cause, the reviewing court may relieve a party from a default resulting from any failure to comply with the appellate court's rules, except the failure to file a timely notice of appeal. Cal Rules of Ct 8.60(d). A motion for relief from default should comply with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57. For a form for the motion, see §11.62.

Default in failing to file timely petition for review. Although Cal Rules of Ct 8.500(e)(2) states that the time for filing a petition for supreme court review "shall not be extended," it also states that the chief justice "may relieve a party from a failure to file a timely petition for review if the time for the court to order review on its own motion has not expired." For discussion of time period to file petition for review, see §§22.14-22.23.

Relief from default is liberally granted. Reviewing courts, in the interests of justice and in furtherance of the policy of hearing appeals on the merits (*Haskins v Crumley* (1957) 152 CA2d 64, 312 P2d 276), liberally grant relief from default.

Good cause and lack of prejudice must be shown. To obtain relief, the party in default must show good cause, such as mistake, inadvertence, surprise, or excusable neglect similar to that required by CCP §473. See *Estate of Wolper* (1956) 146 CA2d 249, 303 P2d 578. Appellant must demonstrate that the delays have not caused "manifest injustice or prejudice" to respondent (*Oppenheim v Reiter* (1956) 142 CA2d 545, 548, 298 P2d 868) and that appellant has not engaged in "contumacious or willful" misconduct (*Jeffers v Screen Extras Guild* (1956) 140 CA2d 604, 608, 295 P2d 417). In the absence of good cause excusing noncompliance, the appellate rules on procedures and time limits are mandatory. *Baron v Held* (1959) 176 CA2d 252, 1 CR 181; *Babb v Eistrat* (1956) 146 CA2d 252, 303 P2d 785.

Factors considered by court. In ruling on a motion for relief from default, the court generally considers all relevant factors and balances the equities. Each case is thus determined on its facts. *Clement v Reclamation Bd.* (1948) 89 CA2d 115, 119, 200 P2d 196. The court weighs such factors as length of delays, nature and reasons for default, and relative injury to each party on granting or denying relief. *Thornburg v Rais* (1950) 100 CA2d 735, 737, 224 P2d 806; *Jarkieh v Badagliacco* (1945) 68 CA2d 426, 431, 156 P2d 969.

Motion for relief from default in response to a motion to dismiss. When appellant is faced with a motion to dismiss based on failure to comply with the appellate court rules, appellant, in addition to filing written opposition, should ascertain whether it is the local practice to file a formal motion for relief from default. See *Sanders v Warden* (1951) 106 CA2d 707, 236 P2d 19, in which the court ruled that relief from default for failure to comply with former Cal Rules of Ct 17(a) (now Cal Rules of Ct 8.220(a)) (failure to file brief) could be granted only on noticed motion under CCP §473. If a hearing date has been scheduled on a motion to dismiss, and if appellant has filed a motion for relief from default, appellant should request that its countermotion be heard on the same calendar.

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§11.62 2. Form: Motion for Relief From Default

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11.62-1 Motion for relief from default

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR RELIEF FROM DEFAULT;
SUPPORTING MEMORANDUM; DECLARATION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of the** _ _[*name of court*]_ _**:**

Appellant moves this court for relief from default and for permission to _ _[*e.g., file appellant's opening brief/prepare clerk's transcript on appeal/pay costs of transcript on appeal*]_ _ **on or before** _ _[*date*]_ _**.**

This motion is made on the ground(s) that good cause exists for granting this motion under California Rules of Court 8.60(d) in that _ _[*set out specific reasons*]_ _**.**

This motion is based on this notice, the attached declaration(s) of _ _[*name(s)*]_ _**, the attached memorandum in support of motion for relief from default, and the record on appeal on file in this proceeding.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Copies: See §11.10.

Comment: The declaration(s) should set out the facts constituting mistake, surprise, inadvertence, or excusable neglect that led to the default from which relief is sought. See §11.61. For a form for a declaration, see §11.47. See Cal Rules of Ct 8.63 for policies and factors constituting good cause.

Counsel should submit a proposed order with the motion. The order, and all other documents that support the motion, should be served on all parties. See Cal Rules of Ct 8.25, 8.54(a)(1)-(2). A proposed order can be adapted from other forms in this chapter. See, *e.g.,* §11.18.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

When the court of appeal grants a motion for relief from default relating to a matter involving the office of the superior court clerk (*e.g.,* preparation of clerk's transcript), counsel should bring a conformed copy of the resulting order from the court of appeal to the superior court appellate court clerk (*i.e.,* superior court clerk handling appellate court matters) to ensure the carrying out of the terms of the order (*e.g.,* when filing a notice designating the record or paying the costs of preparing a transcript).

For caption and cover requirements, see §11.6.

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D. Augmentation and Correction of Record

§11.63 1. Augmentation of Record

Record may be augmented by motion of a party or on court's own motion. On the motion of any party or on the court's own motion, an appellate court may order the record augmented to include (Cal Rules of Ct 8.155(a)(1)):

- Any document filed or lodged in the case in superior court; or
- A certified transcript or an agreed or settled statement of oral proceedings not designated under Cal Rules of Ct 8.130 (reporter's transcript).

NOTE: The appellant is responsible for the cost of any additional transcript the court orders. Cal Rules of Ct 8.155(a)(1)(B).

Any party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. The attachment must be consecutively numbered, beginning with the number 1. If the reviewing court grants the motion, it may augment the record with the copy. Cal Rules of Ct 8.155(a)(2). If the party cannot attach a copy of the matter to be added, the party must identify it as required under Cal Rules of Ct 8.130 (reporter's transcript) and 5 (clerk's transcript). Cal Rules of Ct 8.155(a)(3). The reviewing court clerk must send all parties notice of the receipt and filing of any matter under this rule. Cal Rules of Ct 8.155(d).

On augmentation of the record when a material part of the record, or of any transcript or appendix, is incorrect or lacks proper certification, see §11.65. On permissibility of augmenting a settled statement, see §11.71. On local appellate court district rules on augmentation or correction of the record, see §§11.67-11.70.

Procedure generally. A party wishing to augment the record should follow the noticed motion procedure of Cal Rules of Ct 8.40, 8.44, 8.54. On use of the formal motion procedure, see §11.66. For a form for a declaration in support of a request to augment the record, see §11.72.

Make requests for augmentation as soon as possible after receiving record on appeal. Requests for augmentation should be made within a reasonable time after receiving the record on appeal and before filing the opening brief unless unusual or unavoidable circumstances have caused a delay. *People v Preslie* (1977) 70 CA3d 486, 491, 138 CR 828. It would be prudent to suggest augmentation at the earliest possible time, to set forth detailed facts justifying the augmentation, and to demonstrate good cause for granting the augmentation.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.64 2. Form: Notice to Clerk (or Reporter) to Prepare and Certify Missing Material (Cal Rules of Ct 8.155(a)) [Deleted]

§11.64 2. Form: Notice to Clerk (or Reporter) to Prepare and Certify Missing Material (Cal Rules of Ct 8.155(a)) [Deleted]

This section was deleted because a formal motion must be made to request augmentation of the record. Cal Rules of Ct 8.155(a)(1). See §11.66.

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§11.65 3. Omissions and Corrections of Record

Omissions. If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in superior court specifying the omitted portion and requesting that it be prepared, certified, and sent to the reviewing court. The party must serve a copy of the notice on the reviewing court. Cal Rules of Ct 8.155(b)(1).

The clerk or reporter must comply with a notice under Cal Rules of Ct 8.155(b)(1) within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment under Cal Rules of Ct 8.155(a), attaching a copy of the notice. Cal Rules of Ct 8.155(b)(2).

Corrections. On motion of a party, on stipulation, or on its own motion, the reviewing court may order the correction or certification of any part of the record. Cal Rules of Ct 8.155(c)(1).

The reviewing court may order the superior court to settle disputes about omissions or errors in the record. Cal Rules of Ct 8.155(c)(2). For a form for a declaration in support of a request to correct the record, see §11.72.

Notice. The reviewing court clerk must send all parties notice of the receipt and filing of any matter under this rule. Cal Rules of Ct 8.155(d).

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§11.66 4. Formal Motion for Augmentation or Correction

Formal motion procedure to augment or correct record. The motion should be made at the earliest possible time. In support of a motion to augment the record, the moving party should discuss in specific detail the relevance of the additional documents to the issues on appeal, the good cause for augmentation of the record, and the reasons, if any, for any substantial delay in requesting augmentation or for the failure to include the documents in the original designation of the record.

For a form for a declaration in support of a motion to augment the record, see §11.72.

Formal motion to correct record. In support of a motion to correct the record, the moving party should explain any delays in making the motion and include the clerk's declaration or certificate, if the alleged error was in the clerk's transcript, or a declaration of the court reporter, clerk, or trial judge, if an alleged error was in the reporter's transcript, stating that the requested change would correct an error. See, *e.g., People v Williams* (1957) 153 CA2d 21, 24, 314 P2d 42. Although the reviewing court liberally grants motions to correct the record so that cases may be decided on their merits (*Averill v Lincoln* (1942) 52 CA2d 398, 399, 126 P2d 398), the moving party has the burden of showing that a material part of the record was incorrect (*People v Gross* (1956) 139 CA2d 607, 614, 294 P2d 88). The motion should be made as early as possible.

For a form for a declaration in support of a motion to correct the record, see §11.72.

Augmentation and correction of record is discretionary with court. Augmentation or correction, even if otherwise warranted, is not a matter of right but is discretionary with the court. *Russi v Bank of America* (1945) 69 CA2d 100, 102, 158 P2d 252.

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5. Local Rules of Courts of Appeal

§11.67 a. First Appellate District

The following are specific to civil appeals in the first appellate district:

- A motion to augment is not necessary if items were inadvertently omitted by the clerk or reporter. Counsel should immediately notify the trial court clerk, who must transmit forthwith the omitted item to the court of appeal with copy to counsel. 1st App Dist R 7(a).
- Appellant should file a request for augmentation in one motion within 30 days after the record is filed. Respondent should file any motion for augmentation within 30 days after appellant's opening brief is filed. Thereafter, the court considers any motion to augment only on a showing of good cause. 1st App Dist R 7(b).
- A motion to augment the clerk's transcript must include a declaration stating that the requested materials have been filed or lodged with the trial court, with copies or specific identification of the documents sought to be included in the clerk's transcript. The motion must be served on opposing counsel. 1st App Dist R 7(c).
- A motion to augment the reporter's transcript must identify with specificity the relevant portions sought to be appended, the name of the reporter, and date of hearing. Additionally, the motion must establish with some certainty how the material may be useful on appeal. Requests for jury voir dire must specify the exact questioning, by which counsel, of which juror, and the reasons justifying the request. 1st App Dist R 7(d).
- All motions to augment must be made in good faith and not for purpose of delay. 1st App Dist R 7(e).

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§11.68 b. Second Appellate District

The following are specific to civil appeals in the second appellate district:

- A motion to augment is not necessary if items were inadvertently omitted by the clerk or reporter. Counsel should notify the trial court clerk, who must transmit forthwith the omitted item to the court of appeal with copy to counsel. 2d App Dist R 2(a).
- Appellant may file a motion to augment containing all its requests within 40 days after the record is filed. Respondent may make a similar motion within 30 days after appellant's opening brief is filed. Thereafter, a motion to augment will be granted only on a showing of good cause for the delay. 2d App Dist R 2(b).
- A motion to augment or correct the clerk's transcript should include copies of the documents requested or their specific identification and an explanation for their omission. The motion must also include a declaration stating that the requested materials had been filed or lodged with the trial court. The motion and all documents supporting it must be served on opposing counsel. 2d App Dist R 2(c).
- On a motion to augment the reporter's transcript, the portion of the relevant record must be identified with specificity, including the name of the reporter and date of hearing. Furthermore, the motion must establish with certainty the usefulness of the requested material on appeal. 2d App Dist R 2(d).
- The filing of or ruling on a motion to augment does not automatically extend other time deadlines under the California Rules of Court (*e.g.,* time to file brief). If additional time is necessary, counsel should request an extension in the motion to augment. 2d App Dist R 2(e).
- A prerequisite for a motion to augment is that the motion be made in good faith and that the motion is not taken for the purpose of delay. 2d App Dist R 2(f).
- A motion to augment must be accompanied by a proposed order. 2d App Dist R 2(g). A form for this purpose is provided by the court, but it is not required.

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§11.69 c. Third Appellate District [Deleted]

The material in this section has been deleted because of a change in the local rules of the third appellate district, which currently has no special requirements for augmentation or correction in addition to those stated in Cal Rules of Ct 8.155.

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§11.70 d. Fifth Appellate District

The following rules regarding augmenting the record in a civil appeal apply in the fifth appellate district:

- All requests for augmentation of the record by appellant should be filed in one motion within 40 days after the record is filed. Any requests for augmentation by respondent should be filed in one motion within 30 days after appellant's opening brief is filed. Other motions to augment will be granted only on a showing of good cause for the delay. 5th App Dist R 1(b).
- A motion to augment or correct the clerk's transcript must contain certified copies of the requested documents or a specific identification of the documents and an explanation for their omission. 5th App Dist R 1(c).
- A reporter's transcript augmentation motion must identify the portion of the record sought to be augmented with specificity, including the reporter's name, the date of hearing, and a statement demonstrating with some certainty how the portion requested may be useful on appeal. 5th App Dist R 1(d).
- A motion to augment will not automatically extend the time to comply with other procedural deadlines in an appeal. If an extension is necessary for other matters, it may be sought separately or in the motion to augment. 5th App Dist R 1(e).
- An augmentation of the record motion must be made in good faith and not for purpose of delay. 5th App Dist R 1(f).

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§11.71 6. Augmentation of Record Not Available When Appeal Is Based on Settled Statement

When appellant proceeds by way of settled statement under Cal Rules of Ct 8.137, rather than by clerk's transcript or another procedure (see Cal Rules of Ct 8.122, 8.123, 8.124, 8.128, 8.130, 8.134), the trial judge's ruling on the settled statement is final. A party may not correct or augment the statement by a motion in the reviewing court under Cal Rules of Ct 8.155. *Burns v Brown* (1946) 27 C2d 631, 636, 166 P2d 1. An appellant who cannot obtain a settled statement should request the appellate court to change the nature of the appeal from a settled statement appeal to an appeal based on a transcript, and at the same time request relief from any defaults that may have occurred. *Burns v Brown*, *supra; Averill v Lincoln* (1944) 24 C2d 761, 151 P2d 119.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.72 7. Form: Declaration in Support of Request or Motion to Augment or Correct Record on Appeal; Order

§11.72 7. Form: Declaration in Support of Request or Motion to Augment or Correct Record on Appeal; Order

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11.72-1 Declaration in support of request or motion to augment or correct record on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

DECLARATION IN SUPPORT OF _ _[*REQUEST/MOTION*]_ _ **TO** _ _[*AUGMENT/CORRECT*]_ _ **RECORD ON APPEAL; ORDER**

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record for _ _[*appellant/respondent*]_ _**.**

2. On _ _[*date*]_ _**, after trial without jury, the Honorable** _ _[*name*]_ _**, Superior Court of the State of California for the County of** _ _[*county*]_ _**, granted judgment to** _ _[*respondent/appellant*]_ _**,** _ _[*name*]_ _**.**

3. On _ _[*date*]_ _**, appellant filed a notice of appeal from the judgment entered by the court.**

4. On _ _[*date*]_ _**, appellant filed a notice designating** _ _[*specify form of record, e.g., the clerk's and reporter's transcript*]_ _ **on appeal. On** _ _[*date*]_ _**, respondent filed** _ _[*specify any counterdesignation filed by respondent, e.g., a notice of additions to the clerk's and reporter's transcript*]_ _**.**

5. The record on appeal was transmitted to the court of appeal by the superior court clerk on _ _[*date*]_ _**.**

[*Add if request is for augmentation*]

6. _ _[*Appellant/Respondent*]_ _ **respectfully requests, in the interests of justice, that this court enter its order augmenting the record on appeal to include the following matters not originally designated by any party:** _ _[*Insert list of files and transcripts requested to augment the record on appeal*]_ _**.**

[*Add if request is for correction*]

[7]. _ _[*Appellant/Respondent*]_ _ **requests that the** _ _[*clerk's/ reporter's*]_ _ **transcript be corrected in the following respects:** _ _[*Insert list of errors with corrections requested*]_ _**.**

[*Continue*]

[8]. Good cause exists for this _ _[*request/motion*]_ _ **in that** _ _[*e.g., the record on appeal would be incomplete without them/these corrections are necessary for a complete and accurate record of the material issues on appeal*]_ _**. The** _ _[*additional/corrected*]_ _ **material is relevant to the issues on appeal, in that:** _ _[*Show relevance*]_ _**.**

[9]. _ _[*Appellant/Respondent*]_ _ **further requests that this court enter an order requiring the clerk of the superior court to transmit to the clerk of the court of appeal** _ _[*e.g., the superior court file containing the requested matters*]_ _ **as part of the record on appeal.**

If called as a witness I could and would competently testify to all of the foregoing of my own personal

knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

ORDER

Based on the _ _[*request/motion*]_ _ of _ _[*appellant/respondent*]_ _ and good cause appearing,

IT IS ORDERED that the record on appeal be _ _[*augmented/corrected*]_ _ as follows: _ _[*State desired change*]_ _.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Chief/Presiding*]_ _
Justice

Copies: See §§11.6, 11.10, and Comment below.

Comment: The order may follow the request or motion, or it may be on a separate page. Before submitting a proposed order, counsel should consult local practice to learn whether the court in which the case is pending prepares its own orders.

The clerk of the reviewing court must mail to each party a copy of any order augmenting the record on appeal. Cal Rules of Ct 8.155(d).

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E. Motion to Strike Defective Brief

§11.73 1. Court's Action to Correct Defective Brief

Court may order brief corrected or replaced or may disregard defects entirely. If a brief does not comply with the requirements of Cal Rules of Ct 8.204 (contents and form of briefs), the following may occur (Cal Rules of Ct 8.204(e)):

- The reviewing court clerk may decline to file it, but must mark it "received but not filed" and return it to the party; or
- If the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice:
- Order the brief returned for corrections and refiling within a specified time;
- Strike the brief with leave to file a new brief within a specified time; or
- Disregard the noncompliance.

Reviewing courts usually allow a reasonable time for counsel to file an amended brief after a defective brief has been stricken. *People v Barry* (1957) 149 CA2d 646, 308 P2d 915 (30 days). See also *Litzmann v WCAB* (1968) 266 CA2d 203, 205, 71 CR 731. Occasionally, the court may request counsel to correct a defective brief by eliminating matters outside the record (*People v Sakelaris* (1957) 151 CA2d 758, 312 P2d 263) or by inserting references to the record (*Smith v Smith* (1961) 188 CA2d 318, 10 CR 279). If a brief contains language that is scandalous or disrespectful to the court, officials, or litigants, the appellate court has the power to strike the brief in its entirety. *Carpenter v Pacific Mut. Life Ins. Co.* (1937) 10 C2d 307, 314, 74 P2d 761, aff'd sub nom *Neblett v Carpenter* (1938) 305 US 297, 83 L Ed 182, 59 S Ct 170; *Williams v Davis* (1944) 67 CA2d 274, 154 P2d 22.

Court may dismiss appeal for persistent neglect of rules. The court may dismiss the appeal if the nonconforming brief was filed after the court has stricken a prior nonconforming brief. In *Berger v Godden* (1985) 163 CA3d 1113, 210 CR 109, the court dismissed an appeal because, after appellant's first brief was stricken for failure to conform to the rules of court, his second brief again ignored the rules by failing to address two issues specified by the court and by not providing any pertinent or intelligible legal argument. The failure to provide appropriate legal argument was held an abandonment of the appeal. 163 CA3d at 1119.

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§11.74 2. Court's Consideration of Issues in Defective Brief

Court may fully consider issues despite serious defects. Even serious defects may result only in criticism of counsel who prepared the brief, with the issues still considered in full (see *Timmsen v Forest E. Olson, Inc.* (1970) 6 CA3d 860, 868, 86 CR 359), if the court decides that it is in the best interests of justice not to strike the brief (*Richmond Redev. Agency v Western Title Guar. Co.* (1975) 48 CA3d 343, 347, 122 CR 434).

Arguments defectively presented may prompt little consideration. Appellate courts have sometimes granted little, if any, consideration to arguments that are improperly or defectively presented. The reviewing court may consider issues waived if the points and authorities on the issues are not stated separately in the brief and are not supported by appropriate references to the record or by sufficient analysis and review of the evidence. *Grand v Griesinger* (1958) 160 CA2d 397, 403, 325 P2d 475; *Routh v Palm Oil Co.* (1958) 160 CA2d 359, 324 P2d 936.

It is often wise not to move to strike a defective brief. Although a party has the option of filing a motion to strike a defective opposition brief, if counsel believes that the opposition party's brief is so defective that the reviewing court is likely to disregard it in whole or in part, it may be best not to request that the brief be stricken or corrected, because the probable result will be an order allowing the opposing party to correct the deficiencies. Counsel may, of course, raise the defective nature of the opposition brief in the oral argument, if any.

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§11.75 3. Form: Motion to Strike Brief

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11.75-1 Motion to strike brief

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION TO STRIKE BRIEF; SUPPORTING MEMORANDUM; DECLARATION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of the** _ _[*name of court*]_ _**:**

_ _[*Appellant/Respondent*]_ _**,** _ _[*name*]_ _**, moves the court for an order striking** _ _[*e.g., appellant's opening*]_ _ **brief.**

1. This motion is made under California Rules of Court 8.204(e)(2)(B) on the ground that _ _[*e.g., appellant's opening brief*]_ _ **does not comply with the Rules of Court in that** _ _[*specify reasons brief is defective*]_ _**. This defect is in violation of California Rules of Court** _ _[*identify rule*]_ _**.**

2. This motion is based on this notice, the attached declaration(s) of _ _[*name(s)*]_ _**, the attached memorandum in support of motion to strike, and the record on appeal and brief on file in this motion.**

In connection with this motion, _ _[*appellant/respondent*]_ _ **requests oral argument.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: See §11.10.

Comment: The declaration and supporting memorandum should specify the reasons the opposition brief is defective. Attached to the moving papers should be a proposed order, which does not require a separate caption. On requirements for supporting documents and proof of service, see §§11.9-11.10.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

California Rules of Court 8.204(e) uses the word "motion," and a party attempting to strike another party's defective brief should use the procedure of Cal Rules of Ct 8.54, with proof of service attached. For caption and cover requirements, see §11.10.

Note, however, that it is often not wise even to file this motion. See §11.74.

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F. Motion for Factual Determinations on Appeal

§11.76 1. Appellate Court May Make Factual Determinations and Take Additional Evidence

General rule. California Constitution art VI, §11 states: "The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right." The legislature implemented the constitutional authority by providing that the reviewing court may make "factual determinations contrary to or in addition to those made by the trial court," and that such determinations may be based on the evidence at trial "with or without the taking of evidence by the reviewing court." CCP §909. For the purpose of making a factual determination "or for any other purpose in the interests of justice," the appellate court may take "additional evidence of or concerning facts occurring at any time prior to the decision of the appeal." CCP §909. The procedure for requesting findings and additional evidence on appeal is set forth in Cal Rules of Ct 8.252.

Rule is to be liberally construed. Code of Civil Procedure §909, by its express terms, is to be liberally construed so that cases may be decided with finality by a single appeal without further proceedings in the trial court or appellate court, if the interests of justice would thus be served. See *Marriage of Karlin* (1972) 24 CA3d 25, 34, 101 CR 240.

Purpose and limits of rule. Although CCP §909 gives the appellate court authority to make factual determinations and take additional evidence, it was not intended to create a substitute for a motion for a new trial on the basis of newly discovered evidence. *Estate of Schluttig* (1950) 36 C2d 416, 423, 224 P2d 695 (ruling under former CCP §956a); *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 602, 128 CR 697 (same). The purpose of the statute's giving the reviewing court this authority is to enable the court to terminate litigation by affirmance, or modification and affirmance of the judgment, or by reversal with directions to the trial court to enter judgment for appellant, if it appears that respondent could not make a further showing in the trial court based on any reasonable theory of the case. *People v Benford* (1959) 53 C2d 1, 6, 345 P2d 928; *People v Pena* (1972) 25 CA3d 414, 101 CR 804, disapproved in part on other grounds in *People v Duran* (1976) 16 C3d 282, 292, 127 CR 618.

Rule is rarely applied. In practice, the court's authority under CCP §909 is used sparingly (see *Tyrone v Kelley* (1973) 9 C3d 1, 13, 106 CR 761, 769; *Tupman v Haberkern* (1929) 208 C 256, 269, 280 P 970; *Conservatorship of Hart* (1991) 228 CA3d 1244, 1257, 279 CR 249; *Jacobs v State Bd. of Optometry* (1978) 81 CA3d 1022, 1034, 147 CR 225) and only as an extraordinary remedy in exceptional circumstances (*Tyrone v Kelley*, *supra; Jacobs v State Bd. of Optometry*, *supra*). See also *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 830, 258 CR 676. This preference for appellate courts to exercise sparingly their authority to take evidence and make findings of fact on appeal under CCP §909 and Cal Rules of Ct 8.252(c) is echoed in the Advisory Committee Comment to Cal Rules of Ct 8.252(c), which cites *In re Zeth S.* (2003) 31 C4th 396, 2 CR2d 683.

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§11.77 2. Proper Use of Power in Making Factual Determinations

Appellate court may not make factual determinations to resolve conflicts in evidence or as substitute for hearing under CCP §632. The authority under CCP §909 to make factual determinations may not be used to resolve conflicts in evidence (*Marriage of Davis* (1983) 141 CA3d 71, 75, 190 CR 104) or as a substitute for a hearing on request for a statement of decision under CCP §632.

Appellate court may make factual determinations to affirm or modify judgment under limited circumstances. The appellate court may make factual determinations to affirm or modify the judgment when the trial court:

- Failed to make a required factual determination (*Kenney v Kenney* (1934) 220 C 134, 138, 30 P2d 398; *Guardianship of Marino* (1973) 30 CA3d 952, 961, 106 CR 655; *Kerr Land & Timber Co. v Emmerson* (1969) 268 CA2d 628, 635, 74 CR 307; *Murphy v San Gabriel Mfg. Co.* (1950) 99 CA2d 365, 369, 222 P2d 85);
- Made an incorrect finding through clerical error (*Green v Antoine* (1955) 133 CA2d 269, 276, 284 P2d 76);
- Made conflicting findings through clerical error (*Johndrow v Thomas* (1947) 31 C2d 202, 207, 187 P2d 681);
- Made an erroneous factual determination not supported by any evidence (*Salopek v Schoemann* (1942) 20 C2d 150, 156, 124 P2d 21; *Lane v Smith* (1943) 61 CA2d 340, 142 P2d 944); or
- Made insufficient factual determinations in support of the judgment (*Noce v Department of Fin.* (1941) 45 CA2d 5, 13, 113 P2d 716).

If the appellate court changes or corrects the trial court's factual determinations, with the result that the trial court's judgment would be erroneous, the appellate court has the authority to modify the judgment and affirm it as modified. *People v Good* (1963) 223 CA2d 298, 35 CR 825; *Hardy v Hardy* (1958) 164 CA2d 82, 330 P2d 281; *Beyl v Yasukochi* (1955) 135 CA2d 638, 287 P2d 863.

Examples. Generally, when the appellate court has exercised the right to make factual determinations, it has resulted in affirmation or affirmation with some modification of the judgment. See, *e.g., Johndrow v Thomas, supra* (trial court findings amended to correct clerical error); *Wallace Ranch Water Co. v Foothill Ditch Co.* (1935) 5 C2d 103, 122, 53 P2d 929 (findings on water rights modified to be consistent); *Guardianship of Marino, supra* (appellate court found that father's custody would be detrimental to minor, based on trial court's oral comments); *Beyl v Yasukochi, supra* (trial court findings modified to correct property description and limit easement so as to be consistent with conclusion of law).

Appellate court rarely makes new findings resulting in reversal. Even though the reviewing court has power under CCP §909 to make factual determinations in certain situations, the statute does not change the basic principle of law that the appellate court will not substitute its own factual determinations for those of the trial court. *People v Werner* (1960) 184 CA2d 441, 7 CR 548 (decided under former CCP §956a). Thus, the appellate court rarely corrects factual determinations or makes new factual determinations and reverses the trial court's judgment with directions for the trial court to enter a new judgment in appellant's favor. *Lockheed Aircraft Corp. v County of Los Angeles* (1962) 207 CA2d 119, 24 CR 316. As a rule, appellate courts infrequently make new or different findings for the purpose of reversal, and never for the purpose of resolving conflicts in the evidence. *Altadena Escrow Corp. v Beebe* (1960) 181 CA2d 743, 5 CR 530.

When facts considered by appellate court occur after entry of judgment. If the facts sought to be produced in the appellate court occurred after entry of judgment and dictate a judgment in appellant's favor, the reviewing court may take new evidence, make new factual determinations contrary to those of the trial court, and reverse the judgment with directions to the trial court. *Conservatorship of Hart* (1991) 228 CA3d 1244, 1258, 279 CR 249 (appellate court accepted new evidence on gift tax consequences and made new factual determinations, reversing trial court). See also *In re Elise K.* (1982) 33 C3d 138, 150, 187 CR 483; *People v Associated Oil Co.* (1931) 211 C 348, 296 P 273; *Stellman v Stellman* (1953) 119 CA2d 805, 260 P2d 209.

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§11.78 3. Limitations on Factual Determinations

A motion or request for the appellate court to make factual determinations will not be considered if:

- Trial by jury exists as a matter of right and has not been waived. CCP §909.
- There has been undue delay in presenting the application. *Replogle v Ray* (1941) 48 CA2d 291, 311, 119 P2d 980.
- The evidence is conflicting and the trial court has failed to include in its statement of decision the factual basis for its ruling on a particular issue. In this situation, the reviewing court does not supply missing findings and may remand the case to the trial court for additional factual determinations. *Treu v Kirkwood* (1954) 42 C2d 602, 268 P2d 482; *Packer v Sillas* (1976) 57 CA3d 206, 221, 128 CR 907.
- The trial court failed to issue a statement of decision (or failed to make factual determinations) and failed to announce what its statement of decision or findings would be. In this circumstance, the reviewing court reverses and remands the case to the trial court. *Estate of Pendell* (1932) 216 C 384, 14 P2d 506.
- The appeal is based solely on the clerk's transcript (*Estate of Dreer* (1932) 122 CA 763, 10 P2d 803) or judgment roll (*Cummings v Columbia Pictures Corp.* (1935) 8 CA2d 244, 47 P2d 504).

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§11.79 4. Procedure

Motion procedure. The request for factual determinations may be made by serving and filing a motion. Cal Rules of Ct 8.252(b).

Specific requirements. Aside from complying with the general requirements of Cal Rules of Ct 8.40, 8.44, and 8.54-8.57 on motions (see §§11.9-11.10), a motion for "findings of fact" must contain a draft of the specific proposed findings. Cal Rules of Ct 8.252(b). The adverse party may serve and file a written opposition to the request. See Cal Rules of Ct 8.54. For a form for the motion, see §11.80.

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§11.80 5. Form: Motion for Factual Determinations on Appeal

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11.80-1 Motion for factual determinations on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR FACTUAL DETERMINATIONS ON APPEAL; SUPPORTING MEMORANDUM; DECLARATION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of** _ _[*name of court*]_ _**:**

_ _[*Appellant/Respondent*]_ _, _ _[*name*]_ _**, moves this court for an order making factual determinations in its decision on the appeal in this case.**

1. This motion is made under Code of Civil Procedure section 909 and California Rules of Court 8.252(b), and on the ground that _ _[*state reasons for the request, e.g., the trial court failed to make certain determinations of fact; the trial court's determinations of fact were erroneous; or the trial court failed to make factual determinations based on the additional evidence presented by the requesting party in its application to the appellate court to take additional evidence on appeal*]_ _**.**

2. The specific _ _[*additional/contrary*]_ _ **factual determinations requested by** _ _[*appellant/respondent*]_ _ **are as follows:** _ _[*Insert specific language of proposed factual determinations and reasons for each factual determination requested*]_ _**.**

3. This motion is based on this notice, the attached declaration(s) of _ _[*name(s)*]_ _**, the attached supporting memorandum, and the record on appeal filed in this proceeding.**

In connection with this motion, _ _[*appellant/respondent*]_ _ **requests oral argument.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: See §11.10.

Comment: The motion must set forth in precise detail each factual determination that the requesting party wants the reviewing court to make (Cal Rules of Ct 8.252(b)), the reasons the party failed to make the request in the trial court, or, if made to the trial court, the reasons the trial court denied the request. If the motion is based on evidence to be produced in the appellate court, the requesting party should set forth in detail the evidence that would support each factual determination.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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G. Motion to Produce Additional Evidence on Appeal

§11.81 1. Discretionary and Rare

Appellate court's authority to take new evidence rarely exercised. Under CCP §909, the appellate court may take additional evidence for the purpose of making factual determinations or for any other purpose in the interests of justice. See discussion in §11.76 on authority for factual determinations and on taking evidence in the reviewing court. However, ordering this remedy is extremely rare. *Conservatorship of Hart* (1991) 228 CA3d 1244, 1257, 279 CR 249; *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1088, 267 CR 457. When exercising the power, it has been done sparingly, and usually to affirm a lower court decision to terminate litigation, not to reverse. *Kabisius v Board of Playground & Recreation* (1935) 4 C2d 488, 494, 50 P2d 1040; *Tupman v Haberkern* (1929) 208 C 256, 269, 280 P 970. Using new evidence on appeal to reverse is highly unusual. See *Conservatorship of Hart, supra; Stellman v Stellman* (1953) 119 CA2d 805, 260 P2d 209.

Court may not reweigh evidence. The authority to receive new evidence may not be used to reweigh evidence when there is conflicting evidence in the record or used as a substitute for a motion for new trial. *Spaulding v Cameron* (1952) 38 C2d 265, 270, 239 P2d 625*; Philippine Export & Foreign Loan Guar. Corp. v Chuidian, supra; Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 830, 258 CR 676.

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§11.82 2. Writs of Coram Nobis and Coram Vobis in Lieu of Motion to Produce Additional Evidence

When the new evidence sought to be admitted will become part of conflicting evidence to be reweighed, the normal procedure is to move in the trial court for a new trial under CCP §567. However, after the time for the filing of a new trial motion has elapsed, the only available remaining procedure for relief is a petition for writ of coram nobis in the trial court (if the notice of appeal has not been filed) or a writ of coram vobis (if the notice of appeal has been filed), because a motion to augment or a motion to produce additional evidence on appeal is not appropriate. *Rollins v City & County of San Francisco* (1974) 37 CA3d 145, 147, 112 CR 168. Both petitions provide a means of seeking relief when no other remedy is available and when newly discovered evidence, not known and thus not presented at trial, would have prevented the entered judgment. *Rollins v City & County of San Francisco, supra.* The two petitions are used in California almost exclusively to attack judgments in criminal cases, and are seldom used in civil proceedings. See California Civil Writ Practice (4th ed Cal CEB 2008).

Some cases have limited the use of these writs to cases involving extrinsic fraud that prevented a party from presenting evidence. See *Betz v Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841; *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Mullen v Department of Real Estate* (1988) 204 CA3d 295, 301, 251 CR 12; *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 6, 156 CR 805.

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§11.83 3. When Court Will Deny Motion to Take New Evidence

The reviewing court has wide discretion in ruling on a motion for production of additional evidence on appeal in nonjury cases, but it usually denies the motion if:

- There was undue delay in presenting the application. *Tsakos Shipping & Trading S.A. v Juniper Garden Town Homes, Ltd.* (1993) 12 CA4th 74, 87, 15 CR2d 585; *Crespo v Cook* (1959) 168 CA2d 360, 336 P2d 31; *Bauer v Bauer* (1940) 38 CA2d 309, 317, 100 P2d 1070.
- The evidence was not presented in the trial court even though it was available and could have been presented if due diligence had been exercised. *Conservatorship of Hart* (1991) 228 CA3d 1244, 1257, 279 CR 249; *Elbert, Ltd. v Hall* (1950) 101 CA2d 208, 214, 225 P2d 590; *Baker v Ferrel* (1947) 78 CA2d 578, 177 P2d 973.
- The proffered evidence is merely cumulative. *Estate of Schluttig* (1950) 36 C2d 416, 423, 224 P2d 695; *Conservatorship of Hart, supra; Donovan v City of Santa Monica* (1948) 88 CA2d 386, 397, 199 P2d 51.
- The proffered evidence is immaterial or irrelevant. See, *e.g., National Dollar Stores, Ltd. v Wagnon* (1950) 97 CA2d 915, 922, 219 P2d 49; *Kapitan v Smith* (1945) 70 CA2d 454, 161 P2d 270.
- Evidence is inadmissible, *e.g.,* hearsay. *Wolf v Drew* (1928) 94 CA 449, 450, 271 P 346.
- There is conflicting evidence in the record and substantial evidence support the trial court's findings. *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Spaulding v Cameron* (1952) 38 C2d 265, 270, 239 P2d 625.
- The evidence would not be determinative of the issues in the case (*Morrison v Jaksick* (1960) 187 CA2d 175, 181, 9 CR 474; *Hennelly v Bank of America* (1951) 102 CA2d 754, 760, 228 P2d 79), or no useful purpose would be served in receiving such evidence (*Continental Cas. Co. v Phoenix Constr. Co.* (1956) 46 C2d 423, 440, 296 P2d 801; *Pack v Vartanian* (1965) 232 CA2d 466, 476, 42 CR 729).
- The trial court was not entitled to take evidence. See, *e.g., Douglass v Dahm* (1950) 101 CA2d 125, 224 P2d 914 (motion to take additional evidence on appeal denied in case of appeal from judgment on the pleadings).
- The evidence would conflict with stipulated facts. *City of Port Hueneme v City of Oxnard* (1959) 52 C2d 385, 391, 341 P2d 318.
- The evidence would be so extensive that it would result in a virtual retrial of all the issues. *Halvorsen v Halvorsen* (1941) 44 CA2d 211, 112 P2d 28.
- The appeal is based exclusively on the judgment roll. *Cummings v Columbia Pictures Corp.* (1935) 8 CA2d 244, 247, 47 P2d 504.
- The additional evidence would conflict with the theory of the case presented at trial. See *Addison v Susanville Lumber, Inc.* (1975) 47 CA3d 394, 120 CR 737.

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§11.84 4. Procedure

Under Cal Rules of Ct 8.252(c), a request to produce additional evidence in the appellate court must be made by motion. See, *e.g., Jackson v Wallace* (1976) 59 CA3d 784, 788, 131 CR 218. See §§11.9-11.10. The reviewing court may grant or deny the motion to produce additional evidence in whole or in part, and it may make its order subject to specified conditions. If the motion is granted, the court will direct that the evidence be taken before the court, a department or justice of the court, or a court-appointed referee. The court will also given reasonable notice of the time and place of the taking of evidence and set forth the issues on which the evidence will be taken. When documentary evidence is offered by a party, an original, a certified copy, or a photocopy may be submitted and the court may admit the document into evidence and add it to the record on appeal. The court may admit the document without a hearing. Cal Rules of Ct 8.252(c)(3). For a form for the motion, see §11.85.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.85 5. Form: Motion for Production of Additional Evidence on Appeal

§11.85 5. Form: Motion for Production of Additional Evidence on Appeal

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11.85-1 Motion for production of additional evidence on appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR PRODUCTION OF ADDITIONAL EVIDENCE ON APPEAL; SUPPORTING MEMORANDUM; DECLARATION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of the** _ _[*name of court*]_ _**:**

1. _ _[*Appellant/Respondent*]_ _**,** _ _[*name*]_ _**, moves this court for an order allowing production of additional evidence on appeal.**

2. This motion is made under Code of Civil Procedure section 909 and California Rules of Court 8.252(c), and on the ground(s) that _ _[*state grounds, e.g., since the entry of judgment in this matter and the filing of the notice of appeal additional material evidence determinative of the issues on appeal has come to the attention of appellant*]_ _**.**

3. The additional evidence that _ _[*appellant/respondent*]_ _ **wishes to produce on appeal is as follows:** _ _[*insert a summary of evidence on appeal*]_ _**.**

[*Option 1: When party was unable to produce evidence at trial*]

4. _ _[*Appellant/Respondent*]_ _**,** _ _[*name*]_ _**, was unable to produce this evidence in the trial court because:** _ _[*insert reasons*]_ _**.**

[*Option 2: When facts occurred after judgment and after expiration of time to move for new trial*]

4. The facts sought to be proved by _ _[*appellant/respondent*]_ _ **occurred after judgment and after the expiration of the time to move for a new trial, and are set forth in the declaration of** _ _[*name*]_ _**, attached hereto, together with the reasons the facts should be produced on appeal.**

[*Continue*]

5. This motion is based on this notice, the attached declaration(s) of _ _[*name(s)*]_ _**, the attached supporting memorandum, and the record on appeal filed in this proceeding.**

In connection with this motion, _ _[*appellant/respondent*]_ _ **requests oral argument.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: See §11.10.

Comment: The motion, declarations, and supporting memorandum should set forth in as much detail as possible the evidence sought to be presented to the appellate court. If possible, the applicant should submit declarations from the

witnesses who would be called to testify in connection with the production of evidence. Written material to be submitted as documentary evidence should be attached as exhibits to declarations of witnesses who can authenticate and provide foundation for the documents.

On requirements for supporting documents, see §11.9. For caption and cover requirements, see §11.10.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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H. Judicial Notice in Reviewing Court

§11.86 1. Authority to Take Judicial Notice

Evidence Code §459 governs judicial notice, both mandatory and discretionary, in the appellate court. *People v Edwards* (1993) 17 CA4th 1248, 1255 n2, 22 CR2d 3; *20th Century Ins. Co. v Garamendi* (1994) 8 C4th 216, 270 n8, 32 CR2d 807. The reviewing court has the same power as the trial court under Evid C §454 in deciding on the propriety of taking judicial notice of a matter or its "tenor," *i.e.,* the significance or interpretation of the matters being judicially noticed. Evid C §459(b). However, the appellate court has the authority to take judicial notice of a matter in a tenor different from that noticed by the trial court. Evid C §459(a). This means that the appellate court is not bound by any interpretation of judicially noticed matters, such as documents, made by the trial court judge.

Thus, when a motion to augment or produce additional evidence on appeal is unavailable, a party may sometimes be able to bring the relevant information (*e.g.,* facts not subject to dispute (*20th Century Ins. Co. v Garamendi, supra*), court files (*In re Ernest M.* (1977) 71 CA3d 890, 892, 139 CR 773), records in other proceedings (*People v Jurado* (1981) 115 CA3d 470, 482, 171 CR 509)) to the appellate court's attention through a request for judicial notice.

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§11.87 2. Compulsory Judicial Notice

Under Evid C §459(a), the reviewing court *must* take judicial notice of each matter that:

- Was properly judicially noticed by the trial court; and
- The trial court was required to judicially notice under Evid C §451 or §453.

Under Evid C §451, the court must take judicial notice of:

- Constitutional, statutory, and decisional laws of California and the United States and of certain charter provisions in the California Constitution;
- Certain subject matters in enumerated sections of the Government Code or United States Code;
- Rules of professional conduct for attorneys and rules of practice and procedure adopted by the Judicial Council;
- Rules of pleadings, practice, and procedure prescribed by the United States Supreme Court;
- The true meaning of all English words and of all legal expressions; and
- Facts and propositions of generalized knowledge so universally known that they cannot be reasonably disputed.

In addition, Evid C §453 provides that the court *must* take notice of items set forth in Evid C §452 on the request of a party, if the party gives sufficient notice to its adversary and furnishes the court with sufficient information to enable the court to take the judicial notice. Thus, the permissive judicial notice of Evid C §452 becomes compulsory on proper request. On matters set forth in §452, see §11.88.

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§11.88 3. Permissive Judicial Notice

The reviewing court may take judicial notice of any of the items enumerated in Evid C §452, which are listed below:

- The constitutional, statutory, and decisional law of any state and the resolutions and private acts of Congress and the California Legislature;
- Regulations and legislative enactments of the United States or any public entity in the United States;
- Official acts of the legislative, executive, or judicial departments of the United States or any state;
- Court records of California, the United States, or any state;
- Rules of court of any court of California, the United States, or any state;
- The laws of any organization of nations, foreign nations, and public entities in foreign nations;
- Facts and propositions of common knowledge within the court's jurisdiction that cannot be reasonably disputed; and
- Facts and propositions not reasonably disputed and capable of immediate and accurate determination by resort to reasonably undisputed accurate sources.

On a request in compliance with Evid C §453, the items set forth above will become subject to compulsory judicial notice. Evid C §453. See discussion in §11.87.

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§11.89 4. Court Procedure for Judicial Notice

When taking judicial notice of any matter in Evid C §452 (permissive judicial notice) or in §451(f) (facts and propositions of generalized knowledge) that is of substantial consequence to a determination of the action, the reviewing court must comply with Evid C §455(a) if the matter was not previously judicially noticed. Evidence Code §455(a) provides that the court must give each party a reasonable opportunity to present information to the court about the propriety of taking judicial notice and the tenor of the matter to be noticed. Evid C §459(c).

Furthermore, if the reviewing court resorts to any source of information not included in the record or not received in open court, the court must provide each party with a reasonable opportunity to respond to such information before judicial notice may be taken. Evid C §459(d).

JUDICIAL PERSPECTIVE: A "reasonable opportunity" under the statute would be 10 days.

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§11.90 5. Procedure for Making Request

To obtain judicial notice under Evid C §459, a party must serve and file a separate motion with a proposed order. Cal Rules of Ct 8.252(a). The motion must state (Cal Rules of Ct 8.252(a)(2)):

- Why the matter to be noticed is relevant to the appeal;
- Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and
- Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

If the matter for which notice is requested is not in the record, the party must serve and file a copy of the item for which judicial notice is requested or explain in the motion why it is not practical to do so. Cal Rules of Ct 8.252(a)(3). The motion must comply with the motion requirements of Cal Rules of Ct 8.40, 8.44, and 8.54-8.57. The local rule of Division One of the Court of Appeal for the Fourth District requires that all requests for judicial notice be submitted as a separate bound motion and served on all parties. 4th App Dist R 8(g).

JUDICIAL PERSPECTIVE: The motion should indicate that judicial notice was requested/granted/not granted (and reasons therefor) in the trial court. We are *very* reluctant to entertain such motions for the first time on appeal. We also get such requests associated with statutory interpretation issues, *e.g.,* legislative history services. However, it is questionable whether all information in these "pockets" is relevant to determining legislative intent, *e.g.,* letter from author of bill to governor stating purpose of legislation or a judiciary committee consultant's analysis of the bill. I personally have serious reservations regarding their relevance, but other justices may not.

See also Ploeger, *Judicial Notice on Appeal in Federal Court and State Court: What to Do and Why*, 22 CEB Civ Litigation Rep 71 (May 2000).

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§11.90A 6. Format of Request

In *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005) 133 CA4th 26, 34 CR3d 520, the Third District Court of Appeal provided a tutorial on judicial notice of legislative materials and specified the proper format for a motion for judicial notice. For future motions, the court directed moving parties to identify each document for which judicial notice is requested as a separate exhibit and to specify the authority under which the document can be judicially noticed. In addition, the court set out a list of legislative materials that have been found to constitute legislative history, as well as a list of materials that do not constitute legislative history. 133 CA4th at 31.

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I. Remittitur

§11.91 1. Effect of Remittitur

The appellate court's jurisdiction concludes when the clerk of that court issues the remittitur, revesting the trial court with jurisdiction. *Riley v Superior Court* (1957) 49 C2d 305, 316 P2d 956; *Isenberg v Sherman* (1932) 214 C 722, 725, 7 P2d 1006. The timing for issuance of the remittitur after the conclusion of an appeal is set forth in Cal Rules of Ct 8.272. For a more extensive discussion of remittitur, see chap 18.

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§11.92 2. Immediate Issuance of Remittitur

Motion or stipulation available in supreme court; stipulation only available in court of appeal. The supreme court may direct immediate issuance of the remittitur for good cause shown or on stipulation of the parties. Cal Rules of Ct 8.540(c)(1). However, the court of appeal may direct the immediate issuance of the remittitur on the parties' stipulation or on dismissal of appeal under Cal Rules of Ct 8.244(c)(2). Cal Rules of Ct 8.272(c).

Order for immediate issuance of remittitur rarely issued. The power to direct immediate issuance of the remittitur is rarely granted and then almost always in cases of significant public interest. *Legislature v Reinecke* (1972) 6 C3d 595, 604, 99 CR 481, modified on other grounds in (1972) 7 C3d 92, 101 CR 552 (reapportionment of congressional and legislative districts); *City of Carmel-by-the-Sea v Young* (1970) 2 C3d 259, 273, 85 CR 1 (constitutionality of disclosure statute concerning public officials.); *Corona Unified Hosp. Dist. v Superior Court* (1964) 61 C2d 846, 854, 40 CR 745 (validity of hospital financing statute).

Motion procedure recommended. Although neither Cal Rules of Ct 8.272(c) or 8.540(c)(1) sets forth the exact procedure for requesting immediate issuance of remittitur, because of the serious nature of the remedy, a motion in compliance with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57, with a showing of good cause, is suggested.

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§11.93 3. Stay of Issuance of Remittitur

Stay may be issued for good cause. In a limited number of special situations, for good cause, such as the desire to file a petition for certiorari with the United States Supreme Court (*Severns Drilling Co. v Superior Court* (1936) 16 CA2d 435, 60 P2d 530; *Reynolds v E. Clemens Horst Co.* (1918) 36 CA 529, 172 P 623) or for serious error (*Krug v Meehan* (1951) 108 CA2d 416, 239 P2d 46), the reviewing court can issue a stay of the issuance of remittitur for a reasonable time. Cal Rules of Ct 8.272(c), 8.540(c)(2).

Motion procedure is required. Given the nature of the extraordinary relief, motion procedure, with a showing of good cause, is required for a request to stay issuance of remittitur in either the court of appeal or the supreme court. Cal Rules of Ct 8.272(c), 8.540(c)(2).

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4. Recall of Remittitur

§11.94 a. Grounds

The appellate court may recall the remittitur on its own motion, on a motion or petition of a party, or on stipulation. Cal Rules of Ct 8.272(c). In the supreme court, remittitur may be recalled only on the court's or a party's motion. Cal Rules of Ct 8.540(c)(2). The grounds for recall include:

- **Correction of clerical error.** *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 165, 188 CR 104; *In re McGee* (1951) 37 C2d 6, 9, 229 P2d 780.
- **Correction of mistake relating to facts of case.** *In re McGee, supra*.
- **Clarification of court ruling.** *Ruth v Lytton Sav. & Loan Ass'n* (1969) 272 CA2d 24, 76 CR 926.
- **Fraud.** *Trumpler v Trumpler* (1899) 123 C 248, 252, 55 P 1008.
- **Court misled.** *McClearen v Superior Court* (1955) 45 C2d 852, 856, 291 P2d 449.

See §§18.14-18.21. See also 9 Witkin, California Procedure, *Appeal* §§847-852 (5th ed 2008).

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§11.95 b. Procedure

A party seeking recall of the remittitur must file a motion supported by affidavits or stipulation, setting forth the specific facts that would justify the recall. Cal Rules of Ct 8.272(c), 8.540(c)(2). The motion should comply with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57. See §11.9.

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J. Calendar Preference

§11.96 1. Use Motion When Priority Not Mandatory

Mandatory preferences. Priority in calendar setting in the appellate courts is mandatory only in certain types of appeals, as authorized by statute or court rules. The following are entitled to preferential calendar treatment in the reviewing court:

- Appeals in probate proceedings (CCP §44);
- Appeals in contested elections cases (CCP §44);
- Actions for libel or slander by an elected official or candidate (CCP §44);
- Judgment freeing or denying a recommendation to free a minor from parental custody and control (CCP §45);
- Declaratory relief action involving professional liability insurance issued to health care providers (CCP §1062.5);
- Juvenile proceedings (Welf & I C §§395, 800); and
- Actions to challenge a general development plan (Govt C §65752).

Discretionary calendar preference on showing of good cause. If the case is not entitled to a mandatory preference on appeal, a party may seek calendar preference, *i.e.,* an expedited appeal schedule, which may include expedited briefing and preference in seeking the date for oral argument, when the party has sufficient justification. Under Cal Rules of Ct 8.240, a motion for preference on the appellate calendar must be supported by a supporting memorandum and served and filed "promptly" after the grounds for preference arise. The motion for priority should also be in accordance with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57 on motions in general. See §§11.9-11.10. For a form for the motion, see §11.97.

Good cause. The same reasons for creating statutory priority in setting cases on the trial calendar arguably constitute good cause for priority on appeal. For example, cases involving a party over age 70 (CCP §36(a)); wrongful death or personal injury actions; when a party is under age 14 (CCP §36(b)); when a party suffers from illness, raising substantial medical doubt as to survivability beyond 6 months (CCP §36(d)); actions for damages arising from commission of a felony for which defendant was criminally convicted (CCP §37); certain declaratory relief actions (CCP §1062.5); actions to recover possession of real property (CCP §1179a); enforcement of arbitration awards (CCP §1291.2); eminent domain actions (CCP §1260.010); and child custody cases (Fam C §3023) receive trial-setting priority. For a discussion of priority statutes for trial purposes, see California Civil Procedure Before Trial, chap 42 (4th ed Cal CEB 2004). See *Moffitt v Ford Motor Co.* (1931) 115 CA 499, 1 P2d 994, on the requirement of good cause.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.97 2. Form: Motion for Calendar Preference

§11.97 2. Form: Motion for Calendar Preference

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11.97-1 Motion for calendar preference

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR CALENDAR PREFERENCE ON APPEAL; SUPPORTING MEMORANDUM; DECLARATION; ORDER

To the Honorable _ _[*Chief Justice/Presiding Justice*]_ _ **and Associate Justices of the** _ _[*name of court*]_ _**:**

_ _[*Name*]_ _**,** _ _[*appellant/respondent*]_ _**, moves this court for an order granting preference to this case on the court calendar.**

1. There is good cause for this motion in that _ _[*specify, including date on which counsel became aware of good cause*]_ _**.**

2. This motion is based on this paper, the attached declaration(s) of _ _[*name(s)*]_ _**, the memorandum in support of the motion for calendar preference on appeal, and the record on appeal filed in this proceeding.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: See §11.10.

Comment: On requirements for supporting documents, see §11.9. For caption and cover requirements, see §11.10.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

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§11.98 K. Approval of Stipulated Reversal of Judgment

Consider stipulated reversal in settlement. In limited circumstances, especially in the context of settlement, parties were able to stipulate to an appellate court reversal of judgment. See *Neary v Regents of Univ. of Cal.* (1992) 3 C4th 273, 10 CR2d 859. The *Neary* presumption in favor of stipulated reversals was superseded by CCP §128(a)(8), which disapproved reversals of trial court judgments based on posttrial stipulations by the parties. See *Muccianti v Willow Creek Care Ctr.* (2003) 108 CA4th 13, 133 CR2d 1. Code of Civil Procedure §128(a)(8) states public policy grounds for courts not to allow stipulated reversals, including possible erosion of public trust and disincentive for pretrial settlements, but allows reversals if the court finds no possibility that the interests of the parties or nonparties will be adversely affected and that the reasons of the parties requesting reversal outweigh the presumption against its approval. CCP §128(a)(8)(A)-(B).

First appellate district rule. Although the California Rules of Court do not specifically address this issue, 1st App Dist R 4 sets out its procedure for seeking court approval of a stipulated reversal. The rule is a good general guideline for the contents of a motion for stipulated reversal.

A motion filed in the first appellate district for stipulated reversal of judgment of a trial court must include a copy of the judgment and a joint declaration of counsel containing (1st App Dist R 4):

- A description of the parties, and the factual and legal issues presented at trial;
- A statement on whether the judgment involves important public rights or unfair, illegal, or corrupt practices, or involves torts that affect a significant number of persons or that affects the public or a significant number of persons not parties to the litigation;
- If judgment is against a state licensee, a statement as to whether the judgment exposes the licensee to possible disciplinary proceedings; and
- Disclosure of whether judgment may have collateral estoppel or other effects in potential future litigation and, if so, whether third parties who might be prejudiced by a stipulated reversal have received notice of the motion.

The parties must provide a sufficient showing to support the findings required by CCP §128(a)(8) (findings that court of appeal must make to reverse or vacate judgment by stipulation).

For a more extensive discussion of stipulated reversals, see §§15.37-15.41.

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§11.99 L. Transfer and Consolidation of Appeals

Circumstances warranting transfer or consolidation of appeal. Occasionally, a party may wish to transfer an appeal from one appellate district to another (or among divisions of the same district) because of the proposed transferee court's experience with the facts of the particular case, based on a previous or pending appeal of a similar or related case, or because of judicial disqualifications or recusals. When the related case on appeal is still pending and the respective cases share issues in common, the party may also wish to have the cases consolidated for briefing, oral argument, or for all purposes. See *General Elec. Co. v Federal Employees' Distrib. Co.* (1954) 122 CA2d 509, 265 P2d 19; *Sampson v Sapoznik* (1953) 117 CA2d 607, 256 P2d 346; *Silver v Bank of America* (1941) 43 CA2d 835, 111 P2d 666.

Court of appeal's authority to transfer. In a court of appeal having more than one division, the administrative presiding justice of that court has the authority to transfer an appeal from one division to another in the following circumstances (Cal Rules of Ct 10.1000(b)(1)):

- When two or more appeals arise from the same trial court proceedings, all the appeals will be assigned to the same division hearing the first appeal filed; and
- When the number of judges available to hear an appeal is insufficient because of recusals, the appeal will be assigned to another division randomly selected by the clerk.

Supreme court's authority to transfer. Except as provided above, the supreme court may transfer cases (Cal Rules of Ct 10.1000(a)(1)):

- From the supreme court to a court of appeal;
- From a court of appeal to the supreme court;
- From one court of appeal to another; or
- From one division of a court of appeal to another.

Procedure. Any motion to transfer, motion to consolidate, or both should comply with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57, both procedurally and substantively. See §§11.9-11.10.

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§11.100 M. Counsel Pro Hac Vice

General rule. An attorney who is not a member of the California Bar, not a California resident, and not regularly employed or regularly engaged in business, professional, or other activities in California, but who is a member in good standing of the bar of any United States court or the highest court of another state or territory, may apply to represent a client pro hac vice (for the particular case only), on the condition that the lawyer has associated with an active member of the California Bar as attorney of record in the case. Cal Rules of Ct 9.40(a).

Procedure. Under Cal Rules of Ct 9.40(c)(2), the application to appear in the appellate courts as counsel pro hac vice must comply with Cal Rules of Ct 8.54 on motions in the reviewing court (see §11.9), and must state (Cal Rules of Ct 9.40(d)):

- The applicant's residence and office address;
- The courts to which applicant has been admitted to practice, and dates of admission;
- That the applicant is a member of good standing in those courts, and is not currently suspended or disbarred in any court;
- The title of court and case in which the applicant has filed a pro hac vice application in California in the preceding 2 years, the date of each application, and whether or not granted; and
- The name, address, and telephone number of the active member of the state bar who is attorney of record in the subject case.

The application must be accompanied by a proof of service on all parties and on the State Bar of California at its San Francisco office. Cal Rules of Ct 9.40(c)(2).

Special permission to argue in particular case. The supreme court and courts of appeal have discretion to permit argument in a particular case from an attorney, licensed in another jurisdiction, who is not a member of the state bar, if the lawyer has special expertise in the particular field affected by the case before the court. Cal Rules of Ct 9.40(g).

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§11.101 N. Withdrawal or Substitution of Attorneys

When substitution of attorneys becomes necessary, a party must serve and file in the reviewing court a substitution signed by the party and the new attorney. In all appeals and in original proceedings related to a superior court proceeding, the party must also serve the superior court. Cal Rules of Ct 8.36(b).

An attorney may request withdrawal by filing a motion to withdraw. The motion must comply with Cal Rules of Ct 8.40, 8.44, and 8.54-8.57 and be served only on the party represented and the attorneys "directly affected," unless the court orders otherwise. Cal Rules of Ct 8.36(c)(1). The proof of service need not include the address of the represented party, although if the motion to withdraw is granted, then the withdrawing attorney must promptly provide the court and the opposing party with contact information for the withdrawing attorney's client. Cal Rules of Ct 8.36(c)(2). The clerk of the court must also notify the superior court of any ruling on the motion to withdraw. Cal Rules of Ct 8.36(c)(3). If the motion to withdraw is filed in a proceeding pending in the supreme court after a grant of review, then the supreme court clerk must also notify the court of appeal of any ruling on the motion. Cal Rules of Ct 8.36(c)(4).

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V. ABANDONMENT OF APPEAL AND VOLUNTARY DISMISSAL

A. Before Record on Appeal Filed

§11.102 1. Procedure

Before the record on appeal is filed with the reviewing court, appellant may file with the superior court a written abandonment of the appeal or a stipulation with adverse parties for the abandonment. The filing of the written abandonment or stipulation "effects a dismissal of the appeal" and restores jurisdiction in the superior court. Cal Rules of Ct 8.244(b); *Marriage of Dade* (1991) 230 CA3d 621, 625, 281 CR 609. Service on all counsel is required. Cal Rules of Ct 8.244(b)(1), 8.825(b)(1).

PRACTICE TIP: Although not required, the better practice is for appellant to serve all counsel with copies of any voluntary abandonment or dismissal of the appeal at the same time the documents are filed with the court.

For a form for a voluntary abandonment before the record is filed, see §11.106.

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§11.103 2. Severable Appeal

When severable portions of an appeal are abandoned and dismissed, the superior court regains jurisdiction only over the abandoned portions. The reviewing court continues to adjudicate the appeal with respect to the severable segments of the appeal not abandoned. *Dow v Superior Court* (1956) 140 CA2d 399, 297 P2d 30.

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§11.104 3. Notice by Clerk

The clerk of the superior court must promptly send a copy of the notice of abandonment or stipulation for abandonment to the parties and to the clerk of the reviewing court. Cal Rules of Ct 8.244(b)(2).

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§11.105 4. Reimbursement of Costs

On dismissal of an appeal before the record is complete, appellant is entitled to reimbursement of the portion of its deposit for preparation of the record in excess of actual costs up to the point of dismissal. See Cal Rules of Ct 8.130(f)(3), 8.122(d)(2).

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§11.106 5. Form: Voluntary Abandonment and Dismissal (Before Record on Appeal Filed)

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11.106-1 Voluntary abandonment and dismissal of appeal (before record on appeal filed)

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of superior court*]

[*Title of case*]

VOLUNTARY ABANDONMENT AND DISMISSAL OF APPEAL

To the clerk of the court:

1. On _ _[*date*]_ _**, appellant,** _ _[*name*]_ _**, filed a notice of appeal from the judgment of the Superior Court of California, for the County of** _ _[*county*]_ _**, which was entered on** _ _[*date*]_ _**.**

2. Appellant hereby voluntarily abandons, withdraws, and dismisses the appeal _ _[*with/without*]_ _ **prejudice to the filing of another appeal.**

3. The record on appeal has not yet been filed with the court of appeal.

4. On _ _[*date*]_ _**, appellant deposited** _ _[*dollar amount*]_ _ **with this court to cover the estimated costs of preparing the record on appeal. Appellant hereby requests that the clerk reimburse that portion of the deposit in excess of the actual cost of preparation of the record on appeal to the date of filing of this abandonment of appeal.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Copies: Original to file with the superior court; one courtesy copy for service on each attorney of record and unrepresented party; office copies. Counsel should check with the court clerk to learn whether local court rules require that a copy be filed with the original. Under Cal Rules of Ct 8.244(b)(2), the clerk of the superior court must send a copy or other notice of the abandonment to the parties and to the clerk of the reviewing court.

Comment: A voluntary abandonment and dismissal before the filing of the record on appeal must be filed with the superior court clerk. Cal Rules of Ct 8.244(b)(1).

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B. After Record on Appeal Filed

§11.107 1. Procedure

An appellant desiring to dismiss an appeal after the filing of the record in the reviewing court must file with the appellate court a request or stipulation to dismiss the appeal. Any such request must also be served on all parties. Cal Rules of Ct 8.244(c)(1). The reviewing court "may" then order the dismissal of the appeal and immediate issuance of the remittitur. Cal Rules of Ct 8.244(c)(2). See Cal Rules of Ct 8.762(b) for an analogous rule for voluntary dismissal of an appeal to the appellate division of the superior court in a limited civil case after the record on appeal is filed. For a form for the abandonment of the appeal after the record is filed, see §11.109. For a form for a stipulation, see §11.110. For an order of dismissal, see §1.111.

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§11.108 2. Notice by Clerk

The clerk of the reviewing court must immediately notify the all parties and, when relevant, the lower court of the filing of the abandonment or the order of dismissal by the appellate court. See Cal Rules of Ct 8.264(a)(1).

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.109 3. Form: Request for Dismissal of Appeal (After Record on Appeal Filed)

§11.109 3. Form: Request for Dismissal of Appeal (After Record on Appeal Filed)

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11.109-1 Request for dismissal of appeal (after record on appeal filed)

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

REQUEST FOR DISMISSAL OF APPEAL

Appellant, _ _[*name*]_ _**, through** _ _[*his/her/its*]_ _ **attorney of record hereby requests an order of this court dismissing** _ _[*with/without*]_ _ **prejudice** _ _[*his/her/its*]_ _ **appeal from** _ _[*specify judgment or order appealed from*]_ _**, filed with this court on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Copies: See §11.106.

Comment: This application is considered routine. If there is a possible argument that dismissal would prejudice other parties or should not be ordered because the issues are of great public importance (see §11.3), the requesting party should state the argument in the request.

For caption and cover requirements, see §11.6.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.110 4. Form: Stipulation for Dismissal (After Record on Appeal Filed)

§11.110 4. Form: Stipulation for Dismissal (After Record on Appeal Filed)

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11.110-1 Stipulation for dismissal (after record on appeal filed)

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR DISMISSAL OF APPEAL

IT IS STIPULATED by the parties, through their respective counsel, that the appeal of _ _[*identify party*]_ _ **from** _ _[*specify judgment(s) or order(s) appealed from*]_ _**, taken on** _ _[*date*]_ _**, may be dismissed** _ _[*with/without*]_ _ **prejudice** _ _[*and without costs to either party*]_ _**, and that the remittitur be issued immediately.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: See §11.106.

Comment: If the parties do not stipulate that costs are waived and that the remittitur issue immediately, respondent will be entitled to costs (see §20.5), and the parties will have to wait for issuance of the remittitur, which usually takes 60 days (see §18.4). If there is a possible argument that dismissal would prejudice other parties or should not be ordered because the issues are of great public importance (see §11.3), the requesting party should address the argument in the request for dismissal.

For caption and cover requirements, see §11.6.

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Source: Civil Litigation/California Civil Appellate Practice/11 Applications and Motions/§11.111 5. Form: Order for Dismissal of Appeal

§11.111 5. Form: Order for Dismissal of Appeal

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11.111-1 Order for dismissal of appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER FOR DISMISSAL OF APPEAL

The written _ _[*request of appellant,* _ _[*name*]_ _, *stipulation of the parties*]_ _ **for an order dismissing the appeal of** _ _[*name*]_ _ **from the** _ _[*order/judgment*]_ _ **of the Superior Court, having been filed, and good cause appearing,**

IT IS ORDERED that the appeal of _ _[*name*]_ _ **be dismissed** _ _[*with/without*]_ _ **prejudice** _ _[*and without costs to either party*]_ _ **and that the remittitur be issued immediately.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Chief/Presiding*]_ _ **Justice**

Copies: See §11.106.

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§11.112 C. Abandonment or Dismissal in Case of Incompetent or Minor

If the pending appeal is of a minor's, or of an insane or incompetent person's, claim, which may be compromised only with court approval (CCP §372), the guardian must file any petition for compromise with the appellate court. That court may then refer the matter to the trial court for hearing, determination, and findings as to whether the proposed compromise is in the best interests of the ward. On receipt of the trial court's findings, the reviewing court will rule on the compromise and issue an order on the requested dismissal. Cal Rules of Ct 8.244(d); *Anderson v Latimer* (1985) 166 CA3d 667, 677, 212 CR 544.

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§11.113 D. Limitations on Right of Voluntary Dismissal

Appellant's right to dismissal after filing of record. California Rules of Court 8.244(b)-(c), governing requests for abandonment and dismissal after the record on appeal is filed, states that the reviewing court "may dismiss the appeal," indicating the discretionary nature of the court's power to rule on the matter. This rule is consistent with the case law. "An appellant may not dismiss his appeal as a matter of right; whether he will be permitted to do so is within the discretion of the court." *De Garmo v Goldman* (1942) 19 C2d 755, 768, 123 P2d 1. See also *Lucich v City of Oakland* (1993) 19 CA4th 494, 502, 23 CR2d 450; *Okuda v Superior Court* (1983) 144 CA3d 135, 137 n1, 192 CR 388 ("[i]f an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot" (quoting *Liberty Mut. Ins. Co. v Fales* (1973) 8 C3d 712, 715, 106 CR 21)); *Lara v Cadag* (1993) 13 CA4th 1061, 1065, 16 CR2d 811 (court of appeal was "required" to comply with parties' request for partial dismissal of appeal).

For discussion of stipulated reversal, see §§11.98, 15.37-15.41, and 17.58.

Appellant's right to dismissal before filing of record. On the other hand, under Cal Rules of Ct 8.244(b), relating to a request for abandonment and dismissal before the filing of the record on appeal, an appellant can serve and file in superior court an abandonment of the appeal, which "effects a dismissal of the appeal." However, there may be limitations on this right. The court of appeal in *Marriage of Dade* (1991) 230 CA3d 621, 627, 281 CR 609, held that, after the trial court regained jurisdiction under former Cal Rules of Ct 19(a), predecessor to Rule 8.244(b), the trial court had jurisdiction to vacate the abandonment of an appeal that raised issues of continuing public interest. The *Dade* court noted that "appellate courts have refused to dismiss an appeal when the appeal raises issues of continuing public interest." See *Okuda v Superior Court* (1983) 144 CA3d 135, 137 n1, 192 CR 388; *Lucchesi v City of San Jose* (1980) 104 CA3d 323, 326 n2, 163 CR 700. See also discussion in 9 Witkin, California Procedure, *Appeal* §735 (5th ed 2008): "The better view is, however, that the reviewing court has the power to refuse, and should exercise it, in the interests of justice, to prevent injury to co-appellants or to others beneficially interested in the litigation."

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§11.114 E. Vacating Abandonment

Once appellant files a notice of abandonment under Cal Rules of Ct 8.244(b), or the appellate court grants dismissal under Cal Rules of Ct 8.244(c), the reviewing court loses jurisdiction. *Whitehead v Dickey* (1965) 232 CA2d 740, 43 CR 183; *Conservatorship of Oliver* (1961) 192 CA2d 832, 836, 13 CR 695. The trial court, revested with jurisdiction by virtue of the abandonment or dismissal of the appeal, may vacate the abandonment on a showing of "good cause" (*e.g.,* duress, excusable neglect, continuing public issue), thereby revesting the appellate court with jurisdiction over the appeal. *Marriage of Dade* (1991) 230 CA3d 621, 625, 281 CR 609; *Evola v Wendt Constr. Co.* (1958) 158 CA2d 658, 323 P2d 158; 9 Witkin, California Procedure, *Appeal* §733 (5th ed 2008).

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12

Appellant's Opening and Reply Briefs

Harvey M. Grossman

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I. OPENING BRIEF

§12.1 A. Importance and Function of Opening Brief

The principal document for presenting the appellant's case is the appellant's opening brief. Its importance cannot be overstated. Even though appellant's counsel will have an opportunity to file a reply brief and to present an oral argument, if the opening brief does not make a significant impact, the prospects of ultimate success are slight. The opening brief warrants a maximum effort, not only to comply with the rules but to function as an effective instrument of appellate advocacy.

Persuasion is part of much of the litigation process, but it is especially important in an opening brief. At this point, the case has been decided at one level, and the inertia factor, buttressed by the limitations on appellate review, and the reluctance to require the lower court to reconsider a completed case tend to support affirmance. To persuade the appellate court to change the status quo and overturn the lower court's decision is a formidable challenge.

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B. Multiple Appellants

§12.2 1. Filing Joint Brief or Adopting Another Brief

In cases with multiple appellants, counsel should consider either filing a joint brief or adopting all or part of another party's brief. These practices are expressly permitted by Cal Rules of Ct 8.200(a)(5).

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§12.3 2. Advantages and Disadvantages

Filing a joint brief or adopting all or part of another party's brief reduces the effort and expense of the appeal and avoids irritating the court with unnecessarily duplicative presentations. If all or part of a co-appellant's brief is adopted, the presentation in the adopted brief can be augmented with a nonrepetitive brief.

However, there may be practical reasons for not filing a joint brief or adopting another brief, *e.g.,* a conflict of interest or a desire to detach a party from a coparty. Additionally, a joint or adoptive approach may deprive appellants of the benefit of variations on a theme, which might be more persuasive than a single presentation.

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§12.4 3. Referencing Another Brief

Adopting a brief by reference applies only to another brief filed in the appellate court. It is not appropriate to adopt by reference a brief or motion filed in the trial court. *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 1422, 267 CR 819, overruled on other grounds in *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 578, 57 CR3d 204; *Balesteri v Holler* (1978) 87 CA3d 717, 721, 151 CR 229.

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C. Determining Grounds for Appeal

§12.5 1. Conduct Initial Evaluation

In the initial evaluation of the case, counsel should reach a general but tentative decision on the grounds to be urged on appeal. See chap 5. The determination of the points to urge in the brief is essential as a guide to legal research and as an aid in organizing the record. Decisions will have to be made on the following:

- Whether grounds initially viewed as marginal are to be included or dropped; and
- Whether arguments considered central to the appeal require further focus and refinement.

JUDICIAL PERSPECTIVE: Generally, it is more effective to focus on one or a few major points. Avoid drowning your best arguments in a sea of minor issues that are not likely to have affected the result in the lower court.

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§12.6 2. Conduct Research to Shape Issues

Researching the issues and reviewing the record will help

- corroborate the choice of some points;
- lead to the abandonment of others; and
- suggest additional arguments not previously considered.

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§12.7 3. Avoid Waiver of Issues Not Raised

The reviewing court is likely to consider waived or abandoned any issue not raised in the appellant's opening brief. *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1345 n6, 100 CR2d 446; *California Recreation Indus. v Kierstead* (1988) 199 CA3d 203, 244 CR 632. It is not appropriate to rely on points not mentioned in the parties' briefs. *Penn v Prestige Stations, Inc*. (2000) 83 CA4th 336, 345 n2, 99 CR2d 602.

PRACTICE TIP: Pay particular attention to the possibility of waiver when trying to obtain a reversal of an order entered on alternative grounds. In that circumstance, an appellant must demonstrate that each ground relied on by the trial court is erroneous. Failure to address each ground on appeal will be considered a waiver of any challenge to the trial court's ruling on that ground. See *Hambros Reserve, Ltd. v Faitz* (1992) 9 CA4th 129, 11 CR2d 638.

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D. Managing Record

§12.8 1. Read Record

Counsel should personally read the record and not delegate the task to others. The record is ordinarily composed of the clerk's transcript or its equivalent and, if there has been oral testimony, a reporter's transcript and exhibits. On designating the record, see chap 9.

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§12.9 2. Develop Tools to Manage Record

Unless the entire record is extremely short and simple (*e.g.,* if a demurrer to the complaint was sustained without leave to amend at the outset of the case), reduce the substance of the record to more manageable proportions through digests, summaries, and indexes. A simple chronological digest of the reporter's transcript, indexed according to subject matters pertinent to the appeal, is a more workable tool than the raw record. The extent to which further refinements are warranted depends on the nature and complexity of the record and the issues on appeal. The essential point is that counsel should develop tools to facilitate working with a record that is cumbersome in its raw form.

JUDICIAL PERSPECTIVE: Consider obtaining an electronic version of the record. You can search the file for specific issues, find objections, sort the record by issue, and quickly discard material irrelevant to the issues presented for review.

The time spent in developing these aids is offset by the time saved in drafting the opening brief and in expediting counsel's work during the later stages of the appeal (*e.g*., drafting the reply brief and preparing for oral argument). Beyond the potential for time saving, these measures can be justified on an even more fundamental basis: They give counsel a better grasp of the record; they enhance the presentation's accuracy, precision, and overall quality; and they enable counsel to convey the sense of assurance that flows from a firm command of the record.

PRACTICE TIP: Although digests, summaries, and indexes are useful tools in working with the record, each step raises the possibility of inadvertent errors. Counsel should check the record references in the brief for accuracy against the original record.

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§12.10 E. Researching Issues

Before drafting the opening brief, appellant's counsel should have a firm grasp of the facts in the record as well as the applicable legal principles. Authorities pertinent to the issues on appeal should be thoroughly researched, including, *e.g.,* supporting cases, statutes, restatements, treatises. Research results should be organized as a working guide for preparing the brief. Research should include any contrary authorities that may need to be explained or distinguished.

PRACTICE TIP: If research is delegated, researchers should prepare a comprehensive and up-to-date review of authorities. Before beginning the opening brief, counsel should be thoroughly familiar with the research of others.

On researching grounds for appeal, see chap 5.

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II. OVERVIEW OF BRIEF

§12.11 A. Requirements of Brief

There is no set formula for a brief. The specific format will vary depending on the case. The California Rules of Court establish minimum requirements that must be followed, but considerable room is left for variation.

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§12.12 1. Basic Parts

The appellant's opening brief generally consists of these basic parts:

- Preliminary sections, including a table of contents and a table of authorities (see Cal Rules of Ct 8.204(a)(1)(A)); certain preliminary recitals (see §§12.34-12.35); and (unless deferred to a later point in the brief) a short summary of the general nature and thrust of the appeal (see §12.45);
- Statement of the case setting out the nature of the action or proceeding, the relief sought, and the basic facts of the appeal (see Cal Rules of Ct 8.204(a)(2); see also §§12.48-12.58);
- Argument addressing the grounds on which the appeal is premised (see §§12.62-12.82);
- Conclusion tying the brief together and requesting desired relief (see §§12.91-12.94); and
- Attachments (optional; see §§12.96-12.98).

PRACTICE TIP: It is neither necessary nor customary to preface the brief with a formal list of "questions presented." But see §22.56 (specification of issues required for petitioner's brief on the merits in the California Supreme Court).

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§12.13 2. Importance of Each Part

Each part of the brief should be viewed as integral to the appellant's objective of persuading the appellate court to reverse or otherwise alter the trial court decision. It is generally inappropriate to merely incorporate the same arguments raised in a trial brief; the brief should stand on its own. See §§12.62-12.82.

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§12.14 B. Length

Absent permission from the Chief Justice or presiding justice (Cal Rules of Ct 8.204(c)(5)), appellate briefs may not be more than 14,000 words, including footnotes. A combined brief under Cal Rules of Ct 8.216, in which appellant is also a respondent because of a cross-appeal, may not exceed double the lengths specified in Cal Rules of Ct 8.204(c). Cal Rules of Ct 8.204(c)(4).

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§12.15 1. Permission to Exceed Word Limit

When seeking permission to exceed the word limit, counsel may be required to show with specificity why additional words are necessary. See *In re S.C.* (2006) 138 CA4th 396, 399, 41 CR3d 453 (practice of presiding justice to accept appellate counsel's declaration that good cause existed to file brief exceeding word limitation).

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§12.16 2. Certificate of Length

The appellant's brief must include a certificate by appellant's counsel or an unrepresented party stating the number of words in the brief; the person certifying may rely on the word count of the computer program used to prepare the brief. Cal Rules of Ct 8.204(c)(1). A brief produced on a typewriter must not exceed 50 pages. Cal Rules of Ct 8.204(c)(2). The tables, the certificate, and any attachment under Cal Rules of Ct 8.204(d) are excluded from the length limits. Cal Rules of Ct 8.204(c)(3).

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§12.17 3. Benefits of Brevity

Serious practical considerations dictate that the opening brief be true to its name, that is, kept as short as possible and consistent with the needs of the particular case. A lengthy brief may evoke a negative reaction from an overburdened appellate court. The negative reaction will be compounded if the length stems from prolixity rather than from the legitimate needs of the case. See *In re S.C.* (2006) 138 CA4th 396, 399, 41 CR3d 453 (appellant chastised for rambling, 202-page brief). Additionally, the same factors that contribute to excessive length (*e.g.,* a rambling style, needless repetition, preoccupation with minutiae) detract from the brief's effectiveness. Finally, an overlong brief is an unnecessary expense.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.18 4. Balancing Brevity With Thorough Argument

§12.18 4. Balancing Brevity With Thorough Argument

The brief needs to be as short as possible while thoroughly presenting and arguing the issues. Although this balancing issue will arise in a great variety of cases (*e.g.,* length and complexity of the record, number and complexity of issues) and thus precludes any precise formula, the following guidelines may be helpful:

- View the length limits of Cal Rules of Ct 8.204(c) as a true upper limit; most briefs should be well below that limit.
- Subject the tentative draft of the brief to critical scrutiny, segment by segment, to eliminate, consolidate, or condense passages without impairing its integrity or effectiveness; for example, a commonly accepted proposition should be merely stated, not belabored.

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C. Format

§12.19 1. Paper

The paper must be white or unbleached, recycled, 8½ by 11 inches, and of at least 20-pound weight. Cal Rules of Ct 8.204(b)(1), 1.6, 1.22, 2.3(2), 2.131 (defining "recycled").

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§12.20 2. Typeface

Any conventional typeface may be used, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2).

The type style must be roman; but for emphasis, italics or boldface may be used, or text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters. Cal Rules of Ct 8.204(b)(3).

Except as provided in Cal Rules of Ct 8.204(b)(11) (typewritten briefs), the type size, including footnotes, must not be smaller than 13-point; both sides of the paper may be used. Cal Rules of Ct 8.204(b)(4).

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§12.21 3. Line Spacing and Margins

The lines of text must be unnumbered and at least 1½-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. "Single-spaced" means six lines to a vertical inch. Cal Rules of Ct 8.204(b)(5).

The margins must be at least 1½ inches on the left and right and 1 inch on the top and bottom. Cal Rules of Ct 8.204(b)(6).

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§12.22 4. Page Numbering and Binding

The pages must be consecutively numbered. The tables and the body of the brief may have different numbering systems. Cal Rules of Ct 8.204(b)(7).

The brief must be bound on the left. If the brief is stapled, the bound edge and staples must be covered with tape. Cal Rules of Ct 8.204(b)(8).

On cover requirements, see §§12.29-12.32. On duplication methods, see §§12.99-12.104.

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§12.23 5. Signature Requirements

The brief need not be signed. Cal Rules of Ct 8.204(b)(9).

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§12.24 6. Typewritten Briefs

The format requirements of typewritten briefs are discussed in Cal Rules of Ct 8.204(b)(11).

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§12.25 D. Headings

In compliance with the rules of court, headings should be used to designate essential components of the brief, such as "Statement of the Case" (Cal Rules of Ct 8.204(a)(2)), and to delineate points made in the "Argument" (Cal Rules of Ct 8.204(a)(1)(B)). Headings should precede each point in the brief; subheadings may be used if desired. They need not be technical "assignments of error" but should generally be descriptive of the subject matter covered. Cal Rules of Ct 8.204(a)(1)(B).

Beyond these requirements, headings and subheadings may increase the brief's effectiveness by, *e.g.,*

- aiding in understanding and following the general outline of the presentation of facts and in focusing on aspects that need special attention;
- enhancing readability; and
- compelling counsel to assess the various segments in the basic outline and deleting or revising those that do not fit in the structure.

PRACTICE TIP: Headings should be full sentences written in the active voice. A reader should derive a basic understanding of the entire brief by reading the headings in the Table of Contents. Cal Rules of Ct 8.204(a)(1)(A).

JUDICIAL PERSPECTIVE: Headings should lead the reader to the result sought in the brief.

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E. Writing Style; Footnotes; Nomenclature

§12.26 1. Refine and Polish Brief

In preparing the opening brief, consider not only the content but also the manner in which the content is presented. The brief should be refined and polished through successive drafts until the end product is clear, concise, readable, and persuasive. For suggestions on stylistic details, see Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers (4th ed 2000).

PRACTICE TIP: To test the brief for readability and clarity and to invite other ideas for improvement, submit a tentative draft to a colleague or other person unfamiliar with the case.

JUDICIAL PERSPECTIVE: If any reader, whether colleague, secretary, family member, or friend, thinks any sentence or part of the brief is confusing or poorly written, assume that he or she is right and rewrite or eliminate that portion.

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§12.27 2. Use Footnotes Sparingly

The use of footnotes is controversial. Many justices do not like them. On the other hand, some practitioners advise using a few well-placed footnotes to mention a collateral point, to substantiate an assertion with a quotation from the record, or to quote the precise language of a statute without obstructing the flow of the brief.

JUDICIAL PERSPECTIVE: There should be as few footnotes as possible. None is even better.

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§12.28 3. Use Party Names, Not Designations

Although the parties to an appeal are formally designated as "appellant" and "respondent" (Cal Rules of Ct 8.10(a)(1)), these abstract designations should be held to a minimum in the brief. In the interest of clarity, use the parties' actual names, suitable abbreviations, or appropriate descriptions (*e.g.,* "the husband").

When party designations are needed, use the trial court designations of "plaintiff" and "defendant." To avoid any misunderstandings, state the parties' designations early in the brief, perhaps in a footnote.

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F. Cover

§12.29 1. Required Information

The cover must state the following (Cal Rules of Ct 8.29(b), 8.204(b)(10)):

- The title of the brief;
- The title, trial court number, and court of appeal case number;
- The names of the trial court and each participating trial judge;
- The name, address, telephone number, and State Bar number of each attorney filing or joining in the brief (the cover need not state the bar number of any supervisor of the attorney responsible for the brief);
- The name of the party that each attorney on the brief represents; and
- When by statute or rule service is required on a nonparty public officer or agency, a statement that identifies the statute or rule requiring such service.

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§12.30 2. Titles

California Rules of Court 8.200-8.204(a) refer to the parties on appeal as "appellant" and "respondent." The titles of the briefs should be kept very simple (Cal Rules of Ct 8.200(a)):

- Appellant's first brief is designated Appellant's Opening Brief;
- Respondent's brief is designated Respondent's Brief; and
- Appellant's reply brief is designated Appellant's Reply Brief.

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§12.31 3. Colors

Covers of briefs should be in certain prescribed colors (Cal Rules of Ct 8.40(b)(1)-(2)):

- Green for appellant's opening brief;
- Yellow for respondent's brief;
- Tan for appellant's reply brief;
- Yellow for combined appellant's opening brief and respondent's brief (Cal Rules of Ct 8.216); and
- Tan for combined reply brief and respondent's brief (Cal Rules of Ct 8.216).

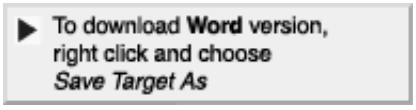
A brief not conforming to the color code will be accepted for filing, but if repeated violations occur, the court may proceed under Cal Rules of Ct 8.204(e)(2) (noncomplying briefs). Cal Rules of Ct 8.40(b)(3).

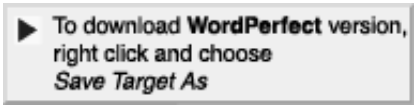
NOTE: Plastic or acetate covers are expressly prohibited in the fourth appellate district. 4th App Dist R 2.

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§12.32 4. Form: Cover





No. _ _ _ _ _ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _[*NUMBER*]_ _ APPELLATE DISTRICT,
DIVISION _ _[*NUMBER*]_ _

_ _[*Name*]_ _, Plaintiff and Appellant v _ _[*Name*]_ _, Defendant and Respondent	**Court of Appeal No. _ _ _ _ _ _**

APPELLANT'S OPENING BRIEF

Appeal From the Judgment of the
Superior Court of California, County of _ _[*name*]_ _.
Trial Court Case No. _ _ _ _ _ _
Honorable _ _[*name*]_ _, Judge

_ _[*Attorney's name, address, telephone number, fax number, and State Bar number*]_ _
Attorney for Plaintiff and Appellant
_ _[*names of parties*]_ _

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.33 G. Certificate of Interested Entities or Persons

§12.33 G. Certificate of Interested Entities or Persons

Every party must file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008) with its principal brief or its first application or opposition. Cal Rules of Ct 8.208(d). See App D. Failure to comply may subject that party to sanctions, including striking the document, dismissing the appeal, or deciding the appeal on the basis of the record or the appellant's filings. Cal Rules of Ct 8.208(d). The certificate must list entities or persons interested in the proceedings. Cal Rules of Ct 8.208(e). Each party has a continuing duty to update the information by way of a supplemental filing. Cal Rules of Ct 8.208(f).

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III. PRELIMINARY PORTIONS OF BRIEF

A. Table of Contents

§12.34 1. Nature and Purpose

Every brief must begin with a table of contents. Cal Rules of Ct 8.204(a)(1)(A). The table of contents, in outline form, sets out the various sections and subsections of the brief with appropriate page references. This outline of the general structure enables the court to see what the appeal is about and to focus on aspects of special interest.

PRACTICE TIP: Even though preparing the table of contents is a relatively mechanical task, do not neglect it. Because the court's first contact with the brief is the table of contents, review it carefully for its potential impact. Two prime criteria should be considered when reviewing the table of contents: (1) Does it present a succinct, intelligible outline of the appellant's perception of the case? and (2) Is it likely to capture the court's attention? If either criteria is not satisfied, more work on the headings and subheadings or the underlying structure and content of the brief may be needed.

JUDICIAL PERSPECTIVE: I always look first to the table of contents to understand the major points of the appeal. If the headings are poorly done, that usually indicates that the rest of the brief is poorly done, and I may never be able to figure out the issues.

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§12.35 2. Form and Content

The table of contents should list, with page references, all divisions and subdivisions in the brief, including the full headings and subheadings of the argument. The table of contents is the reader's introduction to each part of the brief. In a complex case, it may help to subdivide the statement of facts and create separate headings for each subject. See §12.25. Properly worded, these headings and subheadings can be extracted for the table of contents to lead the reader through the entire story. See sample tables of contents in §§12.36-12.37.

PRACTICE TIP: Look for any mechanical errors that may have been made in compiling the table of contents. This factor is especially important because it may so easily be taken for granted. A small but significant error in the index (*e.g.,* omission of a "not") can assume particular prominence.

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3. Sample Forms: Table of Contents

§12.36 a. Sample Form: For Simple Brief

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

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B. (Heading as it appears in argument portion).....

IV. CONCLUSION (see §§12.91-12.95).....

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§12.37 b. Sample Form: For Complex Brief

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

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4. Defendants Entered Into an Elaborate Scheme to Conceal the Medical Malpractice

5. Defendants Falsified ABC's Claim File and Arranged to Place It in the Hands of Inexperienced Attorneys

6. Plaintiff Frustrated Defendants' Attempt to Settle the Smith Case Cheaply

7. As Part of Their Original Conspiracy, Defendants Had Agreed to Ruin Anyone Who Got in Their Way

8. Defendants Were Instrumental in Causing Plaintiff to Be Indicted and Tried for Receiving and Concealing a "Stolen" ABC Claim File

9. Plaintiff Was Acquitted Because the Jury Found That the Claim File Had Not Been Stolen

10. Plaintiff Suffered Substantial Damages As a Result of Defendants' Intentional and Malicious Conduct

III. ARGUMENT

A. Summary of the Argument (see §§12.62-12.90)

B. The First Cause of Action States a Valid Claim for Malicious Prosecution and Conspiracy to Commit Malicious Prosecution

1. The Complaint Alleged All Elements of Malicious Prosecution

2. There Is No Privilege to Perpetrate a Malicious Prosecution

3. The Doctrine of "Independent Investigation" Cannot Insulate Defendants, Because Plaintiff Pleaded That Their Misstatements and Omissions Defrauded the Investigators

4. Plaintiff Has Rebutted the Prima Facie Existence of Probable Cause Arising From the Grand Jury Indictment by Alleging It Was Procured by Defendants' Fraudulent Testimony

C. Nothing of Which the Trial Court Could Properly Have Taken Judicial Notice Could Be a Basis for Sustaining Defendant's Demurrer

1. Judicial Notice Cannot Be Taken of the Purported Facts Contained in the Documents Submitted by ABC

2. It Would Be Error to Sustain a Demurrer Without Leave to Amend Based on Judicial Notice of Any Fact in the Documents Submitted by ABC

IV. CONCLUSION (see §§12.91-12.95)

Comment: This sample shows how a subdivided statement of facts prepares the reader for a complex fact situation. It allows the appellant to characterize the facts in a subtly argumentative way to focus the court's attention on the equities favoring the appellant. Complex situations might be handled by including an abbreviated "statement of the case" early in the brief and introducing a more detailed discussion of the facts relevant to a particular issue before the argument on that issue. See §12.59 for sample statement of the case. See also §§12.60 (sample procedural history), §§12.83-12.90 (sample argument).

JUDICIAL PERSPECTIVE: An abbreviated "statement of the case" or introduction is a good idea. Very briefly state what the case is about and the issues, followed by the statement of facts.

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B. Table of Authorities

§12.38 1. Nature and Purpose

The primary purpose of the table of authorities is to assist the court in finding the discussion on a particular authority. The table helps the reader assemble materials to refer to while reading and evaluating the arguments.

PRACTICE TIP: If the brief is not produced in the office, counsel and the company producing the brief should have a clear understanding of who will be responsible for preparing the table of authorities to avoid a duplication of effort or a last-minute discovery that no table was made. Even if the task is clearly delegated and assumed, counsel is ultimately responsible for meeting the requirements of Cal Rules of Ct 8.204(a)(1)(A), so ensure that the company producing the brief understands and complies with the requirements. Carefully proofread the final product.

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§12.39 2. Form and Content

Every brief must be prefaced by a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited. Cal Rules of Ct 8.204(a)(1)(A). This table is a listing, by categories, of the authorities cited in the brief, showing the pages where each one is cited or discussed.

The authorities within each category (*e.g.,* cases, statutes) are customarily listed in alphabetical order, with multiple sections of the same code or constitutional provisions listed numerically. Although not required by the rules, it is best to use subcategories with subheadings where appropriate (*e.g.,* listing state and federal cases separately rather than all cases together). On headings, see §12.25.

PRACTICE TIP: Consider emphasizing authorities of paramount importance (*e.g.,* using boldface type, with a suitable explanation) when the list of authorities is long. Each of the various categories of authorities (*e.g.,* cases, statutes, court rules) must be listed separately. Cal Rules of Ct 8.204(a)(1)(A). There may, of course, be categories other than those specified in Rule 8.204(a)(1)(A).

NOTE: Although Rule 8.204(a)(1)(A) might be read as authorizing a single catch-all category of "other authorities," the better practice is to specify additional categories (*e.g.,* "treatises") when possible. Each category should be preceded by an appropriate heading.

Although it will be one of the last sections completed, the table of authorities, like the table of contents, is placed at the beginning of the brief, directly following the table of contents.

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§12.40 3. Sample Form: Table of Authorities

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TABLE OF AUTHORITIES

Cases ***Page***

Jones v Smith **(2003) xx C4th xx, xx CR2d xx**

Martin v Johnson **(2005) xx C4th xx, xx CR2d xx**

[*Continue in alphabetic order*]

Statutes

Code of Civil Procedure §123

Code of Civil Procedure §456

[*Continue in alphanumeric order*]

Court Rules

California Rules of Court 8.147(a)

California Rules of Court 8.224

[*Continue in numeric order*]

Other Authorities

Restatement of Contracts, Section 2

Comment: The accepted nomenclature is "Table of Authorities" rather than "Table of Citations." Cal Rules of Ct 8.204(a)(1)(A). The rules of court do not require any particular citation style for briefs. For consistency in this book, the citation style in this table follows the simplified CEB style for citing cases and statutes. In practice, however, the citation style should follow one of the two styles designated for a supporting memorandum (Cal Rules of Ct 1.200):

- Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers (4th ed 2000); or
- The most recent edition of the Uniform System of Citation ("Bluebook," published by the Harvard Law Review Association).

JUDICIAL PERSPECTIVE: The California courts virtually insist on the California Style Manual and do not like the Harvard "Bluebook." The "Bluebook" should be restricted to federal practice.

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C. Introduction (Prefatory Statement)

§12.41 1. Nature and Purpose

The opening brief is most helpful when it begins with a few preliminary recitals indicating the general nature and origin of the appeal and dispelling at the outset any issues of timeliness or jurisdiction. For example, the required recitals on appealability (see §12.43) would be appropriate even though they also ordinarily appear in the procedural history portion of the "Statement of the Case" (see §12.60).

The introduction (often titled "Prefatory Statement") should clarify the parties' relationship. If there are several plaintiffs or defendants, some of whom are parties to the appeal, this fact should be stated. If a cross-complaint might result in confusion of parties at the appellate level, this problem should be clarified.

The introduction should not duplicate a more detailed recitation of procedural facts in the statement of the case, nor should it be used for arguing the merits of the appeal. To avoid such temptations, confine the introduction to a brief paragraph or two, as in the example in §12.44.

PRACTICE TIP: An alternative method for introducing the case is to combine the introduction with a brief overview of the facts to lead into the more detailed discussion of the facts and procedural history. This method has the advantage of introducing the brief on as dramatic a note as possible. It is also the *preferred* method of many appellate specialists. See sample introductory statement of the case in §12.59.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.42 2. Form and Content

§12.42 2. Form and Content

The introduction should state the following:

- Nature of the action or proceeding in the trial court;
- Date and nature of the judgment or order appealed from;
- Date the notice of appeal was filed;
- Pertinent chronology if the timeliness of the appeal turns on any motions (*e.g.,* a motion for new trial); and
- Whether the case was tried with or without a jury if the case was tried on its merits.

PRACTICE TIP: Be aware of the introduction's potential impact on the court, and include any aspect likely to capture the court's attention. For example, a judgment awarding the plaintiff $5000 in compensatory damages and $5 million in punitive damages should be described in those terms and not simply as "money judgments."

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§12.43 3. Statement of Appealability

The appellant's opening brief must either (Cal Rules of Ct 8.204(a)(2)(B))

- state that the appeal is from a final judgment that disposes of all issues between the parties; or
- explain why the order or nonfinal judgment is appealable.

Failure to comply fully with these requirements may result in the court striking the appellant's opening brief, either on the court's own motion or on motion of a party. A further failure to comply fully may result in dismissal of the appeal for failure to submit a brief in compliance with the rules of court. *Lester v Lennane* (2000) 84 CA4th 536, 557, 101 CR2d 86.

PRACTICE TIP: The statement of appealability assures the court that it is dealing with an appealable judgment or order and reminds the appellant not to overlook the threshold issue of appealability. To alleviate at the outset any judicial concern on this score, the requisite recitals should appear early in the brief (although there is no formal requirement about placement). Moreover, counsel should comply with any placement preferences peculiar to the particular district or division. For example, some courts prefer the statement of appealability to be in a separate section of the brief so that it will be included in the table of contents and located more readily.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.44 4. Sample Form: Introduction (Prefatory Statement)

§12.44 4. Sample Form: Introduction (Prefatory Statement)

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I. INTRODUCTION

This is an appeal by _ _[*name*]_ _ from a judgment of the Superior Court of _ _[*name*]_ _ County in an action instituted by _ _[*name*]_ _ against _ _[*name*]_ _ for _ _[*indicate nature of action*]_ _.

The action below was tried _ _[*with/without*]_ _ a jury and culminated in a judgment _ _[*indicate prevailing party and nature of judgment*]_ _. Judgment was entered on _ _[*date*]_ _. (CT 123. [See §§12.50-12.52.]) This appeal is taken from that judgment, which finally disposes of all issues between the parties. Notice of appeal was timely filed on _ _[*date*]_ _.

Comment: This sample introduction and the remainder of the brief (used throughout this chapter) have not been updated for legal accuracy. It is presented as an example of *form,* not *content,* and should not be presumed accurate with regard to the state of the law.

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D. Summary of Argument

§12.45 1. Nature and Purpose

Although not mandated by the rules, a summary of the argument may be useful if the issues are particularly complex. The summary gives the court a capsule view of the appellant's perception of the case, that is, how the lower court went astray and why and how the appellate court should take corrective action.

The summary helps secure the maximum advantage to the appellant from the limited time that can be devoted to the case by the court, enabling it to grasp the essence of the appellant's position quickly. At the same time, it may whet the reader's appetite for the balance of the brief. Including a summary may also aid in the court staff's perception of the case or at least enhance the prospects that any errors in perception will be corrected.

PRACTICE TIP: The summary should not merely repeat the table of contents, nor does including a table of contents eliminate the need for a clear and concise statement of the appellant's position. On table of contents, see §§12.34-12.37.

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2. Form and Content

§12.46 a. Length and Amount of Detail

If a summary is to serve its basic purpose, it should not be a mere restatement of the brief. Such duplication in the guise of a "summary" is counterproductive. Likewise, if the summary is reduced to mere abstract generalities (*e.g.,* "The trial court committed manifest error"), it will probably be useless. Between these extremes, generalization is difficult, but a summary longer than three or four pages is probably suspect. Compare the length of the summary with the length of the balance of the brief; if the number of summary pages seems excessive compared with the number of pages in the brief, the summary is likely to be ineffective and a burden to the court.

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§12.47 b. Placement

A summary might be appropriate in one of two logical places in the brief:

- **At the beginning** (following the table of contents, table of authorities, and preliminary recitals). Placing the summary at the beginning helps the appellant capture the court's attention as soon as possible. The summary will serve as a guide to the argument and statement of the case and will help the reader grasp the significance of key facts.
- **After the statement of the case and at the start of the argument.** This placement orients the reader to the argument after he or she has acquired the facts, and it provides a strong focus and introduction for the argument.

PRACTICE TIP: If the summary is placed at the beginning of the brief, include sufficient factual background to place the arguments in context because the reader will presumably not yet have read the statement of the case.

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IV. STATEMENT OF THE CASE: PROCEDURAL AND SUBSTANTIVE FACTS

§12.48 A. Nature and Importance

The appellant's opening brief must contain a statement of the case concisely setting out the nature of the action or proceeding and the relief sought, a summary of the material facts, and the judgment or ruling of the superior court. Cal Rules of Ct 8.204(a)(2).

The statement of the case must be drafted with the scope of appellate review in mind. For example, if the appeal is from the granting of a nonsuit, the evidence must be viewed in the light most favorable to the appellant. See *Raber v Tumin* (1951) 36 C2d 654, 226 P2d 574. On review of a jury verdict, however, the appellant must state the facts most favorable to the respondent. See *Pick v Santa Ana-Tustin Community Hosp.* (1982) 130 CA3d 970, 978, 182 CR 85. On scope of appellate review, see chap 5.

The appellate court usually has some knowledge of the relevant propositions of law but no prior knowledge of the facts, so it must look to appellant's counsel to fill this void. Unless counsel fulfills this responsibility, the arguments may be incomprehensible as well as unpersuasive. Moreover, if the appellant fails to provide an adequate statement of the case, the court is obliged to look to the respondent's brief.

PRATICE TIP: If there is a legitimate reason for addressing evidence beyond the appellate court's purview, expressly indicate the special and proper purpose for which it is being done. For example, the appellant need not limit the discussion to the respondent's evidence when arguing that an error was prejudicial. See Cal Const art VI, §13 (court authorized to consider "entire cause").

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§12.49 B. Form and Content

The summary of material facts must include both procedural and substantive facts. Cal Rules of Ct 8.204(a)(2). Except for simple briefs, the procedural facts are often placed under the heading "Statement of the Case" and the substantive facts under the heading "Statement of Facts." Both may be placed under the major heading of "Statement of the Case," and each may be given a subheading. The exact organization is less important than compliance with the substance of Rule 8.204.

NOTE: Some of the required elements (*e.g.,* nature of the action, lower court judgment or ruling) are usually covered in the introduction (see §§12.41-12.44), but they may be addressed in more detail in the statement of the case.

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§12.50 1. References to Record

The statement of the case must contain only matters that appear in the record on appeal (Cal Rules of Ct 8.204(a)(2)(C)), aside from the limited matters of which the court may take judicial notice. Evid C §§450-460. See *Johnson v Tago, Inc.* (1986) 188 CA3d 507, 512 n1, 233 CR 503 (court will disregard improper references to events outside record). Each fact recital in the statement of the case should be supported by a reference to the record. See *Green v City of Los Angeles* (1974) 40 CA3d 819, 115 CR 685 (duty of appellant's counsel to refer court to record supporting appellant's position); *Williams v Williams* (1971) 14 CA3d 560, 565, 92 CR 385 (brief failed to cite portion of record supporting each assertion; court of appeal has no independent duty to search record).

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§12.51 2. Practical Reasons for Reference to Record

Reference to the record is mandated by Cal Rules of Ct 8.204(a)(1)(C), and a brief that fails to comply with this rule may be returned by the clerk marked "received but not filed" under Cal Rules of Ct 8.204(e) (noncomplying briefs). However, the following are additional reasons to scrupulously adhere to this practice:

- Reference to the record helps counsel meet the fundamental requirement (reflected in Cal Rules of Ct 8.204(a)(2)(C)) that the statement be accurate and confined to matters in the record on appeal;
- It attests to the credibility of the appellant's presentation and facilitates the court's independent investigation, which is particularly important if the respondent challenges the accuracy of the appellant's account; and
- It requires counsel to read the record carefully to determine that the brief contains what the record actually reveals.

WARNING: Inability to find a supporting record reference might mean that a statement should be deleted or reframed.

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§12.52 3. How to Cite to Record

Citations to printed records should be to volume and page number. If any part of the record is in electronic format, then the citation should be made with the same level of specificity as for the printed record. Cal Rules of Ct 8.204(a)(1)(C).

Abbreviations should be succinct, readily comprehensible, and used in a consistent fashion. For example, the clerk's transcript and reporter's transcript are often referred to as follows:

- **Clerk's transcript:** "CT 24:5-10" or "CT 24/5-10" (page number before the colon or slash; line number(s) after);
- **Reporter's transcript:** "RT 44:20" or "RT 44/20" (page number before the colon or slash; line number(s) after);
- **Appendix used in lieu of clerk's transcript** (Cal Rules of Ct 8.124): References to the appendix should be noted in similar fashion to the clerk's and reporter's transcripts.

See, e.g., sample forms in §§12.59-12.60 for examples of citations.

PRACTICE TIP: To avoid any confusion about the method used to cite the record, consider putting an explanatory footnote at the beginning of the brief, wherever the first reference is made.

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C. Drafting Effective Statement of the Case

§12.53 1. Organize According to Needs of Case

There is no required method of organization for presenting the statement of the case. See sample form in §12.59 and accompanying text for illustration and discussion of the ways in which organization might vary. The precise organization must follow the needs of the particular case.

PRACTICE TIP: Examine well-written appellate opinions in the same area as the appellant's appeal to gain insights into structures that have received tacit judicial approval. On statement of facts, see Moskovitz, Winning an Appeal §3.3 (2d ed 1995).

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§12.54 a. Formulate Outline

Before writing a first draft, decide on a logical presentation sequence and draft a suitable outline, with the principal points serving as subheadings in the presentation.

In formulating the outline, bear in mind that the case must ordinarily be presented from two intertwined perspectives: one addressed to the underlying facts, the other to the proceedings in the litigation. If the sole focus is on the underlying facts, the appellate court will not be clear on how the legal issues in the case arose. Focusing heavily on the chronology of the lawsuit itself (*e.g.,* a witness-by-witness account of the trial testimony) may result in excessive detail that fails to convey the essential story. In other words, avoid a fact summary that is merely a sequential recitation of the testimony as it was presented at trial.

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§12.55 b. Present in Chronological Order

Most appellants decide to use a chronological narrative. Although such a presentation should refer to the salient aspects of the lower court's proceeding, the underlying facts should usually be presented in terms of their own logical development. Direct quotations from the record, although they do lend credibility to the fact summary, should be used only when counsel needs to capture the precise flavor of the testimony, and then they should be as brief as possible.

If the facts are extremely complex, it may be necessary to organize them by subject matter, in conjunction with a chronological or other suitable presentation of the facts pertinent to each subject.

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§12.56 c. Manage Complex Facts

Complex briefs with extensive facts require special treatment. An Introductory Statement of Facts as a separate heading can be useful in telling a general story of what happened, with a note that the particular facts pertaining to each issue will be presented separately when that issue is discussed.

Each issue would include the following:

- Statement of facts relating the evidence pertinent to that issue; and
- Legal argument showing the error.

Complex facts may also be managed by subdividing the statement of facts, using headings and subheadings, which can then be extracted to create a forceful table of contents. See illustration in §12.61. Separating the undisputed facts from the disputed facts is helpful to emphasize that the appellant's claims of error are grounded on matters not in dispute.

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§12.57 2. Emphasize Most Relevant Facts

Decide which of the underlying facts and which portions of the trial court proceedings are particularly relevant to the issues on appeal, and focus the account on those aspects. Include a summary account of other matters to acquaint the appellate court with the factual background of the case, but when addressing aspects of the case not germane to the issues on appeal, avoid any unnecessary details.

Avoid a narrow concept of relevancy. When there is a potential issue of whether the errors were prejudicial, the appellant's statement of the case should summarize portions of the evidence as a basis for contending that the case was a close one. Point out procedural aspects bearing on the possibility of prejudice (*e.g.,* the jury arrived at a 9-to-3 verdict after lengthy deliberation). On facts affecting determination of prejudice, see §§5.34-5.39. Also, consider the desirability of persuading the appellate court that the lower court's result was unjust. Facts that assist in this endeavor are relevant.

PRACTICE TIP: The appellant should present unfavorable aspects of the case as appropriate. The presentation of relevant unfavorable facts can afford counsel some room for advocacy; that is, counsel may be able to soften and preempt the impact of adverse facts by pointing out mitigating factors. For example, counsel may weaken the impact of adverse testimony by showing that it came from an untrustworthy source.

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§12.58 3. Be Fair

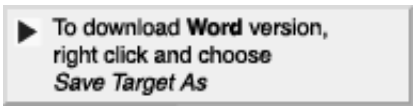
Tactical considerations and professional ethics dictate that the appellant state the case fairly and accurately. See Cal Rules of Ct 8.204(a)(2); Cal Rules of Prof Cond 5-200. If appellant's counsel misstates the facts or presents a distorted picture by ignoring facts adverse to the appellant's position, the opponent will likely call such distortions to the court's attention—or the court may discover them on its own. At that point, counsel's credibility is destroyed, and the court may become distrustful even of well-founded assertions. Indeed, if the appellant asserts a lack of substantial evidence as a ground for appeal and then fails to state the evidence fairly, presenting only the facts and inferences most favorable to its side, the court can waive the argument. *Handy v Shiells* (1987) 190 CA3d 512, 519, 235 CR 543; *Oliver v Board of Trustees of Eisenhower Med. Ctr.* (1986) 181 CA3d 824, 832, 227 CR 1; *Wickham v Southland Corp*. (1985) 168 CA3d 49, 54, 213 CR 825.

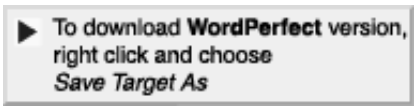
PRACTICE TIP: Although the concept of fairness clearly covers the substantive presentation (*i.e.,* avoiding misstatements, overstatements, omissions of relevant adverse facts, and half-truths), it also encompasses matters of tone, style, and the appearance of fairness. Scrupulously avoid pejorative language, epithets, sarcasm, or ridicule. Any disrespectful or contemptuous reference to the trial judge is likely to be received negatively by the appellate court. Without neglecting the obligation of advocacy, counsel's need for a dispassionate tone is particularly acute in the statement of the case because that tone itself will convey an aura of fairness, enhancing the credibility of the factual recitals.

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D. Sample Forms

§12.59 1. Sample Form: Statement of the Case





II. STATEMENT OF THE CASE

The present action has its origin in a cover-up by which Defendant ABC Insurance Company, along with numerous doctors and employees of a hospital it insured, sought to avoid paying the proper amount of damages to the family of one Jane Smith. She had died as a result of a major incident of serious medical malpractice. The cover-up included a scheme, described with great specificity in the complaint, to arrange to have a copy of the ABC claim file on the case, which contained calculated misinformation, given to an inexperienced attorney, with whom ABC intended to settle the case for far less than its true value. The participants in the cover-up also agreed that they would take certain steps to ruin anyone who might frustrate their scheme or be involved in bringing it to light. Particularly, they agreed to falsely assert, if necessary, that the claim file had been stolen. In this way, they hoped to conceal their attempt to cover up the malpractice and to cause anyone involved in the Smith action who ultimately got in their way to be indicted for a crime.

Plaintiff and appellant John Jones had the misfortune to be employed by the law firm that was the recipient of the ABC claim file. He successfully settled the Smith malpractice case for substantially more than ABC had hoped to pay. He then became the victim of the defendants' conspiracy when they led the police and the prosecuting authorities to believe that the claim file had been stolen.

Appellant was therefore indicted and tried for receiving and concealing stolen property. He was acquitted because the jury found that, in fact, the claim file had not been stolen. Appellant then brought the present action against those involved in the conspiracy that led to his indictment and trial.

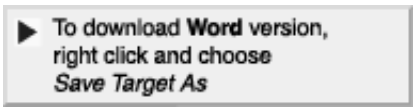
The trial court dismissed the action after sustaining all of defendants' demurrers to every cause of action in appellant's complaint without granting him leave to amend, ostensibly on the ground that defendants' conduct was privileged. The issue before this court is whether, on the facts alleged in the complaint, appellant could state a cause of action on any legal theory.

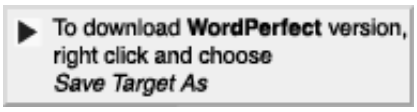
Appellant will establish that if the allegations of the complaint are true, as they must be presumed to be on this appeal, the judgment must be reversed. There can be no question that appellant has stated all the elements of a cause of action for malicious prosecution. Privilege is not a defense to a cause of action for malicious prosecution. Thus, appellant certainly should have been allowed to go to trial on this theory. Appellant will also show that the trial court was in error in sustaining the demurrers to the other causes of action on the ground of privilege. Last, appellant will show that there is no other theory on which the demurrers could have been sustained.

Comment: The drafter of this brief has chosen to present a statement of the case that functions as an introduction and to follow it up with sections detailing the procedural history and the facts. Another commonly used format is to lead with an introduction and then present the facts and procedural history in subsections under the heading Statement of the Case. In a simpler brief, all these sections might be combined in one section titled Statement of the Case. The precise format may vary, depending on the needs of the particular case, as long as the requirements of Cal Rules of Ct 8.204 are met. Those requirements include either (1) a statement that the appeal is from a judgment finally disposing of all issues between the parties or (2) an explanation of why the order or nonfinal judgment is appealable.

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§12.60 2. Sample Form: Procedural History





A. Procedural History

Appellant filed a complaint pleading a first and primary cause of action for malicious prosecution and conspiracy to commit malicious prosecution. (CT 4-22.) The remaining causes of action are simply various other legal theories, with some additional facts, on which appellant sought to recover damages relating to the same general circumstances giving rise to the malicious prosecution. (CT 23-52.) These facts are all related to the series of events that led to appellant being indicted, tried, and acquitted of stealing and concealing the Smith claim file. Defendants were served and responded to the complaint by demurring and moving to strike portions of the complaint. (CT 53-124.)

Argument was held on April 6, 2009. Thereafter, the trial court sustained all demurrers without leave to amend as to all causes of action on the ground that all theories of the complaint were barred because defendants' conduct was privileged. (CT 552-553, 556.) The trial court's minute order reflects that the basis for its ruling was the decision in *Pettitt v Levy* (1972) 28 CA3d 484, 104 CR 650. The trial court took the motions to strike off calendar. *Pettitt v Levy, supra*.

Judgment of dismissal was filed on June 15, 2009. (CT 557.) This appeal is taken from that judgment, which finally disposed of all issues between the parties. Appellant filed a timely notice of appeal on July 7, 2009. (CT 559.)

Comment: The procedural history is presented before the facts in this brief because it is appropriate to focus the court's attention at the outset on the fact that this is an appeal from a demurrer. The order of procedural history and statement of facts will vary, depending on the material issues in the case. Procedural histories should always include the jurisdictional basis for the appeal. Other contents will vary from brief to brief, depending on the issues presented.

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§12.61 3. Sample Form: Statement of Facts

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B. Statement of Facts

1. Introduction

Because this appeal arose from the trial court's sustaining a demurrer to the complaint without leave to amend, the issue is whether plaintiff and appellant has stated, or could state, a cause of action under any possible legal theory. For such purposes, all material facts pleaded in the complaint, and those that arise by reasonable implication, must be considered true. *Pollack v Lytle* (1981) 120 CA3d 931, 936 n2, 175 CR 81.

Defendant ABC Insurance Company (hereafter "ABC") requested the trial court to take judicial notice of numerous materials relating to the litigation underlying appellant's complaint. (CT 67-68, 218-340.) The order sustaining the demurrer does not reflect whether the trial court did so. Appellant will show that it would have been error for the trial court to have taken judicial notice of these materials. The following statement of facts, therefore, is taken solely from the allegations of the complaint. The purported additional facts that ABC sought to place before the court through its request for judicial notice will be discussed separately in connection with that legal issue.

2. Plaintiff Was an Attorney Whose Practice Emphasized the Prosecution of Medical Malpractice Actions

Appellant John Jones is, and at the time of the events that gave rise to his complaint was, an attorney whose practice emphasized medical malpractice actions. (CT 7:2-6.) In September 2003 he was employed by the law firm of Brown & Black to help them handle a medical malpractice action they had filed titled *Smith v County Hosp.* (CT 17:13-16.) As a result of his involvement in the *Smith* action, appellant eventually came to be tried and acquitted of receiving and concealing stolen property. It is thus important for an understanding of his complaint to detail the facts alleged concerning the *Smith* litigation.

3. ABC Was Aware That Medical Malpractice Had Been Committed on Jane Smith

In October 2002 Jane Smith was admitted for minor surgery at a hospital operated by defendant County Hospital. Anesthesia was negligently administered to her. As a result she became comatose and eventually died. (CT 9:11-19.) Defendant George Thomas, M.D. (hereafter "Thomas"), was the Chief of Anesthesiology at County Hospital. (CT 8:19-21.)

The doctors directly involved in the incident admitted to Thomas that gross negligence had occurred. Thomas passed this information on to ABC through defendant Richard Johnson (hereafter "Johnson"), who was a claims manager for ABC. (CT 7:24-26, 9:20-26.)

4. Defendants Entered Into an Elaborate Scheme to Conceal the Medical Malpractice

It was apparent that ABC, County Hospital, Thomas, and others all had substantial exposure in medical malpractice actions brought by Mrs. Smith for her injuries and by her family for wrongful death after she died. Defendants therefore entered into an elaborate scheme to conceal the true cause of Mrs. Smith's condition and to pretend that she had simply suffered a heart attack during surgery. (CT 11:6-21.) To carry out this conspiracy, defendants undertook the following conduct.

5. Defendants Falsified ABC's Claim File and Arranged to Place It in the Hands of Inexperienced Attorneys

Defendants' first strategy was to take steps to assure that any medical malpractice action that might arise would be handled by an inexperienced attorney, with whom a settlement for far less than the true value of the case could be reached. (CT 11:22-24, 12:2-7, 17:24.) They planned to accomplish this result in the following manner: It was the common practice of ABC, and other insurance companies, through their claims managers, to establish an approximate value for a case, known as "the reserve," and to record the reserve in the company's claim file, which is kept on the case. (CT 10:14-18.)

The reasonable value of the Smith case exceeded four million dollars ($4,000,000). (CT 10:12-13.) In furtherance of their conspiracy, ABC vastly understated the amount of the reserve in its claim file as being only one hundred fifty thousand dollars ($150,000). (CT 16:19-20.) Defendants then arranged to have Johnson provide a copy of the ABC claim file to the law offices of Brown & Black, who had become the Smiths' attorneys, before they retained appellant to assist them. (CT 16:21-24.) It was common practice for insurance companies to give discretion and authority to their claims managers, either expressly or impliedly, to give a copy of the claim file, including the amount of the reserve, to prospective litigants or their attorneys. (CT 10:21-27.)

6. Plaintiff Frustrated Defendants' Attempt to Settle the Smith Case Cheaply

Defendants' plan began to unravel when their attempt to settle the Smith case for one hundred twenty-five thousand dollars ($125,000) was rejected by Brown & Black. (CT 17:8-10.) Instead, appellant came to work for Brown & Black. (CT 17:13-16.) In 2004 he obtained a structured settlement for the Smiths, which was substantially higher than ABC's original offer. (CT 17:17-19.) On February 1, 2005, appellant left the employ of Brown & Black. (CT 17:20-21.)

7. As Part of Their Original Conspiracy, Defendants Had Agreed to Ruin Anyone Who Got in Their Way

That was not the last that appellant was to hear of the Smith case. As part of their conspiracy, defendants had also agreed that if any of their scheme should start to come to light, they would all deny that they (1) were aware that medical malpractice had been perpetrated on Mrs. Smith, (2) had falsified the reserve in the claim file, and (3) had voluntarily arranged to deliver a copy of the ABC claim file to anyone. Johnson had agreed with defendants that if he was indicted, or otherwise charged with a criminal offense relating to his having been the one who provided a copy of the claim file to Brown & Black, he would not contest the charges but would plead nolo contendere. (CT 14:18-23, 15:21-23.) Defendants further specifically agreed to cause damage to anyone who might actively participate in the prosecution of the Smith medical malpractice claim rather than accept the defendants' version. (CT 16:1-4.)

8. Defendants Were Instrumental in Causing Plaintiff to Be Indicted and Tried for Receiving and Concealing a "Stolen" ABC Claim File

Against this background, several years after the Smith case was settled, the fallout from the conspiracy unfolded in the following manner, which led to appellant's indictment and trial: On February 5, 2005, the Los Angeles County Police were conducting a search of the Brown & Black law offices for purposes not related to the Smith case. They came across the copy of the ABC claim file in the Smith case that Johnson had long ago delivered to Brown & Black. (CT 17:25-18:1.) The police then asked ABC, and its attorneys, officers, and employees, what they knew about the presence of the ABC claim file in the Brown & Black office. (CT 18:2-5.)

Defendants led the police, and a grand jury, to believe that the copy of the claim file had been stolen. (CT 18:6-19:3.) They did not tell the authorities about their conspiracy to cover up the medical malpractice that had caused Mrs. Smith's death or how the copy of the claim file came to be in Brown & Black's office as part of defendants' cover-up conspiracy. (CT 18:6-19:3.)

Defendants knew that they were not telling the truth and that they did not have probable cause to make any accusation that appellant had been involved in the commission of a crime. They made false statements in furtherance of their design to cause trouble for appellant, who had successfully represented the Smiths in the medical malpractice action, "knowing full well and intending that he would be accused of a crime based upon their deceitful statements." (CT 19:4-11.)

Appellant was indicted for receiving and concealing stolen property, namely, the claim file. (CT 19:12-21.) Appellant was eventually tried for these alleged crimes. (CT 20:2-8.)

9. Plaintiff Was Acquitted Because the Jury Found That the Claim File Had Not Been Stolen

On October 12, 2009, a jury found appellant to be not guilty *because it concluded that the claim file had, in fact, not been stolen.* (CT 20:912.)

10. Plaintiff Suffered Substantial Damages As a Result of Defendants' Intentional and Malicious Conduct

Reports of appellant's indictment were carried in most of the newspapers and publications that are read by attorneys. It was broadcast on radio and television. (CT 20:1-22.) He became unable to prepare and try his cases properly. (CT 20:1-17.) He suffered substantial losses in his law practice, which was tremendously adversely affected. (CT 20:17-19.) Appellant also incurred approximately seventy-five thousand dollars ($75,000) in attorney fees to defend against the criminal charges. (CT 20:2-24.) In addition, he suffered severe emotional distress as a result of defendants' conduct. (CT 20:1-16.)

Appellant alleged that defendants' acts were done maliciously, deliberately, intentionally, and in conscious disregard of his rights. He further alleged that the acts were done, in part, for the purpose of discrediting him as an attorney and ruining his business so that he would no longer be in a position to prosecute actions against any other insureds of ABC or any other insurance carriers. Appellant therefore sought exemplary and punitive damages. (CT 21:1-8.)

Comment:

Introduction: The introduction to this statement sets the stage for the facts that follow by stating the proper rule for appellate review of the facts. See §12.43. Because the appeal arose from a demurrer, the facts underlying the action are taken from the allegations of the complaint. This technique is more effective than beginning each sentence with "The allegations of the complaint show…."

The second paragraph of the introduction illustrates how facts not strictly before the court on review may be called to the court's attention for a limited purpose. It also demonstrates how facts relevant to a particular issue may be treated separately to avoid cluttering up and interrupting the flow of the statement of facts.

Order: This statement presents the facts in chronological order, which is the usual organization for a statement of facts. It illustrates the technique of subdividing a complex fact situation to draw the court's attention to the most important points. See §§12.64-12.66. For a sample complex table of contents, see §12.37.

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V. ARGUMENT

A. Nature and Format

§12.62 1. Purpose of Legal Argument

A legal argument must do the following three things:

(1) State the broad legal principles and refine those principles to develop the precise legal theory on which the argument rests;

(2) Demonstrate the relevance of that theory to the material facts of the specific case; and

(3) Show that the error resulted in prejudice to the appellant.

NOTE: When the brief must include a discussion of prejudice, it usually follows the development of the theory and its application to the facts. For example, one might argue that the error was highly prejudicial by showing how the error was vital to the central issue of the case or that the evidence was so close that the error tipped the balance in the respondent's favor. For illustrations of prejudice, see §§5.29-5.39.

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§12.63 2. General Organization

The argument portion of the brief consists of the various points and subpoints being urged as grounds for reversal or modification of the judgment or order being reviewed. For the brief to be persuasive, the argument should be designed to convince the court of the validity of the specific grounds of error complained of, rather than serving only as a descriptive treatise or encyclopedic summary of the law.

PRACTICE TIP: If the prejudicial nature of the error complained of is not obvious, demonstrate that it was prejudicial to the appellant and resulted in a miscarriage of justice. Cal Const art VI, §13. See §5.29.

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§12.64 3. Headings and Subheadings

Each point must be given an appropriate heading. Cal Rules of Ct 8.204(a)(1)(B). Failure to do so may lead the court to conclude that no claim of error is based on the point. *Live Oak Publ'g Co. v Cohagan* (1991) 234 CA3d 1277, 1291, 286 CR 198. Depending on the complexity of the point, subheadings corresponding to subpoints in the analysis are often helpful. Under Cal Rules of Ct 8.204(a)(1)(B), each heading or subheading should summarize the point, which should be supported by argument and, if possible, citation of authority.

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§12.65 a. Use Active Statements

Statements actively asserting the propositions being urged are generally more effective than mere descriptive titles. Headings should be so framed that reversal will be compelled if the arguments are well made. *Lowery v Robinson* (1965) 238 CA2d 36, 42, 47 CR 495. For example, if the proposition being urged is that the action was barred by limitations, a heading reading "Plaintiff Filed a Timely Complaint" is preferable to one reading simply "Statute of Limitations." The headings should state, even if in abbreviated form, the conclusion of the appellant's particular argument.

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§12.66 b. Make Headings Specific, Not Abstract

Headings should usually be framed in terms of the specific case rather than in abstract principles of law, although the latter may be appropriate as subpoints in developing the argument. The statement "The Statute of Limitations Is Tolled Until the Injury Is Discovered" may be appropriate as a subhead, but the main heading should include a reference to the specific case, *e.g.,* "Plaintiff Filed a Timely Complaint."

PRACTICE TIP: Headings and subheadings should be short and concise. A single brief sentence usually suffices. Carefully choose each word and phrase so that they accurately reflect the subject matter and draw the reader toward the concluding inference.

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4. Pattern and Elements of Argument

§12.67 a. Use Inferential Scheme, Not Syllogisms

Novice drafters of appellate briefs sometimes attempt to wrestle their legal arguments into a syllogism:

_A_ is _B._
_C_ is _A._
Therefore _C_ is _B._

The conclusion of a legal argument does not necessarily follow from the premise as it does in a syllogism. Legal arguments exemplify an inferential scheme of propositional logic:

If _P,_ then _Q._
_P,_
therefore _Q._

As applied to an appellate argument, this can be expressed as follows:

If _X_ is the set of facts and _Y_ is the law applicable to those facts, then the lower court's judgment or ruling is erroneous.
(If _P,_ then _Q._)

_X_ is the case as shown by the record,
and _Y_ is the law as shown by the cited authorities, …
(_P,_)

therefore the lower court judgment or ruling is erroneous. (_therefore Q._)

The actual shape of a legal argument develops less formally than in this illustration. The heading of the argument asserts the appellant's claim (the conclusion of the argument) in a concise fashion. (On argument headings, see §§12.64-12.66.) The text of the argument then sets out the appellant's claim more fully, together with the data supporting it (*i.e.,* factual items in the record), and bridges the data and the claim with legal propositions backed by supporting authority. If the court assents to the inference, it will convert a conditional proposition to a legal judgment.

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§12.68 b. Make Inferences Persuasive

In a legal argument, the premises (unlike premises of a syllogism) are controverted; hence, the attorney must convince the court to accept the premises to persuade it to make the inference to the conclusion sought.

NOTE: Judges are sometimes reluctant to draw an inference, even when convinced of the premises, unless they are also convinced that the result will be fair and reasonable.

PRACTICE TIP: When there is rebutting legal or factual data, the conclusion of a legal argument may not be inferred, even though the premises are assented to. If there is potentially rebutting data, appellant's counsel should consider the need to negate it.

On pattern of arguments, see Toulmin, The Uses of Argument, chap 3 (rev ed 2003).

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B. Drafting Effective Argument

1. Determine Argument Sequence

§12.69 a. Develop Tentative Outline

Before writing a first draft, develop a tentative outline that lists the issues and subissues. This will provide the skeleton for drafting headings and subheadings. Each issue will later be developed by stating the relevant propositions of law, discussing supporting authorities, and tying the propositions and authorities to the facts of the case.

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§12.70 b. Determine Presentation Sequence: Most Important Points First

Discard weak points before beginning the drafting process. The most important points should be presented first, although this approach can vary according to the needs of the case. This is generally advisable because of the limited amount of time the court can devote to the brief, the significance of first impressions, and the likelihood that the court will assume that the initial arguments presented are the best the appellant has to offer. Likewise, reserve the greatest amount of argument for the most important legal issues.

Sometimes a relatively straightforward presentation sequence will suffice (*e.g.,* statement of proposition of law, citation and discussion of supporting authorities, comparison of facts with the proposition and authorities). In other instances, development of the argument may require a step-by-step intertwining of facts and law through a series of subpoints.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.71 c. Develop Logical Argument

§12.71 c. Develop Logical Argument

Whatever sequence is used, the following guidelines are helpful for keeping the argument focused:

- Proceed toward a fixed objective in a logical sequence; do not meander aimlessly among the facts and the law.
- Make sure the presentation sequence will be apparent not only to the attorney author but also to the judicial reader.

PRACTICE TIP: Provide the court with suitable road maps, such as a preliminary paragraph indicating the theme of the argument to come or subheadings (and sub-subheadings) to chart the course of the argument.

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§12.72 d. Indicate When Issues Were Preserved for Appeal

If not otherwise obvious, indicate the manner in which a point was preserved for appeal (*e.g.,* an objection to evidence under Evid C §353(a)), with an appropriate record reference.

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§12.73 2. Use Authorities Selectively

In providing supporting authority for a given proposition, one or two citations will usually suffice. Lengthy, cumulative string citations add nothing, impede the flow, and serve only to irritate busy judicial readers.

PRACTICE TIP: When the inclusion of many authorities is justified—as when cases on point are in conflict and counsel seeks to show that the cases supporting the appellant's position represent the weight or trend of authority—explain why, in this particular instance, the number of citations is legitimate.

The limited number of authorities should be selected carefully. Referring to a leading case on point is preferable to citing cases that merely follow it uncritically. Other factors being equal, a recent case is preferable to an earlier one. When the leading case itself is relatively old, accompany it with a recent case that follows it, to allay any concerns about the continuing vitality of the doctrine.

PRACTICE TIP: Although it is proper to cite such generally recognized works as the restatements, encyclopedias, and compilations, view them primarily as research tools and not as authorities in their own right.

On weight given cases from other jurisdictions, see §5.50. On using legal authorities, see §§5.48-5.57.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.74 a. Specific Cases

§12.74 a. Specific Cases

In choosing the most suitable cases, examine facts and holdings as well as propositions cited. A factually similar case is likely to carry more weight than one that is factually remote. A case that turned on a cited proposition will be more persuasive than one that merely paid lip service to the point. For maximum benefits from such factual parallels and holdings, discuss the cases rather than merely citing them.

PRACTICE TIP: When focusing on a particular segment of an opinion, cite the specific page or pages where the issue appears.

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§12.75 b. Quotations

In developing the argument, appellant's counsel may wish to quote pertinent language from the authorities relied on. Within limits, this practice is both proper and persuasive. However, avoid miring the argument in page after page of quotations that serve no real purpose and might annoy a busy reader. In drafting and editing the brief, carefully assess each quotation to ascertain the following:

- Does the quotation add to the argument, or is it unnecessarily cumulative?
- Is all the language quoted necessary for a fair and effective presentation?

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§12.76 3. Handle Adverse Authorities

One of the most difficult questions facing counsel is what approach to take with adverse authorities. The most appropriate course, consistent with professional responsibility and sound tactics, is a combination of candor and advocacy. In essence, point out the adverse authorities and explain why they should not be considered controlling in the present case (*e.g.,* they are factually distinguishable or represent mere dicta, or the principles they embody should not to be applied to the case at hand). Also consider arguing that the previously adopted doctrine should be reexamined and rejected, if such an approach is not precluded under the stare decisis principles of such cases as *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321.

If counsel cannot effectively distinguish adverse authority or make an argument for adopting a new rule of law, the point should be reevaluated and, if necessary, abandoned. On evaluating adverse authority, see §§5.52-5.57.

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§12.77 4. Address Novel Questions

At times, the point being urged by the appellant may be relatively novel, or one of first impression, at least in California. Acknowledge that the question is still open (which in itself may arouse the court's interest), and then explain why it should be resolved in the appellant's favor. Counsel may draw on such means as

- analogies to established doctrines in other areas and their underlying policies;
- precedents from other jurisdictions;
- views from treatises or law review articles; and
- the consequences of adopting or rejecting the position in question.

On factors influencing appellate courts to adopt a new rule of law, see §§5.58-5.63.

PRACTICE TIP: Before urging that a point is novel, be reasonably certain that it is in fact novel and not the result of flawed research. Even then, qualify the assertion of novelty to avoid any inadvertent oversight, saying, *e.g.,* "Our research has not disclosed any reported California appellate case on point" rather than "There are no California cases on point."

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§12.78 5. Apply Facts

In presenting the arguments, point out how the cited authorities apply to the facts of the case at hand. The argument portion of the brief requires a treatment of the facts as well as of the law.

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§12.79 a. Avoid Duplication

Although the facts covered in the argument will necessarily have been discussed as part of the statement of the case, avoid duplication as far as practicable. Consider dealing with relevant facts in a summary fashion in the argument, with cross-references to the pertinent portions of the statement of the case. Alternatively, address the point in broad outline in the statement of the case, and defer to the argument for a more expansive treatment. Even when some duplication is inevitable, varying the language helps avoid a sense of repetition.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.80 b. Support Argument With Record

§12.80 b. Support Argument With Record

When discussing facts in the argument, basic principles of presentation should not be disregarded. See §§12.48-12.58. Confine the presentation to matters of record, supported by suitable record references. When factual matters are argued, counsel still needs scrupulous accuracy and due regard for the principles of appellate review.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.81 c. Use Thoughtful and Serious Tone

§12.81 c. Use Thoughtful and Serious Tone

Although the argument portion of the brief may show an advocate's tone more readily than the statement of the case, that tone should be thoughtful and serious, not strident or bellicose. Never use pejoratives or epithets.

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§12.82 6. Advocate, But Avoid Overstatement

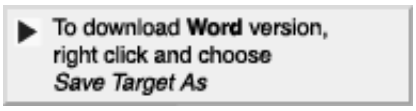
In arguing the principles of law, as in addressing the facts, present the case fairly. Although the argument should be convincing, do not overstate the case. For example, arguing that a principle is a matter of established law when in fact it is unsettled will undermine counsel's credibility. Conversely, a candid recognition of the true state of the authorities on adverse points will evoke a more receptive response from the reviewing court.

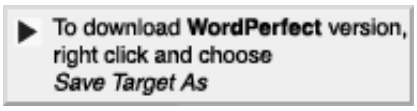
Try to convey a sense of injustice sufficient to convince the appellate court that the judgment ought not to stand. Merely claiming injustice, however, will not satisfy the burden of proving unfairness and, if unsupported, may even be counterproductive. Address arguments to the essential injustice of the trial court's actions or their consequences; that injustice need not be confined to the substantive aspects of the case but may stem from procedural deficiencies as well.

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7. Sample Forms: Argument

§12.83 a. Sample Form: Summary of Argument





III. ARGUMENT

A. Summary of the Argument

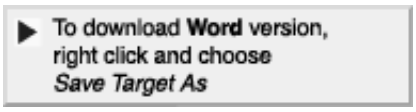
All defendants demurred on numerous different grounds to all of appellant's causes of action. In his memorandum in opposition to the demurrers, appellant analyzed every ground raised by defendants and showed them all to be erroneous. (CT 393-485.) The trial court sustained all the demurrers without leave to amend on the sole ground that defendants' conduct alleged in the complaint was privileged. (CT 552-553, 556.)

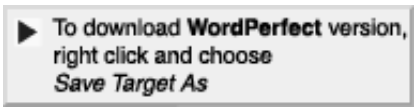
The major theory on which appellant based his complaint, however, was contained in his first cause of action for malicious prosecution. Appellant will analyze that theory first and show that privilege is not even arguably a defense to a cause of action for malicious prosecution. He will then show why none of the other grounds asserted in the demurrers has any merit either.

Comment: An introduction to or summary of the argument is not required but is a useful technique for focusing the court's attention. Note that the appellant will lead the argument portion of the brief with the major contention and devote significantly less attention later on to lesser points.

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§12.84 b. Sample Form: Assignment of Error





B. The First Cause of Action States a Valid Claim for Malicious Prosecution and Conspiracy to Commit Malicious Prosecution

1. The Complaint Alleged All Elements of Malicious Prosecution

Comment: In the argument, assignments of error are stated and developed. State each assertion of error as a separate issue with appropriate headings and subheadings. Frame the headings in terms of the specific case rather than in abstract principles of law. An example of an abstract and passive way of stating the subheading is "1. Elements of Malicious Prosecution."

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§12.85 c. Sample Form: Broad Legal Principle

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The elements of a cause of action for malicious prosecution are (a) instigation of legal proceedings, (b) lack of probable cause, (c) malice, and (d) favorable termination of the prior proceedings. See 5 Witkin, California Procedure, *Pleading* §751 (5th ed 2008).

Comment: This paragraph states the broad legal principle supporting the appellant's claim of error. Subsequent paragraphs define this principle and apply it to the facts.

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§12.86 d. Sample Form: Narrow Legal Principle

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As Witkin also states in 10 Witkin, Summary of California Law, *Torts* §476 (10th ed 2005):

> **One who procures a third person to institute a malicious criminal prosecution is liable, to the same extent as if he or she instituted it. The test is whether the defendant was *actively instrumental* in causing the prosecution. [Emphasis added.]**

Even someone who had no part in initiating an action, but who later participated in it, can be held liable for malicious prosecution on an aiding and abetting theory. *Lujan v Gordon* (1977) 70 CA3d 260, 264, 138 CR 654. Moreover, if there is a conspiracy to commit a tort, such as malicious prosecution, the acts of each conspirator are imputed to all other conspirators. *Wyatt v Union Mortgage Co.* (1979) 24 C3d 773, 784, 157 CR 392. In *Rupp v Summerfield* (1958) 161 CA2d 657, 326 P2d 912, a judgment in plaintiff's favor in a malicious prosecution action was affirmed. The court of appeal upheld an instruction to the effect that anyone who knowingly testifies falsely at a preliminary hearing may be held liable for malicious prosecution. It rejected defendant's argument that the initiation of a criminal proceeding is required, instead approving language from Prosser (161 CA2d at 663):

> **It is not true, as suggested by appellant, that the sole basic element of an action for malicious prosecution is the initiation of a criminal proceeding, for which he cites Prosser, Torts, §860 (1941). Dean Prosser continues at page 865 in his text on torts, and on which appellant remains silent: "*on the other hand if he advises or assists another person to begin the proceeding, ratifies it when it has begun on his behalf, or takes any active part in directing or aiding the conduct of the case he will be responsible,*" and makes it clear, at page 66, that knowingly giving false information to the police constitutes assisting another to begin the proceeding. [Emphasis added.]**

Comment: The paragraphs above narrow the broad legal principle stated at the beginning of the argument and serve as a bridge between the broad principle and the specific facts of the case. Cases that are generally supportive of a legal principle are cited without additional detail. A case more directly on point, such as *Rupp v Summerfield, supra,* is described in detail.

PRACTICE TIP: Although long quotations should generally be avoided (see §12.75), the second quotation reproduced here was chosen because it was directly dispositive of the respondent's principal argument. If a long quotation is used, emphasize the pertinent parts to focus the reader's attention.

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§12.87 e. Sample Form: Tie Principles to Facts of Case

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The complaint in the present case alleged sufficient facts to satisfy every element of a cause of action for malicious prosecution as described above, because the gist of appellant's claim is as follows:

All defendants originally conspired to conceal the medical malpractice that caused Jane Smith's death. In that conspiracy, defendants agreed to do various things, including giving a copy of the ABC claim file, with a deliberately understated value of the Smith family's claim, to an inexperienced attorney in order to settle the wrongful death action cheaply.

Defendants further agreed that if any part of their conspiracy should start to come to light, they would take whatever steps were necessary to make it appear that the claim file had been stolen and to cause damage to anyone, such as plaintiff, who might actively participate in the prosecution of the Smiths' medical malpractice case instead of accepting defendants' story.

When it came to the attention of law enforcement personnel in another connection that a copy of ABC's claim file on the Smith case was in the Brown & Black office, ABC was questioned about it. In keeping with the conspiracy, ABC lied and stated that the claim file had been stolen, even though it well knew that it actually had been delivered to the Brown & Black office by the ABC claims manager, defendant Johnson, as part of the conspiracy to defraud the Smiths.

The above acts were instrumental in causing the grand jury to indict appellant. They were done maliciously, with the dual intent to (1) conceal the malpractice and other fraud that had been perpetrated on the Smiths and (2) injure appellant directly. Defendants could have no probable cause to mislead the authorities into thinking that the claim file had been stolen, because they, more than anyone, knew that it had not been stolen. See, *e.g., Bertero v National Gen. Corp.* (1974) 13 C3d 43, 55, 118 CR 184 (lack of probable cause established when defendant knew claim was groundless even though a reasonable person might have believed it was meritorious).

Obviously, if the truth about the initial conspiracy to defraud the Smiths had been told, appellant would never have been damaged. For if it had been revealed to the authorities that, as part of defendants' conspiracy, the claim file was provided to the Brown & Black office, then the truth would have been known to the grand jury, and the indictment against appellant would never have been returned. Thus, appellant more than adequately alleged how he was damaged. When appellant was found not guilty by the jury, a favorable termination of the prior proceedings was established.

Comment: These paragraphs tie the legal principles to the facts of the case, which are developed in such a way that each principle set out in the first paragraph of the argument reappears here, coupled with the supporting facts.

NOTE: This brief demonstrates the technique for developing facts without a trial transcript. The technique for developing an argument after a trial is similar: Instead of facts alleged in the complaint, the facts supporting the application of the legal principles to the case would be either undisputed evidence or evidence favoring the respondent, taken from the record.

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.88 f. Sample Form: Summarize Argument

§12.88 f. Sample Form: Summarize Argument

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On the basis of the foregoing, it is beyond question that appellant adequately pleaded a classic cause of action for malicious prosecution. His conspiracy allegations link the defendants to each other sufficiently to make each defendant responsible for the actual acts committed by any other defendant.

Comment: The final paragraph sums up the argument concisely and prepares the reader for the next subhead.

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§12.89 g. Sample Form: Address Trial Court's Theories

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2. There Is No Privilege to Perpetrate a Malicious Prosecution

2.1. Although hundreds of pages were filed in support of the various demurrers, not a single defendant asserted that appellant's first cause of action for malicious prosecution was barred by any privilege. Indeed, the Hospital and Thomas acknowledged that privilege does not bar an action for malicious prosecution. (CT 157:9-10.) That the trial court was confused and erroneously sustained the demurrer to that cause of action on the ground of privilege can be seen from the citation in its minute order to *Pettitt v Levy* (1972) 28 CA3d 484, 104 CR 650. (CT 556.)

2.2. *Pettitt* involved former Civil Code §47(2) (now Civil Code §47(b)), which affords an absolute privilege to statements made in any legislative, judicial, or other official proceeding authorized by law. *Pettitt,* however, was *not* an action for malicious prosecution. It was an action for fraud, negligent misrepresentation, negligence, and intentional infliction of emotional distress. It was based on a conspiracy by defendants to wrongfully deprive plaintiffs of the use of certain property by, among other things, submitting false or forged building permits to the City of Fresno. 28 CA3d at 487. The court of appeal held that the absolute privilege of former Civil Code §47(2) protected this conduct. 28 CA3d at 488, 492. The decision, however, stated as follows (28 CA3d at 489):

> **Although the application thereof [*i.e.,* former Civil Code §47(2)] usually arises in the context of a defamation action, it is equally applicable to other actions, with the sole exception of an action for malicious prosecution.**

2.3. The *Pettitt* court was following established law when it noted that the privilege does not apply to a cause of action for malicious prosecution. For that proposition, it relied on the controlling supreme court authority of *Albertson v Raboff* (1956) 46 C2d 375, 382, 295 P2d 405 (superseded by statute as stated in *Palmer v Zaklama* (2003) 109 CA4th 1367, 1379, 1 CR3d 116), which stated:

> **It may be noted at the outset that the fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.**

In *Albertson,* the plaintiff had sued for both slander of title and malicious prosecution regarding earlier litigation in which allegedly false statements in support of a lis pendens had been filed. The *Albertson* court held that the lis pendens filing was absolutely privileged against a claim for slander. It reversed the judgment, however, in its holding that the plaintiff could not state a cause of action for malicious prosecution. 46 C2d at 382. The supreme court held that the privilege does not extend to bar an action for malicious prosecution simply because the false statements are made in the course of a judicial proceeding.

2.4. A moment's reflection shows why this must be the case. The elements of a cause of action for malicious prosecution include (1) favorable termination of a prior judicial proceeding and (2) proof that it was instituted or instigated without probable cause and for an improper motive. The very gravamen of a malicious prosecution cause of action, therefore, relates to something that defendant did or said in connection with a prior judicial proceeding. If the privilege were applicable to an action for malicious prosecution, it would necessarily wipe out the tort.

2.5. The trial court was therefore incorrect in sustaining the demurrer to appellant's cause of action for malicious prosecution on the ground of privilege, regardless of whether the privilege bars any other of his causes of action. The judgment of dismissal must be reversed, and appellant should be allowed to go to trial on his cause of action for malicious prosecution.

Comment:

2.1. This portion of the argument illustrates how an appellant should treat theories raised in the trial court that were presumably relied on by the trial judge. Because the appellate court considers results and not reasons (see §§5.11-5.15), that the trial court sustained the demurrer on grounds of privilege is not controlling. Nevertheless, the appellant must (1) anticipate that the respondent will raise this issue or that the confusion in the record will raise questions in the court of appeal and (2) take a strong stand against the argument in the opening brief. Although the appellate court will examine this issue anew, the citation to the trial court minute order and discussion of its reliance on *Pettitt v Levy* (1972) 28 CA3d 484, 104 CR 650, is proper to show that the trial court was confused or misconceived the law. See *People v Van Gorden* (1964) 226 CA2d 634, 640, 38 CR 265 (trial court opinion showed judge misconceived burden of proof); *Canepa v Sun Pac., Inc.* (1954) 126 CA2d 706, 710, 272 P2d 860 (trial court opinion showed judge used erroneous measure of damages). See §5.17.

2.2. This detailed discussion of *Pettitt v Levy, supra,* is necessary because of the trial court's apparent reliance on it. Extensive discussion of case authority is desirable when a case is either so favorable or so unfavorable to a party's position that it is likely to assume a central position in the appellate court's decision.

2.3. Note how the sequence of this argument differs from that of the preceding argument. Although the underlying legal principles are stated at the beginning of the earlier argument, paragraph 2.3 is the first statement of the legal principle supporting the appellant's position on this argument. The sequence of an argument may vary, depending on the posture in which the argument arose in the lower court. Counsel's chosen sequence answers the implicit question of why counsel is addressing the argument, and it primes the appellate court to view the argument with disfavor because of the erroneous reliance on *Pettitt v Levy*.

2.4. Do not overlook the value of logic and common sense in arguing the appellant's position. See §5.62.

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§12.90 h. Sample Form: Address Respondent's Arguments

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3. The Doctrine of "Independent Investigation" Cannot Insulate Defendants, Because Plaintiff Pleaded That Their Misstatements and Omissions Defrauded the Investigators

3.1. Defendants ABC and Johnson contended that they could not be held responsible for malicious prosecution, because appellant's indictment was returned as the result of an "independent investigation." (CT 71:22-26, 196:13-17.) They relied on *Werner v Hearst Publications, Inc.* (1944) 65 CA2d 667, 151 P2d 308, for their "independent investigation" defense. (CT 72:1, 196:17.) There, the court of appeal explained the independent investigation defense with the following quote from California Jurisprudence, p 673:

> **Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.**

3.2. According to the allegations in the complaint, there was no investigation here that led to appellant's indictment, except for defendants' false statements. Initially there was an independent investigation of the Brown & Black office for matters unrelated to the copy of the claim file. (CT 17:2S 26.) When the authorities came across the claim file, they asked ABC what it knew. ABC led the authorities to believe that it had been stolen. (CT 18:28-19:3.) This is what started the events that culminated in appellant's indictment and trial. Any investigation that led to appellant's indictment was therefore premised on misinformation provided by ABC in keeping with its conspiracy.

If anyone involved had simply come forward and told the truth about how the copy of the claim file came to be in the Brown & Black office, no amount of "independent investigation" on behalf of the district attorney would have resulted in appellant's indictment. In any event, this is a matter that defendants should have been required to raise as an affirmative defense in their answers and that should have been the subject of proof at trial.…

Comment:

3.1. Whether an independent investigation was made in this case is a question of fact that would ordinarily not be before the court on appeal from the sustaining of a demurrer. In this case, however, the respondents argued that the issue was properly before the court because the court could take judicial notice of the documents proving the investigation. In a portion of the brief not reproduced here, the appellant argued that judicial notice was inappropriate. Here, the appellant addresses the question of whether an independent investigation can ever be a defense under the facts and circumstances pleaded in the complaint. Note how counsel for the appellant uses the factual allegations of the complaint throughout the remainder of the argument to show how the doctrine is inapplicable.

3.2. The remainder of this argument (which deals with (1) the applicability of the independent investigation defense when false information is given and (2) another issue about the effect of probable cause on a malicious prosecution claim) is not reproduced here.

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VI. CLOSING PORTIONS OF BRIEF

§12.91 A. Nature and Content of Conclusion

Although the rules do not require it, most briefs contain a conclusion. The conclusion should state the precise relief requested of the court (see samples in §12.95). The requested relief might be a reversal with directions or a modification. See also chap 17.

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§12.92 1. Keep It Short

A conclusion longer than a page is disfavored by the courts; one paragraph (or at most a few) should suffice. If the brief is lengthy and the issues complex, counsel may prefer to write a more extensive conclusion, pointing out in a general way the destination at which the appellant wants the court to arrive. Briefly set out the appellant's overall perception of the trial court decision and what should be done to correct it.

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§12.93 2. Consider Reference to Theme

A short reference to the theme used at the outset of the brief may be helpful in tying the brief together, but this is not the place to duplicate earlier material.

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§12.94 3. Conclude Respectfully

The brief is customarily concluded with a suitable deferential phrase, such as "Respectfully submitted," followed by the names of counsel for the appellant and their designation as such. A signature is not required. Cal Rules of Ct 8.204(b)(9).

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Source: Civil Litigation/California Civil Appellate Practice/12 Appellant's Opening and Reply Briefs/§12.95 B. Form: Conclusion

§12.95 B. Form: Conclusion

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IV. CONCLUSION

[*Select one of the following alternatives*]

[*Alternative 1: Request for reversal*]

It is requested that for the reasons stated the judgment be reversed.

[*Alternative 2: Request for reversal and specific judgment*]

The judgment should be reversed, and a judgment of specific performance should be ordered for appellants.

[*Continue*]

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Appellant

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§12.96 C. Attachments

To facilitate the court's consideration of a crucial portion of the record, counsel should attach to the brief copies of exhibits or other materials in the record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that may not be readily accessible. See Cal Rules of Ct 8.204(d).

Attachments may also enhance the effectiveness of the appellant's opening brief by, for example, serving as a convenient way to present a tabulation or a chart to emphasize a key aspect of the appellant's case without interrupting the flow of the brief (*e.g.,* to compare or contrast the salient aspects of two documents).

NOTE: Use of attachments should not be viewed as an excuse for ignoring the general proscription against referring to matters outside the record.

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§12.97 1. Length

Attachments may not exceed a total of ten pages, unless the presiding judge on application and for good cause permits a longer attachment. Cal Rules of Ct 8.204(d). A copy of an opinion required to be attached to the brief under Cal Rules of Ct 8.1115(c) does not count toward the ten-page limit. An attachment does not count toward the length of the brief in applying the applicable word or page limits. Cal Rules of Ct 8.204(c)(3).

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§12.98 2. Local Practice

Except when proceeding under Cal Rules of Ct 8.204(d), consult local practice as to any proposed attachments. Some appellate districts may follow the practice of not accepting any briefs with "extraneous material," including attachments. If attachments are desired, confirm with the clerk's office where the brief will be filed that they will be accepted.

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VII. DUPLICATION METHODS

§12.99 A. Printing

A brief may be reproduced by any process that produces a clear, black image of letter quality. Cal Rules of Ct 8.204(b)(1). For length limitations, see Cal Rules of Ct 8.204(c); see also §§12.14-12.18.

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§12.100 1. Office Printing

Most briefs are produced using word processed documents printed on a printer at the attorney's office. Briefs prepared this way can look as good as a formally printed brief. This method has obvious advantages in terms of expense, although it may have hidden costs, including duplication expenses and time spent by office staff. Office production also may be useful in saving time. For example, if a brief must be produced over a weekend and filed on a Monday, using a commercial producer may not be feasible.

PRACTICE TIP: Depending on counsel's office resources, office duplication may create a risk that the ultimate product falls short of the optimum. If any doubt exists about the ability to produce a handsome and legible product, contract out the printing.

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§12.101 2. Professional Printing

In some cases, counsel may desire to have the brief printed by a professional printer, which is an acceptable method of duplication under Cal Rules of Ct 8.204(b)(1). When using a professional printer, be sure to select one who is familiar with court conventions and requirements; this will help ensure a product that appears professional and will save office time because the printer can attend to such matters as preparing the table of authorities. If additional copies are needed, order them at the outset to avoid any additional expense of reprinting.

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§12.102 B. Other Processes

Briefs can be produced by commercial organizations that specialize in briefs and perform substantially the same services as printers, or they can be reproduced in the office. The effectiveness of other duplication processes depends on the quality of the particular method; given the available range of technologies, generalization is difficult.

Professional duplication services attuned to the requirements of appellate practice can create an attractive product as well as perform ancillary services, such as preparing the table of authorities, as a knowledgeable printer would.

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§12.103 C. Typewritten Original Ribbon or Carbon Copies

Typewritten original ribbon copies and carbon copies are permitted only by special permission of the Chief Justice or presiding justice. Such permission is usually granted only to parties without counsel who are proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies. Cal Rules of Ct 8.204(b)(11).

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§12.104 D. Considerations in Choosing Method of Reproduction

The major consideration in selecting the method of duplication is whether it will enhance or detract from the effectiveness of the brief. The relative cost of the various methods of duplication may also be an important consideration, depending on the nature of the case or the appellant's financial situation. Printing is generally more costly than some of the alternative duplication methods, and if cost considerations are paramount, this factor may militate in favor of the latter.

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VIII. TIME LIMITATIONS; SERVICE; FILING

A. Time Limitations

§12.105 1. Time Limit

The time for serving and filing the appellant's opening brief depends on the nature of the record. Cal Rules of Ct 8.212(a)(1). If an appellant fails to timely file its opening brief, the court clerk must promptly notify the appellant by mail that the brief must be filed within 15 days of the notice's mailing and that failure to do so may result in dismissal of the appeal. Cal Rules of Ct 8.220(a).

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§12.106 a. Clerk's Transcript

If the traditional clerk's transcript is used (*i.e.,* absent an election by the appellant to proceed by appendix under Cal Rules of Ct 8.124), the appellant's opening brief must be served and filed within 40 days after the record is filed in the reviewing court. (On filing the record, see §§9.67-9.73.) Cal Rules of Ct 8.212(a)(1)(A).

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§12.107 b. Appendix and Reporter's Transcript

If the appellant proceeds under Cal Rules of Ct 8.124 (*i.e.,* by appendix in lieu of a clerk's transcript) and has a reporter's transcript prepared, a similar computation method is used, except that the 40-day period begins when the reporter's transcript is filed. Cal Rules of Ct 8.212(a)(1)(A).

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§12.108 c. Appendix Only

If the appellant proceeds under Cal Rules of Ct 8.124 but does not have a reporter's transcript prepared, the appellant must serve and file the opening brief within 70 days after filing the notice of election under Cal Rules of Ct 8.124. Cal Rules of Ct 8.212(a)(1)(B).

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2. Extensions

§12.109 a. By Stipulation or Leave of Court

The basic time limitations may be extended for up to 60 days by one or more stipulations filed in the appellate court. Cal Rules of Ct 8.212(b)(1). The stipulation must be filed with the appellate court before the period sought to be extended has expired. Cal Rules of Ct 8.212(b)(3). The stipulated extension may not exceed 60 days beyond the date the brief would otherwise be due. Cal Rules of Ct 8.212(b)(1).

PRACTICE TIP: If more time is needed, the stipulation should be sought at the outset to avoid an unnecessary application to the court.

If a stipulation is sought and refused, or if an extension is sought beyond the 60-day maximum permitted by stipulation, application must be made to the presiding justice on a showing of good cause. Cal Rules of Ct 8.212(b)(3). On format of applications, see Cal Rules of Ct 8.50. See also Cal Rules of Ct 8.60(b)-(c), 8.63 (policies and factors governing time extensions). On application for extension of time, see §§11.20-11.26.

NOTE: If additional time for filing the brief is sought by stipulation or application, counsel must deliver to his or her client a copy of the stipulation or application and attach evidence of such delivery to the stipulation or application or certify in the stipulation or application that counsel has done so. Cal Rules of Ct 8.60(f).

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§12.110 b. By Prehearing Conference

The basic time periods for filing the appellant's opening brief may also be tolled by a prehearing conference. If such a conference is ordered under Cal Rules of Ct 8.248(a) before the date the appellant's opening brief is due to be filed, the period for filing the brief is tolled from the date the court of appeal mails notice of the conference until the date it mails notice that the conference is concluded. Cal Rules of Ct 8.248(d).

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§12.111 c. Form: Stipulation Extending Time to File Opening Brief; Order

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_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION EXTENDING TIME TO FILE OPENING BRIEF; _ _[*ORDER*]_ _

IT IS STIPULATED between the parties by their respective counsel of record that the time within which appellant _ _[*name*]_ _ **may file appellant's opening brief shall be extended to, and including,** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for plaintiff and appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for defendant and respondent

[*If appropriate, include the following*]

IT IS SO ORDERED.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Presiding Justice

Copies: Original and one copy to be filed with the court (Cal Rules of Ct 8.44(b)(7)); one copy for each party or group of parties represented by separate counsel of record; office and client copies.

Comment: Although Cal Rules of Ct 8.212(b)(2) states that the stipulation is effective on filing, consult the appellate court clerk on whether local practice requires that an order be obtained. If so, include the word "ORDER" in the title and include the order language as shown.

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B. Service

§12.112 1. Parties

The appellant's opening brief must be served on all other parties to the appeal. Service may be made in any manner (*e.g.,* by mail) permitted by the laws generally governing service of litigation documents. See Cal Rules of Ct 8.25(a)(1) (requiring proof of service "by any method permitted by the Code of Civil Procedure"); CCP §§1010-1020 (permissible service methods).

PRACTICE TIP: Serve at least two copies of the brief on each counsel to facilitate working with the brief or transmitting a copy to the client.

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§12.113 2. Superior Court

Deposit one copy of the brief with the clerk of the superior court for delivery to the trial judge. Cal Rules of Ct 8.212(c)(1).

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§12.114 3. Supreme Court

Serve one electronic copy or four copies of the brief on the California Supreme Court. Cal Rules of Ct 8.212(c)(2). If the court of appeal has ordered the brief sealed, then the four copies of the brief must be placed in a sealed envelope with a cover sheet that contains the information required by Cal Rules of Ct 8.204(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 8.212(c)(2)(B). If an electronic copy of the brief is ordered to be sealed when filed, then the first page must include a cover sheet that contains the information required by Cal Rules of Ct 8.204(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 8.212(c)(2)(A)(ii). In the absence of any notice from the clerk of the court of appeal of an order unsealing the brief, the supreme court clerk must keep all copies of the brief under seal. Cal Rules of Ct 8.212(c)(2)(A)(ii), (B).

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§12.115 4. Attorney General

Serve the brief on the Attorney General when the brief (Cal Rules of Ct 8.29(c))

- questions the constitutionality of a state statute; or
- is filed on behalf of the state, a county, or an officer whom the Attorney General may lawfully represent in a case in which the state or a state officer (in his or her official capacity) is a party, or a county is a party, unless the county's interest conflicts with that of the state or a state officer.

See also Cal Rules of Ct 8.212(c)(3).

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C. Filing

§12.116 1. Number of Copies

The appellant must file an original, four copies, and proof of delivery of four copies to the California Supreme Court. Cal Rules of Ct 8.44(b)(1).

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§12.117 2. Proof of Service

When the brief is filed in the court of appeal, proof must be submitted that the service requirements have been met and paper copies delivered to the clerk of the supreme court. Cal Rules of Ct 8.25(a)(2). The requisite proof normally consists of a proof of service attached to the original brief. The appellant can use the Judicial Council's optional proof of service form. See Proof of Service (Court of Appeal) (Judicial Council Form APP-009).

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§12.118 3. Date of Filing

The "date of filing" of the opening brief is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1). A brief is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3).

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§12.119 4. Failure to File Opening Brief

If the appellant fails to file an opening brief within the required time period, the appellate court clerk mails a warning notice to the parties that if the brief is not filed within 15 days after the notice was mailed, the appeal may be dismissed. Cal Rules of Ct 8.220(a)(1). If the appellant files the brief within that 15-day grace period, the appeal will proceed in the normal course.

The appellant may also take advantage of the 15-day period by making a sufficient written showing of excuse to justify additional time, in which event the presiding justice may grant it. Relief may be granted on suitable conditions. Cal Rules of Ct 8.220(d). On required notice to party represented of application for additional time to file brief, see §11.20.

If no brief is filed within the 15-day period and no extension is obtained, or if an extension is obtained and the brief still is not timely filed, the appeal may be dismissed on the appellate court's own motion.

NOTE: Although Cal Rules of Ct 8.220(a) is directed specifically to late filings, relief from default might also be sought under the general relief provisions of Cal Rules of Ct 8.60(d). See §11.61 for sample application and order extending time to file brief. If counsel fails to file the brief within the allotted time and the appeal is dismissed, the sole remedy may be to move the court for relief from the default. See §§11.61-11.62.

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§12.120 IX. DEFECTIVE BRIEFS

Under Cal Rules of Ct 8.18, the clerk must refuse to accept for filing any brief that fails to comply with the rules, except as the rules otherwise provide (for exceptions, see, *e.g.,* Cal Rules of Ct 8.40(b)(3)).

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§12.121 A. Actions Against Defective Briefs

If a brief does not comply with the requirements of Cal Rules of Ct 8.204 (contents and form of briefs), either of the following may occur (Cal Rules of Ct 8.204(e)):

- The reviewing court clerk may decline to file it but must mark it "received but not filed" and return it to the party; or
- If the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice
- order the brief returned for corrections and refiling within a specified time;
- strike the brief with leave to file a new brief within a specified time; or
- disregard the noncompliance.

In choosing from this range of alternatives, the court presumably considers the nature and seriousness of the deficiency, the extent to which it impairs the normal processes of appellate review, and the feasibility of corrective methods. If the defect consists of an omission of record references, the brief might be returned for appropriate interlineation. If the deficiency is more pervasive (*e.g.,* failure to include a statement of the case), a new brief may be called for. Minor departures from the rules (*e.g.,* wrong margin widths), which do not seriously impair readability but are costly to correct, *might* be disregarded.

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§12.122 B. Consequences of Failure to Comply With Rules

Failure to comply with the letter and spirit of the rules may have further adverse consequences:

- The appellate court may treat a point not adequately dealt with in the appellant's opening brief as abandoned or unworthy of consideration. See, *e.g., Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1021, 261 CR 875.
- Failure to present a fair and meaningful statement of the pertinent portions of the evidence, with appropriate record references, may lead the court to refuse to consider a claim of error premised on the alleged state of that evidence. See, *e.g., Margott v Gem Props.* (1973) 34 CA3d 849, 111 CR 1.
- Failure to file-stamp or conform numerous documents in the joint appendix and failure to contain accurate and complete statements of fact and appropriate citations to the record in a brief may not warrant the "drastic sanction" of dismissal, and the court may proceed to the merits. *Wershba v Apple Computer, Inc*. (2001) 91 CA4th 224, 237, 110 CR2d 145.
- Persistent failure to comply with the rules may have particularly serious consequences, including dismissal of the appeal. See *Berger v Godden* (1985) 163 CA3d 1113, 210 CR 109.

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X. REPLY BRIEF

§12.123 A. Reply Recommended

Unlike an opening brief, the filing of a reply brief is permissive, not mandatory. Cal Rules of Ct 8.200(a)(3). However, it is almost always a good idea to take the opportunity to do so. Even if the appellant believes that the points raised in the response are not persuasive, there is no guarantee that the appellate court shares that view. Given the appellant's overall burden of persuasion (see §5.13) and the variety of purposes a reply may serve (see §§12.124-12.127), it is a rare case in which the appellant can safely "leave it to the court" to see that the respondent's brief has no merit.

The appellate court will prepare a tentative decision before oral argument. Thus, the appellant's reply brief is the last submission the court receives before making its decision, even if the decision is only "tentative."

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B. Purpose of Reply

§12.124 1. Reestablish Factual Premise for Appeal

The appellant's prospects of success hinge on both the abstract merit of the legal issues raised and the validity of the factual premises on which those arguments are based. The reply brief presents an opportunity to set matters straight to the extent that the respondent's brief undermines the factual premises in the appellant's opening brief by directly challenging the appellant's account of the record through blurring key facts or asserting additional facts that appear to weaken the appellant's case.

PRACTICE TIP: It may be helpful to *briefly* summarize the appellant's arguments on appeal at the beginning of the reply brief and then concentrate on the most important points in the respondent's brief.

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§12.125 2. Counter Respondent's Legal Arguments

To the extent the opening brief did not anticipate the respondent's arguments, the reply brief presents an opportunity to do so. Arguments lightly made in the opening may require further attention if the respondent's brief deals with them extensively and persuasively. If the respondent misstates the law or ignores relevant exceptions to or limitations on cited legal principles, bring these matters to the court's attention. Distinguish any authorities central to the respondent's legal arguments.

PRACTICE TIP: Do not hold back issues in the opening brief for address in the reply brief to preclude the respondent from answering them in his or her brief. In addition, do not raise new affirmative issues in the reply brief. See *Reichardt v Hoffman* (1997) 52 CA4th 754, 764, 60 CR2d 770; *Dixon v Board of Trustees* (1989) 216 CA3d 1269, 1286 n26, 265 CR 511. Absent justification for failing to present an argument earlier, the court will not consider an issue raised for the first time in a reply brief. *Save Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172.

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§12.126 3. Restore Focus of Appeal

The reply brief is a vehicle for redirecting the court's focus back to the appellant's perspective. For example, if the appeal deals with complex issues or facts, a reply brief can restate the issues and facts in a simple fashion and provide a final summary. If the respondent portrays the appeal as a mere attempt to reargue the facts, the reply can point out the legal (as opposed to the factual) nature of the issues. Even the sequence of the arguments may help to restore the appellant's perspective of the appeal.

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§12.127 4. Augment Appellant's Authorities

When appropriate, the appellant may cite new cases in answer to arguments made by the respondent. The appellant may also cite any cases in support of the arguments in the opening brief that were decided after the opening brief was filed.

NOTE: The court will ignore portions of a reply brief that refer to news articles and other documents that are not a part of the record and are irrelevant. *Connecticut Indem. Co. v Superior Court* (2000) 23 C4th 807, 813 n2, 98 CR2d 221.

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§12.128 C. Strategy and Tactics

Many of the guidelines that apply to the opening brief apply to the reply brief. See §§12.1-12.99. However, some strategic and tactical considerations are especially pertinent to the reply brief.

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§12.129 1. Be Selective

The reply brief should emphasize only the important issues. It is neither necessary nor appropriate to deal with every assertion made or every case cited in the respondent's brief; rather, counter the arguments and distinguish the authorities that, at least at first, seem to undermine the appellant's position.

PRACTICE TIP: When selecting issues to address, obtain the impressions of a lawyer not intimately involved in the case. If, on reading the opening brief and the respondent's brief, that lawyer is troubled by an argument urged or a case cited by the respondent, it is safe to assume that the court may react similarly. Draft the reply with a view to putting to rest those concerns as well as any others perceived by counsel.

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§12.130 2. Keep Reply Short

Although conciseness and brevity are advisable in the opening brief, they are even more important in the reply brief. Apart from trying the court's patience, it would obviously be inconsistent to contend that the respondent's arguments lack merit and then struggle laboriously to answer each one, however meritless. That approach misses the opportunity to give the court a concise picture of the case as drawn by the appellant.

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D. Procedural Guidelines

§12.131 1. Comply With General Rules Governing Briefs

The various rules governing the appellant's opening brief generally govern the reply brief:

- Rules on the physical specifications of the brief (see §§12.19-12.24);
- Rules on cover color coding (tan for reply brief) (see §12.31);
- Rules on starting with a table of contents and a table of authorities (see §§12.34-12.40);
- Rules on the use of headings (see §12.25);
- Rules on service and filing (see §§12.112-12.119); and
- Rules on support of factual recitals by record references (see §§12.50-12.52).

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§12.132 2. Length

The reply brief is governed by the general limits on length of briefs. Cal Rules of Ct 8.204(c). Although a reply of 14,000 words or, if typewritten, 50 pages is therefore permitted, a properly drafted reply will generally be far shorter. See Cal Rules of Ct 8.204(c). See also §12.14. But see §22.56 (California Supreme Court sets shorter page limit for reply briefs).

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§12.133 3. Time Limits

The reply brief must be served and filed within 20 days after the respondent's brief is filed, unless a cross-appeal is filed. Cal Rules of Ct 8.212(a)(3). On time for filing the reply brief in an appeal in which a cross-appeal has been filed, see §8.42.

NOTE: There is no need to notify the appellate court clerk if the appellant decides not to file a reply brief.

The time to file a reply brief may be extended by stipulation or court order (see §§11.20-11.26, 12.110). Submit stipulations to extend time or requests for the court to extend time to file a reply brief before the 20-day filing period expires.

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13

Respondent's Brief

Ellen Lake

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I. THE BRIEFING PROCESS

§13.1 A. Overview of Respondent's Brief

Brief should be complete, independent, and affirmative. Respondent's brief should be complete and self-contained so that the court can understand respondent's position without referring to appellant's brief. Without distorting the law, respondent's counsel should reformulate the legal questions raised by appellant so that the court will see the case from an affirmative perspective. Respondent's brief must furnish facts, law, and rationale to aid the court in crafting an opinion that affirms the lower court's judgment.

JUDICIAL PERSPECTIVE: Obviously, an argument must be plausible in order to be effective. Respondent's attorney (who comes to the appellate court with a win in the trial court and, usually, a presumption in favor of the win) should make a particular effort to achieve a calm and wholly plausible presentation. When a respondent's brief unduly twists the legal questions or offers overstated or weak arguments, or is unnecessarily shrill or confrontational, the court will wonder why counsel is so concerned and whether it should look more closely at the judgment or order counsel is seeking to defend.

Anticipate appellant's reply. Because respondent writes only one brief, the brief must, if possible, answer in advance whatever arguments appellant will make in the reply brief. If appellant raises entirely new points in the reply brief, do not hesitate to apply for court leave to file a *short* response addressing those points. This request can usually be made by a letter addressed to the court.

JUDICIAL PERSPECTIVE: The rule that an appellant cannot make new arguments for the first time in the reply brief is usually strictly enforced. Respondent's attorney who finds a case or cases that appellant should have cited (and might still cite in a reply brief) is advised to deal with those cases in advance in respondent's brief.

Sample brief. See App B for a sample respondent's brief.

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§13.2 B. Respondent's Advantages

Affirmance more likely than not. Approximately three-fourths of civil appeals decided by opinion are affirmed in full or with modifications. Judicial Council of California, Court Statistics Report, *Courts of Appeal* Table 6 (2006). This high affirmance rate results in large part from the advantages enjoyed by respondent, the party who won in the trial court.

Consider advantages. Respondent's brief should incorporate these advantages as appropriate, depending on their applicability to a particular case:

- **Lower court's judgment presumed correct.** All presumptions are indulged to support the judgment in a wide variety of applications on which the record is otherwise silent. See 9 Witkin, California Procedure, *Appeal* §355 (5th ed 2008). See §5.12.
- **Appellate court's reluctance to disturb discretionary ruling.** When the trial court had discretion, the appellate court will not disturb a discretionary ruling unless a clear showing of abuse of discretion is made. See, *e.g., In re Richard E.* (1978) 21 C3d 349, 354, 146 CR 604; *Corbett v Hayward Dodge Inc.* (2004) 119 CA4th 915, 927, 14 CR3d 741 (to reverse on alleged abuse of discretion, it must appear that injury from such wrong constitutes "manifest miscarriage of justice"). See §5.23.
- **No review of reasons for trial court's decision.** If the lower court judgment is correct, it will be affirmed even if it was reached for wrong reasons. Consequently, respondent can support the trial court's decision on any basis argued in the lower court and, if no new evidence is required, even on grounds not previously raised. *People v Braeseke* (1979) 25 C3d 691, 700, 159 CR 684. For exceptions and limitations to this rule, see §5.15; 9 Witkin, Procedure, *Appeal* §349.
- **Conflicting evidence considered in light most favorable to respondent.** The substantial evidence rule requires the appellate court to consider conflicting evidence in the light most favorable to respondent, giving respondent the benefit of every reasonable inference and resolving all conflicts in favor of the judgment. If the factual determination in the lower court is supported by substantial evidence, the appellate court may not reweigh the evidence even if the weight of the evidence is to the contrary. See discussion in §§5.18-5.22.

JUDICIAL PERSPECTIVE: The respondent's "advantage" may not in fact be an advantage in some cases. Regarding review of sufficiency of evidence in civil cases, I have taken the position that the law requires appellate courts to search the *entire* record, and to make their determinations of sufficiency in light of *all* the evidence in the case. See *Brookhouser v State* (1992) 10 CA4th 1665, 1678, 13 CR2d 658. This approach qualifies the "in the light most favorable" rule. It would make good tactical sense for a respondent who appears in the Sixth District to have this qualification in mind.

- **No reversal unless error prejudicial.** Under the doctrine of prejudicial error in Cal Const art VI, §13, the appellate court may not set aside a judgment unless it finds, from reviewing the entire record, that an error resulted in a "miscarriage of justice." If the error was insubstantial, or if it was cured or waived, it will not support a reversal. See §§5.29-5.39.

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II. PLANNING THE BRIEF

§13.3 A. Read Judgment and Appellant's Opening Brief

First read judgment or order. Before taking any other action, read the judgment or order from which the appeal is taken. Documents that can be helpful in providing an overview of the case include:

- Trial briefs;
- Memorandums filed in support of, or in opposition to, a motion for new trial;
- In a nonjury case, the trial court's notice of intended decision; and
- A statement of decision.

Next read appellant's opening brief. Read appellant's opening brief to see how appellant presented the facts and what issues were urged as grounds for reversal. Carefully evaluate appellant's position for logic, consistency, legal support, and emotional impact.

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§13.4 B. Review the Record

Attorney writing brief must review record. The attorney who will be writing the brief must read the record. This task is too important to be delegated to anyone else. Counsel who is not personally familiar with the record may miss a crucial fact or waive an important issue. Discovering, *e.g.,* when appellant's trial lawyer failed to object to evidence or failed to request a jury instruction, may be the key to winning the appeal.

Attorney must review record even if also trial counsel. The attorney writing respondent's brief must personally read the record even if he or she also served as trial counsel. Recalling testimony heard in the heat of trial months earlier is not reliable. The written record may contain material of which the trial attorney was unaware, or it may show that issues on which he or she intended to rely were not preserved. Moreover, the principal issues on appeal may be different from those at trial, and the written word as reflected in the record may have a vastly different impact from the spoken word counsel remembers from trial. Finally, because the appellate rules require that a specific record citation be given for every procedural and substantive fact stated, the record must be read for that purpose. See Cal Rules of Ct 8.204(a)(1)(C). See discussion in §§12.50-12.52.

JUDICIAL PERSPECTIVE: Trial counsel preparing his or her own appellate brief must be particularly careful to limit the brief to the record on appeal. References to matters outside the record are distracting and inevitably reflect on the attorney's care and skill.

Prepare a page-by-page digest of the reporter's transcript. The digest should be sufficiently complete and accurate so that information can be efficiently retrieved from the record. The digest will assist in writing the brief and preparing for oral argument months later. See §§12.8-12.9.

Not a substitute for the record. Even the most accurate digest should only be used as a guide to, not a substitute for, the record. When writing the brief, counsel must look at the record to make sure that it actually says what the digest says. Returning to the record will also enable counsel to quote colorful language verbatim, when appropriate, instead of paraphrasing.

Consider preparing subject matter digest. Consider writing a subject matter digest so that all evidence on a single point can be reviewed promptly. The digest can be compiled by making notes in the margin or using the computer (or scissors) to cut and paste a page-by-page digest by topic. Dictating the digest while reading the transcript is usually more efficient than writing digest notes. For other techniques for handling the record, see §16.19.

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§13.5 C. Research the Issues

Conduct original research. Research the case anew. Trial court research alone is rarely adequate. New cases on point may have been published since the trial began. Moreover, the change in legal posture from trial to appellate level can significantly change the nature of the authorities required on appeal. On researching an appeal, see §§5.47-5.63.

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III. WRITING THE BRIEF

§13.6 A. Develop a Theme

Integrate facts and law into a coherent argument. The result should be a central theme or message to communicate to the court. The theme of the brief should succinctly convey why the judgment should be affirmed. This theme should be repeated as appropriate in individual arguments. See §3.10. Respondent's argument may have several components, but, if possible, they should be joined by a unifying theme with a clear message.

Example. If appellant's brief does not contest liability but simply consists of weak arguments about damages, respondent's theme should be that appellant has conceded the correctness of the liability finding and has merely made a "shotgun" attack on damages. See the sample Introduction in respondent's brief in App B.

JUDICIAL PERSPECTIVE: The central theme of respondent's brief should almost always be that the trial court was right and appellant is wrong. This "theme" might in a particular case be innovatively developed around a single idea or line of analysis sufficient (in the substantive and procedural circumstances) to support the trial court. Never create a "central theme" just for the sake of having one.

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§13.7 B. Outline the Brief

Begin by drafting a general outline of the entire brief, then create a more detailed outline of each section: the introduction, facts, and legal discussion. Although the outline serves as a guide, it should be revised as problems or opportunities arise. Above all, the outline and the text should be measured by the critical test of whether the main theme or message is being clearly and persuasively delivered.

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§13.8 C. Technical Requirements

Respondent's brief is subject to most of the same technical requirements on format, reproduction, service, and filing as appellant's brief. See Cal Rules of Ct 8.204. See chap 12 for complete discussion of these requirements. Respondent is also required to submit a Certificate of Interested Entities or Persons (Judicial Council Form APP-008) with its principal brief. See §12.33 for discussion and App D for the form.

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§13.9 D. Style, Organization, and Tone

A few simple rules can help in drafting the brief:

- **The brief must be well organized and logically presented.** The issues should be germane and stated clearly and succinctly. Long-winded or irrelevant arguments are distracting to busy judges and staff attorneys. At the same time, the facts and issues must be completely developed with appropriate references to the record and to case law.
- **The brief must be persuasive.** Respondent's brief's function is to persuade the court to rule for respondent. Generally, a tone of academic neutrality is inappropriate (but see below). The court should be convinced that the result urged is consistent with accepted legal doctrine and is fair to the parties. A technically perfect case that reaches an unjust result is not likely to win.

JUDICIAL PERSPECTIVE: The object of the brief is to persuade the appellate court of respondent's point of view. What will be persuasive will vary from case to case. If appellant is challenging a well-established legal premise or concept, for example, consider amassing academically neutral authority to support a statement that the law clearly does not vindicate appellant's position. Such a statement would actually gain weight by being made in an academically neutral manner.

- **State the case accurately and completely.** Nothing will turn a court against an argument faster than a misrepresentation from the record or governing law, or a misleading omission. Appellate justices often warn that if they discover that an attorney has been deliberately inaccurate or untruthful in one aspect of the brief, they will not only distrust the presentation in the rest of the brief but will also distrust that counsel in subsequent cases. Under Cal Rules of Prof Cond 5-200, attorneys are prohibited from misleading a judge by a false statement of fact or law or by intentionally misquoting a statute or decision.
- **Avoid ridicule, sarcasm, or personal attacks.** In extreme cases, counsel have been reprimanded by the court for abusive statements in briefs. See 9 Witkin, California Procedure, *Appeal* §706 (5th ed 2008).

JUDICIAL PERSPECTIVE: Such abuse of advocacy has never served to persuade me to the abuser's position and has often tended to work the other way.

- **Omit humor or use it sparingly.** Humorous writing is a difficult skill to master and, even if counsel possesses it, there is no assurance that the judge reading the brief will be amused.

JUDICIAL PERSPECTIVE: Although well-written humor may be enjoyable in some contexts, it is distracting in an appellate brief.

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IV. PRELIMINARY PORTIONS OF THE BRIEF

§13.10 A. Introduction to the Brief

Sets tone and introduces principal theme or message. The introduction should reframe the issues raised by appellant so that the correctness of the lower court decision appears obvious. It should alert the reader to the argument by summarizing the reasons for affirmance. The Introduction is the first opportunity to state the theme of the brief. See §13.6. See the Introduction in App B, a sample respondent's brief. For a detailed discussion of the introduction, see §§12.41-12.44.

JUDICIAL PERSPECTIVE: A short introduction that provides an overview of the case and counsel's argument is most helpful, but it must be short: no more than a page or a page and a half at the most.

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§13.11 B. Statement of the Case

Must be included. Appellant's opening brief is required to contain a statement of the case, setting forth the nature of the action, the relief sought, a summary of the material facts, and the judgment or ruling appealed from. Cal Rules of Ct 8.204(a)(2). The statement must be "a summary of the significant facts limited to matters in the record." Cal Rules of Ct 8.204(a)(2)(C). Although Rule 8.204 does not explicitly apply to respondent's brief, a statement of the case with similar contents to those specified for an appellant's brief should be in respondent's brief. See §§12.48-12.61. The same principles of relevance, completeness, and integrity to the record apply.

Procedural history and statement of facts. There is no requirement on which of these sections to present first. Both should be carefully crafted to focus on the issues on appeal, and both must contain appropriate citations to the record, including the clerk's and reporter's transcripts and exhibits, to permit easy verification by the reader. Cal Rules of Ct 8.204(a)(1)(C). See §§12.50-12.52 for additional discussion of references to the record and for a recommended method of reference.

JUDICIAL PERSPECTIVE: If appellant succinctly stated as much as (but no more than) necessary to learn what the case is about and how it got to this point, a separate statement from respondent may not be necessary. If a respondent's statement is necessary, it should be short and confined to matters relevant to disposition of the appeal.

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§13.12 1. Procedural History

The procedural history should be a nonargumentative narrative of procedural developments relevant to the appeal. It should set the stage for the arguments that will follow by presenting the procedural events that make affirmance proper, *e.g.,* the trial court's exercise of discretion, appellant's waiver of issues or invitation of error, or alternative grounds for affirmance. The procedural history should not be a dry recitation of dates. A sample procedural history is in App B.

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§13.13 2. Factual Statement

Consider importance. The factual statement presents the story of what happened in the case in a focused and compelling narrative. It should make the court want to rule in respondent's favor.

JUDICIAL PERSPECTIVE: The statement of facts must be clear, true to the record, nonargumentative in tone, and not so slanted as to be unpersuasive. Do not include overt argument in the statement of facts, because the judge may feel that the factual content of the statement is unreliable if you do.

Always write a fact statement. Respondent's counsel should always write a new fact statement rather than accepting that of appellant. Change the narrative sequence and emphasize facts that put respondent's cause in the best light possible. Respondent's fact statement must demonstrate that the trial was conducted fairly and that the right party won. It must be accurate and complete enough to withstand a counterattack in appellant's reply brief as well as the court's scrutiny.

JUDICIAL PERSPECTIVE: If the facts are simple and wholly undisputed, or for some other reason respondent's case will sink or swim with the law rather than with the facts, respondent's most persuasive approach might be to say, in essence, "we accept appellant's statement of the facts; let's just talk about the law, because on the law we win." It is helpful for respondent to tell the court in a succinct and professional way why a second statement of facts is necessary (*e.g.,* for completeness, coherence, accuracy). The court will appreciate such an explanation in order to focus on the differences between the two fact statements.

Correct appellant's omissions or misstatements without making personal attacks. If appellant has misstated or omitted significant facts, make corrections but do not make personal attacks or quibble over minutiae. Let the facts tell their own story.

Inform court of scope of review for facts. The issues raised by appellant will establish the scope of review under which the facts will be stated. Tell the court at the outset, either in the text or a footnote, what standard of review will apply. If appellant has used the wrong standard of review, politely inform the court and present all relevant evidence under the correct standard. On scope of review, see chap 5; 9 Witkin, California Procedure, *Appeal* §§322-415 (5th ed 2008).

Example. If the appeal is from a judgment after a trial and the only issue appellant raises is whether the evidence supports the judgment, respondent should state the facts most favorable to the judgment. By contrast, on an appeal from a nonsuit, the facts must be stated most favorably to appellant's cause.

JUDICIAL PERSPECTIVE: Not all judges care for footnotes. They can be distracting and difficult to read with the text. Consider using the following test: If the material is important enough to be in the brief at all, it should be in the text; if not, it should be omitted altogether.

Present facts in a clear, logical, and interesting narrative form. Often, the most effective presentation is chronological. It is easy to follow and can be the most interesting form of narrative. In other cases, a topical sequence may tell the story better, *e.g.,* the facts can often be divided logically between the topics of liability and damages. Generally, avoid reviewing the record witness by witness. Such a presentation will not present the facts in a clear, logical way, and will be very boring.

JUDICIAL PERSPECTIVE: Although it would be rare, *if* it would be more persuasive to go witness by witness for some part of the fact statement, feel free to do so, but have someone else read the brief to evaluate whether it is a truly more effective presentation.

The fact statement should be nonargumentative. Although the fact statement is not the place for explicit argument, effective advocacy will always lie in how the facts are selected and presented. For example, it is often effective to point out what the record does not contain, particularly if the missing evidence is essential to appellant's position. A sample statement of facts is set out in App B. On the statement of facts, see §§12.48-12.61.

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§13.14 a. Relevancy and Completeness

Present only facts relevant to the appeal. Remember the central theme, and do not clutter the brief with facts that might obscure it. See *Kaiser Steel Corp. v Westinghouse Elec. Corp.* (1976) 55 CA3d 737, 746, 127 CR 838.

Include facts emphasizing the trial court's decision. Within the bounds of conciseness and relevancy, bring to the court's attention any facts that add color and emphasis to the presentation, indicating that the trial court's decision was correct.

Be precise and do not deny adverse facts. Be thorough, and state the relevant facts precisely. If a specific document or specific testimony is at issue, it may be best to quote it and not summarize it. Adverse facts relevant to the appeal must not be denied or ignored, and counsel may not go outside the record to create new facts, except for such limited facts of which the court may take judicial notice. Evid C §459.

Do not misstate the record. Misstating the record, willfully omitting harmful facts, or introducing facts not in evidence will cast doubt on your entire presentation, and may harm your reputation. Such behavior is highly unprofessional (9 Witkin, California Procedure, *Appeal* §§695, 708 (5th ed 2008); Cal Rules of Prof Cond 5-200), and may cause the court to invoke sanctions, or may result in the clerk declining to file it. Cal Rules of Ct 8.204(e).

Consider including exhibits in an appendix. If an exhibit is crucial to the argument, consider including a copy of it in an appendix to the brief. California Rules of Court 8.204(d) permits a party to attach copies of exhibits or other materials in the appellate record as long as the attachment does not exceed ten pages (more with the permission of the presiding justice). This method is particularly effective if the exhibit is a document, map, or photograph. The original exhibits will be transferred to the appellate court if counsel files a notice in the superior court within 10 days after the respondent's brief is filed (Cal Rules of Ct 8.224). Because judges often read briefs when they are away from their desks, having an exhibit in the back of a brief ensures that it will be seen when the brief is read. For the same reason, it may be useful to attach copies of local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible. Cal Rules of Ct 8.204(d).

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§13.15 b. Subheadings

Use subheadings. A lengthy or complex statement of facts should be broken down by subheadings to help the reader identify logical breaking points in the narrative. A review of the subheadings will disclose whether the facts are presented in the most effective sequence. On headings, see §12.25.

Make complete and interesting. Subheadings should be complete and vivid sentences, not general topics. Avoid a subheading like "Plaintiffs' Damages." Instead, the subhead for the damages section in a brief involving the wrongful death of a child might read: "Felipe and His Parents Had a Warm, Loving Relationship. 'He Was the Utmost for Me,' His Father Testified." Subheadings should be written so that anyone reading the brief's table of contents will find a coherent story, both factually and legally.

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V. ARGUMENT

§13.16 A. Selection and Sequence of Issues

Select sequence of issues. Because respondent's brief should be an independent document that affirmatively presents the arguments for confirming the trial court's decision, respondent's choice and sequence of issues should not simply mirror appellant's brief. As discussed in §13.2, respondent has several advantages that can be used to support the judgment. Spotlight the facts and legal principles that show most clearly that the case was decided correctly. Appellant is unlikely to emphasize weak points in his or her case, but you should do so, particularly if any are dispositive. The following sections (see §§13.17-13.22) discuss a few common issues faced by respondent's counsel.

JUDICIAL PERSPECTIVE: If you depart from the sequence used in appellant's brief, make it clear that your brief is responding to appellant's arguments (or, in rare cases, that particular arguments require no response). It is difficult to know whether respondent has responded comprehensively if the brief does not follow, at least broadly, the sequence of appellant's brief. Use whatever approach will be most persuasive in the particular case. Sometimes a point-by-point rebuttal, using appellant's sequence, is the most persuasive.

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§13.17 B. Respondent's Goals

Refute appellant's case and demonstrate merits of respondent's case. The argument portion of the brief should not only refute the legal issues raised by appellant but should affirmatively show the merits of respondent's case and the correctness of the prior judgment. This goal can be achieved by tying controlling legal doctrine to the specific facts of the case. It is respondent's attorney's job to show that the case is governed by case or statutory authority that requires affirmance, and that appellant's authorities are inapplicable or wrong. For detailed discussion of the pattern and elements of legal arguments, drafting legal arguments, and samples, see §§12.62-12.90.

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§13.18 1. Present Affirmative Argument

Present each argument affirmatively, not defensively. An affirmative approach should start with the heading and continue throughout each argument. Point out everything that supports the ruling before responding to appellant's specific points, and note any omissions in appellant's presentation that, if considered, would blunt or defeat the attack on the trial court's ruling.

Do not simply rephrase appellant's headings in the negative. Avoid the temptation to phrase headings or arguments by simply inserting "not" in appellant's argument. Instead, rephrase the issue to show why the ruling was correct.

Example. "The Trial Court Properly Exercised Its Discretion in …" is far more effective than "The Trial Court Did Not Abuse Its Discretion in …."

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§13.19 2. Narrow Appellant's Arguments

Point out what appellant is *not* contending. Frequently appellant's arguments are narrower than they first appear to be. Be sure to point out what appellant is *not* contending and use it to demonstrate the strength of the existing judgment or order, then answer appellant's contentions.

Example. In the argument portion of respondent's sample brief in App B, appellant, who was the defendant in a wrongful death of a child case, argued that there was no evidence of the "monetary value" of the parents' loss. Respondent's argument on that issue began:

> At the outset, it should be noted that [appellant] is *not* contending that there was insufficient evidence of love, affection, and companionship between [the son] and his parents. The warmth of that relationship is amply described in the Statement of Facts. Instead, [appellant] argues that the verdict was defective because there was no evidence of the "amount" or "monetary value" of plaintiff's injury from the loss of their relationship with [their son]. The simple answer is that there is no requirement for such evidence.

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§13.20 3. Refute Each Issue and Raise Every Supporting Ground

Use all applicable arguments. In general, refute every issue that can be successfully refuted. If an issue raised by appellant can be disposed of on several grounds, do so. Start with the most obvious or compelling issue, and point out that, even if the court disagrees with that approach, appellant's argument still fails for additional, specific reasons.

Choose which issues to emphasize. There is an obvious risk in leaving any of appellant's contentions unanswered because it is difficult to predict which issues the court will find persuasive. But if appellant's case can be decisively beaten on one critical issue, the remaining issues may require shorter treatment. As one commentator advised: "Pick out a couple of … points or cases and explain why they are illogical, not supported by the record, inapposite. This may induce the judge to wonder about your opponent's reliability on his major points." Moskovitz, Winning an Appeal (2d ed 1995).

Avoid overkill. You may risk overdignifying appellant's position by overkill. If one of appellant's points is too weak to warrant a full-blown refutation, keep the response short and firm. Do not leave the court with a feeling that the issue must have had some merit if so much effort was required to combat it. One way to solve this dilemma is to treat the opponent's weak points in footnotes. (But see Judicial Perspective in §3.13.)

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§13.21 4. Demonstrate That Any Possible Error Was Harmless; Decide Whether to Concede Error

Raise all possible defenses. Always try to show that any alleged error was nonprejudicial, or was waived, cured, or otherwise lost. It is not a sign of weakness to raise one of these defenses. Appellate courts often prefer to affirm on one of these grounds rather than to decide whether error actually occurred. Conceding error is not necessary in order to make these arguments, but if error is clear and unmistakable, concede the error while arguing, *e.g.,* lack of prejudice. Failure to make such a concession when it is unavoidable will damage counsel's credibility with the court.

Discuss any possibility of partial victory or alternative relief. If it appears that appellant may be entitled to a partial victory or that the court may provide alternative forms of relief, do not hesitate to discuss these possibilities. It is a mark of clear thinking, not weakness, for a party to acknowledge that it may not prevail on all issues. Candor is appreciated by the court, and an analysis of the alternative forms of relief available may assist the court in its disposition of the case. For a form for the conclusion, see respondent's brief in App B.

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§13.22 5. Use Grounds Relied on by Trial Court as Well as Any Other Supporting Affirmance

Strongest position rests on grounds used by trial court. Respondent's strongest position usually rests on the grounds used by the trial court. They convinced the trier of fact, and they now enjoy the presumption of correctness and other rules that favor respondent. Ignoring these grounds may tend to erode the deference normally given to the lower court's judgment.

May use other grounds to support affirmance. Counsel is not confined to the arguments used in the trial court. If correct, the judgment can be affirmed even if it was reached for the wrong reasons. *People v Braeseke* (1979) 25 C3d 691, 700, 159 CR 684. Counsel can argue in support of the judgment on any ground raised in the trial court or, if no new evidence is required, on grounds not previously considered. *Westcon Constr. Corp. v County of Sacramento* (2007) 152 CA4th 183, 195, 61 CR3d 89 (court declined to consider new argument because it did not involve purely legal question); *Wilson v Lewis* (1980) 106 CA3d 802, 805, 165 CR 396 (because evidence on critical issue was undisputed, it could be considered on appeal despite fact that it was not mentioned at trial). See discussion in §13.2. See also §5.44.

May assert error favorable to appellant to establish lack of prejudice. In keeping with the requirement that an error must be prejudicial before it can result in reversal of a judgment, CCP §906 provides that respondent may request review of a ruling from which respondent did not file a cross-appeal to show that appellant was not prejudiced by the errors that appellant is asserting on appeal. If the trial court grants judgment for respondent on one theory, respondent is entitled, under §906, to argue that the trial court erred in not granting judgment in its favor on another theory. If the appellate court agrees with respondent, it should affirm the judgment even if it determines that respondent was not entitled to judgment on the first theory.

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§13.23 C. Headings

Headings link legal principles to the facts. Each separate legal issue must be preceded by a heading that links the legal principle relied on to the facts of the case. The argument may be further divided by subheadings, if desired. Cal Rules of Ct 8.204(a)(1)(B). See §13.15.

Vital to presentation of the issues. The heading serves the function of a newspaper headline. It should summarize the discussion that follows and capture the reader's attention. Because the headings and subheadings, when shown in the table of contents, should present a logical and cohesive overview of the entire argument, many judges read the table of contents first. Headings should therefore be considered crucial and drafted with great care. On headings, see §12.25.

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§13.24 D. Organization of Legal Argument

Make clear and logical. There is no fixed or prescribed format for the discussion of a legal issue. Generally, counsel should be guided by principles of good expository writing. The following books are recommended: Mellinkoff, Legal Writing: Sense and Nonsense (1982); Wydick, Plain English for Lawyers (4th ed 1998); Strunk & White, The Elements of Style (4th ed 2000).

Methods of linking legal principles to facts. The main goal is to tie governing legal doctrine to the specific facts of the case. This technique is what distinguishes a brief from a legal treatise. There are two generally accepted means of achieving this:

- Begin with a statement of legal principles that leads to the result sought, then argue from the facts of the case why they apply, and thus dictate the desired result.
- Reiterate the critical facts and weave them into the applicable law, concluding with arguments supporting respondent's position.

Consider using policy analysis. Case authority and fact discussion are not the only elements of good legal discussion. Often, policy analysis can be extremely important. "Policy" may mean no more than a common sense application of the governing rule, which will inevitably lead to equitable results on the facts of the case. Judges want to know how prior cases have been decided on related points as well as how their decision will affect the parties and the public interest. See Stern, Appellate Practice in the United States (1988).

On the organization of legal arguments, see §§12.62-12.68. See sample respondent's legal argument in App B.

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§13.25 E. Using Case Authority

Certain basic principles on using case authority apply to both appellant's and respondent's briefs. See §§12.73-12.75. However, two concepts especially apply to respondent:

- **Establish respondent's affirmative case before distinguishing appellant's cases.** Cite respondent's own case authority and explain why it applies before dealing with appellant's case authority. Only after establishing respondent's affirmative case should appellant's cases be distinguished. If done effectively, the affirmative presentation will go a long way toward neutralizing appellant's cases even before they are distinguished. Respondent's discussion of appellant's cases need not be lengthy, but appellant's case authority must be treated with accuracy and respect. If appellant relies on language in a case that when read in its entirety stands for a different proposition, or demonstrates that appellant's point is distinguishable, do not be afraid to tackle appellant's position first.
- **Anticipate and answer in advance any new case authorities.** Respondent's brief must anticipate and answer in advance any new case authorities that will be raised in appellant's reply brief. Consequently, if appellant will probably cite certain cases in the reply brief, raise and answer them briefly in respondent's brief.

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§13.26 VI. CONCLUSION TO BRIEF

Ways to conclude. A brief can usually be concluded in one of two ways.

- **If brief is short and issues are straightforward:** For a relatively short brief with straightforward issues, counsel may finish with a single sentence: "For the reasons stated above, the judgment should be affirmed." Even in a short brief, however, an additional sentence or two can emphasize the main theme of respondent's brief.
- **If brief is long and issues are complex:** In a long, complex brief, the conclusion can summarize and tie together the matters discussed earlier, especially the brief's main theme. The discussion could be a point-by-point summary, a more general overview, or a short peroration that appeals to the court's sense of fairness or to the need to preserve the law's integrity. A brief summary of alternative results is also appropriate. See §13.21.

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§13.27 VII. TIME FOR FILING; COVER; SERVICE

When to file. Respondent's brief must be served and filed within 30 days after appellant's opening brief is filed unless time is extended (see below). Cal Rules of Ct 8.212(a)(2). The brief is considered timely if the time to file it has not expired on the day it is mailed by priority or express mail, or delivered to a common carrier promising overnight delivery. Cal Rules of Ct 8.25(b)(3).

Color of brief. The cover of respondent's brief must be yellow. Cal Rules of Ct 8.40(b)(1). The cover of a combined respondent's brief and appellant's brief under Cal Rules of Ct 8.216 must be yellow; the cover of a combined respondent's brief and appellant's reply brief must be tan. Cal Rules of Ct 8.40(b)(2). A professional photocopy service accustomed to copying appellate court briefs will have the standard cover colors in stock for use on briefs and petitions. On cover requirements and sample cover, see §§12.29-12.32.

Time may be extended. The time for filing respondent's brief may be extended by stipulation of the parties for no more than 60 days. Cal Rules of Ct 8.212(b)(1). See §§12.109-12.111. Respondent may gain additional time to file the brief by application to the reviewing court. Cal Rules of Ct 8.212(b)(3), 8.60(c). The application for an extension should specify why counsel cannot meet the deadline (*e.g.,* unusual record complexity, unanticipated calendar conflict, personal illness). Because practices of different divisions vary widely, check with local practitioners early on about a particular court's willingness to extend time. A reviewing court may not shorten a stipulated extension. Cal Rules of Ct 8.212(b)(2).

Must provide evidence of notice of stipulations and applications. In civil cases, counsel must notify their clients of each stipulation or application for additional time for any step in the preparation of the record or filing briefs, and must affix evidence of such notice to the application or stipulation. The evidence of notice need not state the address of the party to whom copies were sent. Cal Rules of Ct 8.60(f).

If respondent's brief not filed on time. If the brief is not timely filed, the appellate court clerk will notify the parties that the case may be submitted for decision on appellant's brief unless the brief is filed within 15 days or unless respondent, within that time, applies to the court with a showing of good cause for relief from the deadline. Cal Rules of Ct 8.220(a)(2), (c)-(d).

If extension stipulated. If counsel for both parties have stipulated to a mutual extension of time to file briefs, that stipulation is filed early in the briefing process. Cal Rules of Ct 8.212(b)(1). Sometimes the clerk overlooks the extension and sends a notice that respondent's brief is late when, in fact, 30 or 60 days remain. Draw the clerk's attention to the stipulation.

Failure to file the brief. For failure to file the brief or show good cause within the 15-day period, or for failure to file the brief within any additional time granted by the presiding justice, under Cal Rules of Ct 8.220(a)(2) the court may:

- Accept, as true, the facts in appellant's opening brief; and
- Unless appellant requests oral argument, submit the case for decision on the record and appellant's opening brief.

Failure to file does not *require* reversal. Respondent's failure to file a brief does not automatically require reversal. The proper procedure is for the appellate court to examine the record and reverse only if prejudicial error is found. *Lee v Wells Fargo Bank* (2001) 88 CA4th 1187, 1192 n7, 106 CR2d 726; *Ruttenberg v DMV* (1987) 194 CA3d 1277, 1282, 240 CR 249. On manner of service of briefs, see §§12.112-12.115.

Always file brief. Respondent should always file a brief. Failure to do so constitutes malpractice. Even if a proper situation arises in which respondent does not want to file a brief, respondent should advise the court of appeal that no brief will be filed and the reason.

JUDICIAL PERSPECTIVE: Despite the requirement that an appellate court conduct its normal review even when Cal Rules of Ct 8.220(a)(2) has been invoked, there is no imaginable circumstance in which failure to file a respondent's brief could do anything but harm the client's position before the court. As a matter of sound tactics, respondent's counsel should always file a respondent's brief.

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14

Amicus Curiae

Roy G. Weatherup

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I. NATURE AND PURPOSE OF AMICUS CURIAE

§14.1 A. Definition

An amicus curiae is, literally, "a friend of the court," who informs or assists the court in a legal matter. See Black's Law Dictionary (7th ed 1999). Amicus curiae briefs play a significant role in the resolution of cases in the appellate courts. Attorneys for litigants often seek amicus briefs in support of their clients. Courts usually welcome such briefs as a significant help in the decisional process. Attorneys preparing amicus briefs must carefully analyze the law governing them, and identify the manner in which their clients' interests may best be protected or served. See §§14.5-14.8 for further discussion of the role of amicus curiae briefs.

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§14.2 1. Distinguished From Party

An amicus curiae who files a brief in an action is not a party to the proceeding. *Estate of Thomas* (1946) 74 CA2d 389, 168 P2d 773. Because a friend of the court is not a party, an amicus curiae does not have the rights of parties, *e.g.,* to appeal a case (*Estate of Thomas, supra*) or to petition for rehearing (*People v Union Bldg. & Loan Ass'n* (1899) 127 C 400, 402, 59 P 692; but see *Green v Biddle* (1823) 21 US (8 Wheat.) 1, 17, 5 L Ed 547). Amicus curiae is generally not entitled to court-awarded attorney fees. *Universal Oil Prods. Co. v Root Ref. Co.* (1946) 328 US 575, 90 L Ed 1447, 66 S Ct 1176 (compensation not usual reward for amicus attorney); but see *Miller-Wohl Co. v Commissioner of Labor & Indus.* (9th Cir 1982) 694 F2d 203 (although criteria not met here, recognition of common law permitting award if court-appointed amicus curiae helps resolve question and party taxed caused situation prompting appointment). Nor can amicus curiae interfere with or control the condition of the record. *Estate of Pina* (1896) 112 C 14, 44 P 332. Other powers and limitations of amicus curiae are discussed in §§14.12-14.14.

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§14.3 2. Distinguished From Intervenor

A friend of the court should be distinguished from an intervenor (CCP §387(a)), who, when allowed to intervene, becomes a party and has the same rights and remedies as an original party to the action. See *Corridan v Rose* (1955) 137 CA2d 524, 528, 290 P2d 939. The goal of intervention, however, may sometimes be achieved by the amicus curiae brief. Permission has sometimes been granted to persons to appear as amicus curiae whose interest in a case did not meet the criteria for intervention. *Jersey Maid Milk Prods. Co. v Brock* (1939) 13 C2d 661, 665, 91 P2d 599 (court gave extended consideration to arguments of attorneys for prospective intervenors, who were permitted to file amicus brief). See also *La Mesa Irrig. Dist. v Halley* (1925) 195 C 739, 743, 235 P 999 (in denying intervention, court stated that proposed intervenors' application to appear as amicus curiae would receive favorable consideration). Although it gives outsiders neither the benefits of binding adjudication nor the right to appeal an adverse decision, an amicus curiae appearance is often adequate for the purposes sought by intervenors and is often less expensive. See 4 Witkin, California Procedure, *Pleading* §214 (5th ed 2008).

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§14.4 3. Statutory Authority

Both California and federal statutes expressly provide for amicus curiae briefs. See US Sup Ct R 37; Fed R App P 29; Cal Rules of Ct 8.200(c), 8.520(f), 8.882(d). This chapter focuses on the application to file and the submission of amicus briefs in the California courts of appeal and the California Supreme Court. See §§14.63-14.64 for discussion of amicus briefs in appellate departments of superior courts, and §§14.65-14.67 for discussion of amicus briefs in trial courts. This chapter does not cover the procedure for filing amicus briefs in the United States courts of appeals (Fed R App P 29) or the United States Supreme Court (US Sup Ct R 37).

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§14.5 B. General Uses of Amicus Brief

Typically, an amicus curiae brief can be used either to:

- Serve a client's interests that may be affected by the court's decision; or
- Emphasize the importance of an issue of public concern.

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§14.6 1. To Inform Court on Issues of Public Importance

When used to inform the court on issues of public importance, the amicus curiae brief allows representatives of government, business, and social interests to provide a more rounded discussion of points and data to be presented in a court case. See, *e.g., Legislature v Deukmejian* (1983) 34 C3d 658, 662, 194 CR 781, 782; *County of Marin v Superior Court* (1960) 53 C2d 633, 2 CR 758. In this use, the amicus brief is a vehicle for courts to obtain information in cases with ramifications beyond the parties' immediate interests. See, *e.g., In re Marriage Cases* (2008) 43 C4th 757, 791 n10, 76 CR3d 683 (noting that "the court has benefited from the considerable assistance provided by [the 45] amicus curiae briefs in analyzing the significant issues presented by this case"). Bar association committees, lay organizations, or individuals may file briefs as friends of the court. See, *e.g., Johansen v California State Auto. Ass'n* (1975) 15 C3d 9, 11, 123 CR 288 (association members, who frequently represent plaintiffs, and lawyer and firm, who often represent insurance company clients, filed amicus briefs on insurance policy question). See also *Garcia v Trucking Ins. Exch.* (1984) 36 C3d 426, 204 CR 435; *Barker v Lull* (1978) 20 C3d 413, 434, 143 CR 225.

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§14.7 2. To Vacate and Reverse Appellate Decision

Third parties may seek to vacate and overturn undesirable precedent. The institutional interests at stake in a particular case are most apparent when the California Supreme Court has granted review after a published decision of the court of appeal has been handed down, one that would have significantly affected a particular class of litigants had the court of appeal decision become final and remained published. Under Cal Rules of Ct 8.1105(e)(1), a supreme court order granting review has the effect of vacating the opinion of the court of appeal and removing its status as a published decision, unless the supreme court has ordered the opinion to remain published pending review. The supreme court rarely exercises its power to keep a court of appeal opinion published after review has been granted.

Examples. Decisions in which the supreme court was asked to overturn important court of appeal decisions include *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 11 CR2d 51, and *Macias v State* (1995) 10 C4th 844, 42 CR2d 592. In both cases, the supreme court reversed appellate court decisions, and both cases had numerous amicus briefs on each side. In *Bily,* the basic issue was the extent, if any, to which third parties were allowed to rely on an audit of a company's financial statements, an issue of great importance to the accounting profession as well as to parties who rely on the opinions of accountants. In *Macias,* the central question was whether manufacturers of the insecticide malathion had a duty to warn the general public about the spraying of the product by governmental officials during a state of emergency. Given the nature of the court of appeal opinion in *Macias,* finding a wide-ranging duty to warn, the case was closely watched by chemical manufacturers, other producers and distributors of products, state officials, groups representing plaintiffs' lawyers, and environmentalists, all of which submitted amicus briefs.

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§14.8 3. To Overrule Prior Supreme Court Decision

Another situation in which the potential impact of a pending appeal on particular economic interest groups arises is when the supreme court has been asked to overrule one of its own prior decisions. In *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116, the high court granted review on the question of whether to overrule its previous decision in *Royal Globe Ins. Co. v Superior Court* (1979) 23 C3d 880, 153 CR 842. Amicus briefs were submitted by insurance companies and insurance industry associations, as well as by lawyers representing insureds. The supreme court decided to overrule *Royal Globe*, thereby abolishing statutory bad faith causes of action. Similarly, in *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836, the high court overturned a prior decision, *Becker v IRM Corp.* (1985) 38 C3d 454, 213 CR 213, that had imposed strict liability on owners of apartments for defective conditions on their premises. Amicus briefs were submitted on both sides, by lawyers for consumers and by associations representing property owners.

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§14.9 C. Amicus Curiae as Advocate

Amicus curiae may function as advocate. Historically, a friend of the court was not an advocate. *Allen v County Sch. Bd.* (ED Va 1961) 28 FRD 358. Over the years, however, the model of the disinterested person assisting the court has given way to the role of amicus curiae as the advocate of a particular position. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale LJ 694 (1963). The rules of court explicitly state that an amicus curiae appearing in the state supreme court or courts of appeal may be an advocate: "The covers of the application and proposed brief must identify the party the applicant supports, if any." Cal Rules of Ct 8.200(c)(5), 8.520(f)(6).

No need to support a party to be an advocate. When acting as an advocate, however, amicus curiae need not support a party. Amicus curiae may advocate its own position or appear on both sides of a case. For example, in *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225, the American Civil Liberties Union's amicus brief supported the part of the trial court's order prohibiting public statements beyond court disclosures by parties and government officials and opposed the part of the order prohibiting the press from the same conduct. In *Pines v Tomson* (1984) 160 CA3d 370, 206 CR 866, the ACLU also filed a brief as amicus curiae supporting and opposing both parties.

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§14.10 D. Association or Corporation as Amicus Curiae

If the party submitting an amicus curiae brief is an association or a corporation, rather than an individual, it is generally wise to submit a detailed description of the organization. The description will help identify the interest of the amicus curiae, and place it in context. It is also desirable to specifically state the issue addressed in the brief and the position taken on that issue. If the case in which an amicus brief is submitted is likely to have a direct impact on other pending cases to which the party submitting the brief is a party, those cases should be specifically identified, with an indication of the status of each case. This disclosure will add credibility to the arguments made by amicus curiae, confirming that the case before the court will affect on other cases.

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.11 E. Court-Invited Amicus Curiae

§14.11 E. Court-Invited Amicus Curiae

Court may invite. Although an amicus curiae usually participates in an appellate court proceeding at its own request, courts may also invite amicus briefs. See, *e.g., U.S. v 12 200-Ft. Reels of Super 8mm. Film* (1971) 404 US 813, 30 L Ed 2d 43, 92 S Ct 37; *Barnett v Superior Court* (review granted Sept. 17, 2008, S165522; superseded opinion at 164 CA4th 18, 79 CR3d 199). The invitation can occur at any time, including after all parties' briefs have been filed.

Relied on for knowledge and experience. The court may rely on friends of the court more for their knowledge and experience in a given area than for their grasp of detailed facts in the record.

- The court's request for amici curiae may indicate a desire for assistance on a difficult question of law. See, *e.g., Royal Globe Ins. Co. v Superior Court* (1979) 23 C3d 880, 153 CR 842, overruled in *Moradi Shalal v Fireman's Fund* (1988) 46 C3d 287, 292, 250 CR 116 (construction of insurance statute).
- The court may request the position and opinions of an organization or interest group potentially affected by its ruling in a case. See *Yarbrough v Superior Court* (1985) 39 C3d 197, 216 CR 425, in which at the appellate court level (vacated opinion at 150 CA3d 388) the state bar and other attorney organizations were invited to participate as amici curiae on issues of court-appointed counsel to represent indigent litigants without compensation.
- When certain issues are not in the parties' interests or within their expertise but the court wishes those issues to be discussed, it will often rely on amicus curiae or other outside sources for assistance. See, *e.g., Sindell v Abbott Labs.* (1980) 26 C3d 588, 163 CR 132 (theory of industrywide liability according to market share formulated by court in DES drug case based in part on law review comment; amici curiae also appeared in support of position of plaintiff and appellant).

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F. Powers, Duties, and Limitations

§14.12 1. To Provide Broad Perspective

Traditionally, a friend of the court, when assisting on a point of law, had a duty to make full disclosure on the point and to act in good faith as an officer of the court, suppressing nothing with intent to deceive the court. *Prince's Case* (1572) 8 Coke 13b, 77 Eng Rep 496. Although it is now acceptable for amicus curiae to advocate a position (on amicus curiae as advocate, see §14.9), the courts still depend on amicus briefs for a broader view of litigation than that provided by the parties. The court may rely on amici curiae to inform it of certain aspects of political, economic, social, and constitutional controversies. Like any officer of the court, amicus counsel should argue in good faith, presenting its arguments as accurately and candidly as possible on points of law and the effect the court's ruling may have on a client's or society's interests.

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§14.13 2. No Right to Appear

Generally, an amicus curiae does not have a "right" to appear in a case and may file a brief only when the court permits. Cal Rules of Ct 8.200(a)(4), 8.520(f)(1); *In re Veterans' Indus.* (1970) 8 CA3d 902, 924, 88 CR 303; *People v City of Long Beach* (1960) 183 CA2d 271, 276, 6 CR 658. The attorney general, however, does not need the presiding judge's permission to file a brief in the court of appeal unless the brief is submitted on behalf of another state officer or agency. Cal Rules of Ct 8.200(c)(7), 8.520(f)(8).

Although the court may refuse to allow an applicant to appear as amicus curiae (*e.g.,* when the parties' counsel are competent and the court desires no further argument), the court tends to be liberal in granting leave to appear, particularly on matters of public concern in which amicus curiae can help to give full scope to the issues. See, *e.g., Golden Gate Bridge & Highway Dist. v Felt* (1931) 214 C 308, 5 P2d 585.

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§14.14 3. Judicial Notice; Motions

A friend of the court can advise on matters of judicial notice or make a motion requesting the court to take action that the court itself may take on its own motion. *Tomkin v Harris* (1891) 90 C 201, 206, 27 P 202 (trial court had right to entertain and grant amicus motion to dismiss for lack of prosecution). See *Golden Gate Bridge & Highway Dist. v Felt* (1931) 214 C 308, 315, 5 P2d 585 (amicus motion to dismiss on ground of collusion between parties entertained and denied). When amicus curiae supplies information by brief or makes suggestions by motion, but its information or suggestions are ignored, it cannot appeal the court's decision. *In re Veterans' Indus.* (1970) 8 CA3d 902, 924, 88 CR 303.

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II. TACTICAL CONSIDERATIONS

§14.15 A. General Nature of Amicus Curiae Arguments

The content of an amicus curiae brief is usually different from that of a party's brief. Amicus curiae represents a defined point of view based on its own identity. It often provides the court with a more thorough analysis of a key question raised in a party's brief, suggests relevant comparative law, or provides a historical perspective.

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§14.16 1. May Provide Broad View of Issues

Counsel for amicus curiae often takes a broader view of the issues than does a party's attorney, who must focus on the individual case. Frequently, a friend of the court tries to demonstrate the total or long-term impact of the court's decision. In advocating its own policies or position on certain issues, amicus curiae should choose an appropriate case, place the issues in their proper context, and try not to harm the case of the party whose position it supports. If feasible, amicus curiae may even cooperate with the party in framing its arguments.

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§14.17 2. May Provide Narrower Focus

Although amicus curiae counsel usually take a broad view of the issues addressed in the amicus brief, it is also possible for an amicus brief to have a narrower focus than a litigant's brief. An amicus brief need not include a detailed discussion of the facts of the case, and need not include specific arguments in the litigant's favor. Rather, the brief may address a single issue of law, or a small number of issues, and need not address all issues in the parties' briefs.

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§14.18 3. May Provide More Detached Public Policy Arguments

Because a person drafting an amicus brief is concerned mainly with issues of law rather than the outcome of the case, it generally advances public policy arguments from a somewhat detached perspective. Even an organization whose members would be directly affected economically by the resolution of a particular legal issue can effectively argue that an adverse resolution of a legal issue would be harmful to the public and might lead to adverse consequences, such as higher prices, more costly insurance, or unavailability of a needed product.

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§14.19 4. May Use Broader Scope of Secondary Authority

In its brief, a friend of the court frequently uses extensive secondary authority that a party might not appropriately include in its arguments, such as detailed statistical information or citations primarily to publications or authority from other jurisdictions. See, *e.g., American Bank & Trust Co. v Community Hosp.* (1984) 36 C3d 359, 382 n1, 204 CR 671 (dissenting opinion of Mosk, J.); *Ducey v Argo Sales Co.* (1979) 25 C3d 707, 719 n5, 159 CR 835. Amicus curiae can also present subtle variations of a party's argument or even questionable arguments that parties may be reluctant to introduce. *Gardner v City of San Jose* (1967) 248 CA2d 798, 807, 57 CR 176 (counsel for city did not suggest theory proposed by amici curiae that would work to its disadvantage; argument made by amici and not espoused by city's counsel not binding on city insofar as it was harmful to city's case).

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§14.20 5. Argument Limited to Issues Raised by Parties

Generally, the appellate court considers only issues properly raised by the appealing parties, not propositions urged for the first time by amicus curiae. *Knetsch v U.S.* (1960) 364 US 361, 370, 5 L Ed 2d 128, 134, 81 S Ct 132; *Eggert v Pacific States Sav. & Loan Co.* (1943) 57 CA2d 239, 251, 136 P2d 822. But see *Mapp v Ohio* (1961) 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684. Amicus curiae must accept the issues made and propositions urged by the appealing parties; any additional questions presented in a brief filed by an amicus curiae will not be considered. *Lance Camper Mfg. v Republic Indem. Co. of Am.* (2001) 90 CA4th 1151, 1161, 109 CR2d 515. Amicus curiae may not "launch out upon a judicial expedition of its own unrelated to the actual appellate record." *Pratt v Coast Trucking, Inc.* (1964) 228 CA2d 139, 143, 39 CR 332.

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§14.21 a. Exception for Judicial Notice or New Case Law

Amicus curiae may be allowed to go beyond the record when the lower court had a duty to take judicial notice of certain matters (*Pratt v Coast Trucking, Inc.* (1964) 228 CA2d 139, 143, 39 CR 332 (PUC findings of which lower court had duty to take judicial notice are properly considered part of appellate record)) or when amicus curiae raises a new legal issue (see *Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682 (affirmed on substantive antitrust grounds in *Fisher v City of Berkeley* (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045)). In *Fisher,* which concerned the validity of Berkeley's rent control ordinance, amicus curiae noted that the United States Supreme Court had decided (in *Community Communications Co. v City of Boulder* (1982) 455 US 40, 70 L Ed 2d 810, 102 S Ct 835) that a home-rule municipality is subject to federal antitrust law. None of the parties had informed the court of appeal or the California Supreme Court of the *City of Boulder* opinion. After being informed by the amicus curiae, the supreme court gave all parties and other amici leave to file supplemental briefs on the antitrust question.

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§14.22 b. Exception for Jurisdictional Issues

The courts have also considered on appeal jurisdictional issues raised for the first time by amicus curiae. *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 510, 146 CR 614 (appeal from judgment of dismissal after general demurrer sustained without leave to amend requires court to affirm judgment of dismissal if correct on any theory, including that advanced by amicus curiae). For a striking example of an issue raised by amici, see *Mapp v Ohio* (1961) 367 US 643, 673 n5, 6 L Ed 2d 1081, 1101 n5, 81 S Ct 1684, in which the court at amici's suggestion, in a mere footnote to its brief, overruled *Wolf v Colorado* (1949) 338 US 25, 93 L Ed 1782, 69 S Ct 1359 (appellants' brief had not urged overruling of *Wolf*). Although the court can raise such matters on its own motion, an amicus brief may be a convenient means of doing so. For further discussion on powers and limitations of amicus curiae, see §§14.12-14.14.

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§14.23 c. Exception if Additional Argument Needed

May amplify and offer variations on arguments in briefs. Although amicus curiae must allege in its application that it will assist the court in deciding the matter (see Cal Rules of Ct 8.200(c)(2), 8.520(f)(3)), the legal requirements not to raise new issues, yet to find further argument necessary, seem to be competing considerations. It is generally accepted that merely repeating the arguments in the parties' briefs would waste the court's time. Although amicus curiae must come within the same scope of review as the parties' (on scope of appellate review, see chap 5), it can amplify and offer variations on the parties' arguments, frequently presenting new perspectives on the case or arguments with a wider or a historical perspective. See, *e.g., Fisher v City of Berkeley* (1984) 37 C3d 644, 209 CR 682 (affirmed on substantive antitrust grounds in *Fisher v City of Berkeley* (1986) 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045) (state supreme court agreed to decide new issue raised for the first time by amicus curiae); *Royal Globe Ins. Co. v Superior Court* (1979) 23 C3d 880, 889, 153 CR 842, overruled in *Moradi Shalal v Fireman's Fund* (1988) 46 C3d 287, 292, 250 CR 116 (history of statute presented by amicus curiae); *Landau v Salam* (1971) 4 C3d 901, 908 n9, 95 CR 46 (argument raised by amicus curiae and not by a party).

Authority for court to rule on issue raised by amicus curiae. Although it may be unusual for an appellate court to decide a case on the basis of an issue proposed only by amicus curiae, it appears clear that a court has the authority to do so. On review of a decision of the court of appeal, "the Supreme Court may decide any issues that are raised or fairly included in the petition or answer." Cal Rules of Ct 8.516(b)(1). All appellate courts are authorized to review intermediate orders and decisions that affected the order or judgment from which the appeal was taken or that substantially affect the rights of a party. CCP §906. Reviewing courts may also decide whether appellant was prejudiced by the error on which appellant relies for reversal or modification of the judgment. CCP §906. *Fisher v City of Berkeley, supra,* illustrates that a judgment that is legally correct may be affirmed on a ground that never occurred to the trial court or even to the litigants. In *Sindell v Abbott Labs.* (1980) 26 C3d 588, 163 CR 132, the supreme court adopted the rule of "market share liability" for manufacturers of fungible products, in certain circumstances, even though amicus curiae, and not the plaintiff, proposed this theory.

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B. Special Considerations for Amicus Curiae

§14.24 1. Review Court Cases on Issues of Importance

Fewer amicus curiae briefs are filed in cases pending in the courts of appeal than are filed in the supreme court. Some organizations regularly monitor newspapers and other publications for trial court cases that are being appealed. Other cases attract enough attention (*e.g.,* rent control measures, controversial constitutional questions) that friends of the court become involved at the court of appeal or even the trial court level. Many counsel, however, do not learn of a court of appeal case until the decision is published. If the losing party does not seek review by the supreme court, or if the court of appeal does not certify its decision for publication, amicus counsel can presumably invoke the "any person" provision of Cal Rules of Ct 8.1120(a)(1) or 8.1125(a)(1) and petition the appropriate court for depublication or publication. For further discussion, see §§21.14, 21.17.

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§14.25 2. Monitor Grants of Review

Counsel involved with a group or an organization interested in appearing as amicus curiae on certain issues, and conscientious practitioners who wish to provide full and competent representation of clients, should regularly monitor grants of review. See, *e.g.,* Civil Litigation Reporter (Cal CEB). See also The California Supreme Court Service (The Recorder). Supreme court grants of review for tort, insurance, and procedure cases can be found in the California Tort Reporter (Bancroft-Whitney). The supreme court publishes a weekly online summary of cases in which review has been granted at http://www.courtinfo.ca.gov/courts/supreme/recent.htm.

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§14.26 3. Amicus Curiae in Supreme Court

At the California Supreme Court level, amicus curiae participation involves a two-step process. The first step is submitting letters supporting or opposing review by the high court. See Cal Rules of Ct 8.500(g). A party supporting review may also request that the supreme court depublish the court of appeal opinion. See Cal Rules of Ct 8.1125. If, and only if, review is granted may applications for leave to file amicus briefs be submitted to the supreme court. For a discussion of the procedures, see §§14.50-14.54.

It is not unusual after review in the supreme court is granted for a party and amicus curiae to carve out the issues together that each wishes to address to the court. Once an amicus brief is filed, any party may file and serve an answer to the amicus brief within 20 days of the filing of the amicus brief. Cal Rules of Ct 8.520(f)(7).

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C. Party Soliciting or Objecting to Amicus Curiae

§14.27 1. Party Soliciting Amicus Curiae

When appropriate. It can be useful for a party to solicit amicus curiae to appear in a case in the supreme court or in the court of appeal. Counsel may believe that a consideration of the economic or political implications of its decision will favorably influence the court. For example, counsel might ask an insurance company to furnish information in an amicus brief on the potential effect the court's decision could have on the industry, or ask a bar organization for its members' assistance on issues affecting tort or constitutional law.

Where to seek assistance. An attorney seeking amicus support should first look to trade associations and other organized groups that represent a particular industry or point of view. The attorney's own client may well be a member of such a group. It is also possible to contact lawyers known to represent particular litigants that might be affected by a particular appellate decision. Such lawyers can often find institutions, organizations, or corporations that might be willing to submit amicus briefs. Lawyers seeking amicus support should carefully consider the time constraints that might apply. In addition to the time required to prepare an amicus brief, many organizations have internal time-consuming requirements, such as approvals by governing bodies of positions taken in amicus briefs, or even approval of the drafts of the briefs.

Neutral organization may be most suitable. In soliciting amicus curiae, counsel may find it more effective to solicit a neutral organization as well as a trade association. In *Murphy v E.R. Squibb & Sons* (1985) 40 C3d 672, 678, 221 CR 447, the supreme court considered whether a pharmacy could be held strictly liable for defects in a drug purchased there. Two amicus briefs were filed on behalf of the defendant pharmacy: a brief by the California State Board of Pharmacy and a joint brief by the American Pharmaceutical Association and the California Pharmacists Association. The court frequently cited the State Board's brief in ruling that the defendant pharmacy was not strictly liable. Presumably, the State Board's brief, although it advocated the pharmacy's position, appeared more neutral and objective than the brief of the two trade associations.

Assisting amicus curiae. Counsel who solicits amicus curiae should be as helpful as possible in furnishing the parties' briefs and otherwise aiding amicus curiae in understanding the issues in the context of counsel's case. On familiarity of issues by amicus curiae, see §14.37.

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§14.28 2. When Party Objects to Amicus Curiae

When appropriate. Sometimes a party may not wish supporting amicus curiae briefs to be filed, because they can attract opposing briefs from other amici curiae. Even when technically in support of a party's position, an amicus curiae can sometimes hurt a party's case. Amicus curiae may focus on certain issues, seeing the case as an opportunity to advance its own social policies. Or an amicus brief may give the party's opponent a target or the court an argument that the party wishes to avoid. See, *e.g., Gardner v City of San Jose* (1967) 248 CA2d 798, 807, 57 CR 176.

Remedy. Unlike the United States Supreme Court rules (see US Sup Ct R 37), the California Supreme Court rules do not first require an applicant to request the written consent of all parties and, if not received, only then apply to the court for leave to file an amicus brief. Because the California rules do not require the parties' prior consent or contemplate the filing of objections to an application for leave to file an amicus brief (see Cal Rules of Ct 8.200(c), 8.520(f)), practitioners use the reply brief as their remedy, even for amicus briefs filed in their support, to amplify, object to, or distinguish arguments of amicus curiae on the merits. On the procedure governing the application for permission to file an amicus brief, see §§14.29-14.45, 14.50-14.54.

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III. APPLICATION PROCEDURE IN COURT OF APPEAL

§14.29 A. Amicus Briefs Less Common in Courts of Appeal

Amicus curiae briefs are filed much less often in the courts of appeal than in the supreme court. Many counsel believe that amicus briefs filed in the courts of appeal attract attention to cases that may never be published or that will be appealed to the supreme court. Unless a party solicits an amicus brief, or counsel otherwise hears or follows newspaper reports of certain cases, potential amici curiae may not learn of a case until the decision is published.

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§14.30 B. Time of Application

When to submit an application for leave to file an amicus curiae brief in the court of appeal depends largely on when counsel learns of the case. If counsel is familiar with the trial court proceedings, it would be proper to file an amicus brief in support of a party at the same time the party files its brief. Even if counsel is filing in support of appellant's position, however, the wiser choice may be to wait for appellant's opening brief to be filed. Counsel may then be better able to focus on the additional arguments needed in the amicus brief.

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§14.31 1. In Support of Respondent

When filing an amicus curiae brief in support of respondent's position, it is almost always better to await appellant's opening brief. What appellant has argued may assist in drafting the amicus brief.

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§14.32 2. In Support of Appellant

If counsel learns of the case only after the opening brief has been filed, counsel filing an amicus curiae brief in support of appellant's position should file it as soon as possible. Counsel filing a brief in support of respondent's position may choose to wait for respondent's brief to be filed before drafting the amicus brief. Counsel who learns of a case only after all parties' briefs are filed in the court of appeal should file the application as soon as possible.

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§14.33 3. File as Far in Advance as Possible

Although there are no deadlines for filing amicus curiae briefs in the court of appeal, except for a time requirement imposed on amicus curiae briefs filed by the Attorney General, it is wise for an attorney contemplating the preparation of an amicus brief to consult with the appellate court clerk on the likely timing of oral argument in the case. The Attorney General must serve and file the brief in the court of appeal within 14 days after the last respondent's brief is filed. Any party may serve and file an answer within 14 days after the brief is filed. Cal Rules of Ct 8.200(b)(6). On a showing of good cause, the Attorney General may request an extension of time to file an amicus brief before the brief is due; similarly, a party wishing to file an answer to the amicus brief may request an extension of time to do so. Cal Rules of Ct 8.212(b)(3). On extensions of time generally, see §§12.109-12.111.

Typically, appellate justices and their staff attorneys begin work on a case after respondent's brief has been filed, even if appellant's reply brief has not yet been filed. In some divisions of the court of appeal, oral argument may come up within a few months after respondent's brief has been filed, while in others oral argument may not be scheduled for more than a year. For an amicus brief to have an impact, it should be filed as far in advance of oral argument as possible.

JUDICIAL PERSPECTIVE: The best time to send in the amicus brief is at or about the same time that the parties' briefs come in, either shortly after appellant's opening brief or respondent's brief is filed. This is the time when parties are best able to respond to issues raised in an amicus brief. In other words, the briefs should come in early enough to allow all parties to brief the issues and not delay the case. If the parties' briefs have been sitting around for a while and an amicus brief is filed requiring a response from the parties, it is probably too late for filing. *But* if an important issue is raised by the amicus brief and was not raised by the parties, that issue would not go without consideration in our court. We would ask the parties by letter to respond to that issue or raise it at oral argument, and we would request submission of letter briefs.

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§14.34 C. Requirements of Application

Basic requirements. To file an amicus curiae brief in the court of appeal, an application must first be filed and granted by the court. Cal Rules of Ct 8.200(c)(1). The Attorney General is not required to obtain permission to file a brief unless it is acting on behalf of another state officer or agency. Cal Rules of Ct 8.200(c)(7). The application or brief must be filed within 14 days after the last appellant's reply brief is filed or could have been filed under Cal Rules of Ct 8.212, whichever is earlier. Cal Rules of Ct 8.200(c)(1), (7). The application must (Cal Rules of Ct 8.200(c)):

- Be signed and filed with the clerk of the reviewing court;
- State the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter;
- Identify any party or any counsel for any party in the appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief;
- Identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the amicus curiae brief, other than the amicus curiae, its members, or its counsel;
- Be accompanied by the proposed brief; and
- Identify the party the applicant supports, if any.

For a form of the application, see §14.45.

In support of petition for rehearing. Nothing in the rules prohibits amicus curiae from applying for leave to file a brief in support of a party's petition for rehearing in the court of appeal. See Cal Rules of Ct 8.200(b), which refers to supplemental briefs after remand or transfer from the supreme court. In this situation, because of the time constraints, counsel should attach the brief to the application. See §14.36.

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§14.35 1. When Amicus Curiae Brief Not Attached to Application [Deleted]

The material previously in this section has been deleted due to a change in the law. See §14.36.

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.36 2. Amicus Curiae Brief Attached to Application

§14.36 2. Amicus Curiae Brief Attached to Application

The application for permission to file an amicus curiae brief in the court of appeal or in the supreme court must be accompanied by the proposed brief. Cal Rules of Ct 8.200(c)(4). The application and proposed brief may be prepared separately and bound together in a single document. However, the proposed brief and the application may be combined. See Cal Rules of Ct 8.200(c)(4).

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§14.37 3. Review Parties' Briefs

Obtain and scrutinize all parties' briefs. To make the required representation that the "proposed amicus curiae brief will assist the court in deciding the matter" (Cal Rules of Ct 8.200(c)(2)), amicus counsel usually reviews the parties' briefs on file in the appellate court or those that were filed in the trial court. Copies of briefs may usually be obtained from the party in whose support the amicus brief will be filed. If that is not possible, a trip to the court of appeal will be necessary to review the documents. In a supreme court case, or on a petition for rehearing in a court of appeal, counsel who wishes to show the error or uncertain effects of a ruling must also study the appellate court opinion.

Consider consulting with party's counsel. Amicus counsel may wish to confer with the party's counsel and review pertinent parts of the record to ensure an understanding of the opposing party's presentation. Familiarity with the details of a case, however, is often not necessary for counsel who are experienced and skilled on a particular question, because an amicus brief is generally filed on a question of law. Counsel must do what is sufficient to place the issues within their proper context in the case. For discussion of the tactical questions amicus counsel should consider, see §§14.15-14.28.

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§14.38 4. Include Statement of Interest

A statement of interest is mandatory when requesting leave to file an amicus brief in the court of appeal. Cal Rules of Ct 8.200(c)(2).

JUDICIAL PERSPECTIVE: I want to know the motivation of the amicus curiae. What is the point the amicus curiae is trying to get across? Unless they are telling you up front, they might be trying to "hide the ball." We will take all the information we can get from reasonable sources in resolving important issues.

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.39 a. Organization

§14.39 a. Organization

The interests of amicus curiae in the case may be set out in a simple statement of why the person or organization seeks to file the brief. See Cal Rules of Ct 8.200(c)(2). If the amicus curiae is an organization involved in issues of public concern, stating its interest in a case may include the organization's general or specific purposes and policies and how they might be affected by the court's decision. The applicant may wish to note other cases with similar or related issues in which the organization has appeared as a party or as amicus curiae.

JUDICIAL PERSPECTIVE: Amicus briefs can be especially good if coming from organizations that have well-honed positions on issues.

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§14.40 b. Private Person or Business

If amicus curiae is a private person or business potentially affected by the court's decision, it is appropriate for counsel to disclose the interest of the amicus curiae in general terms. For example, counsel may represent an insurance company interested in appearing as amicus curiae in a case that could affect its business. See, *e.g., Royal Globe Ins. Co. v Superior Court* (1979) 23 C3d 880, 153 CR 842, overruled in *Moradi Shalal v Fireman's Fund* (1988) 46 C3d 287, 292, 250 CR 116 (amicus curiae briefed legislative history of statute in question).

JUDICIAL PERSPECTIVE: Even if the interest is only pecuniary, it might still be significant if it has general application.

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§14.41 c. Party in Pending Suit Affected by Appellate Court's Ruling

If amicus curiae is a party in a pending suit that may be affected by the appellate court's ruling, it should include, in the statement of interest, the name of that case, its docket number, and the court in which it is on file. As an advocate, counsel should be wary of making blanket statements, such as that the decision in the current case will *definitively* affect the outcome of the case in which amicus curiae is a party.

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.41A 5. Include Statements of Authorship and Monetary Contribution

§14.41A 5. Include Statements of Authorship and Monetary Contribution

The application requesting leave to file an amicus brief must include a statement identifying any party or any counsel for any party in the appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief. Cal Rules of Ct 8.200(c)(3)(A). In addition, the application must identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief, other than the amicus curiae, its members, or its counsel. Cal Rules of Ct 8.200(c)(3)(B).

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6. Service on Parties

§14.42 a. Application Filed Without Brief [Deleted]

The material previously covered in this section has been deleted due to a change in the law. See §14.43.

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§14.43 b. Application Filed With Brief

When filing the application with the amicus curiae brief attached, counsel must serve both the application and the brief on all parties before filing the brief. Cal Rules of Ct 8.200(c)(4). Proof of service must be attached.

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§14.44 c. Number of Copies; Service

In a court of appeal, the original and four copies of an amicus curiae brief or an answer to an amicus curiae brief must be filed, along with proof of service of one copy of the brief on each party and of four copies of the brief to the supreme court. Cal Rules of Ct 8.25(a), 8.44(b)(1). On service requirements and number of paper copies, see §§12.112-12.115.

If the attorney submitting an application for leave to file an amicus brief knows of other amici curiae counsel, copies may be mailed to them as a courtesy.

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.45 7. Form: Application for Leave to File Amicus Curiae Brief

§14.45 7. Form: Application for Leave to File Amicus Curiae Brief

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14.45-1 Application for leave to file amicus curiae brief

[*Title of court*]

[*Title of case*]

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED BRIEF _ _[*IN SUPPORT OF POSITION OF _ _[NAME OF PARTY*]_ _]_ _

To the Honorable _ _[*Chief/Presiding*]_ _ Justice of this Court:

_ _[*Name of person or organization*]_ _ **(hereafter "applicant") requests leave to file an amicus curiae brief in this case _ _[*in support of the position of _ _[name of party*]_ _]_ _.**

Applicant is _ _[*briefly state applicant's interest in the case and, if appropriate, the effect the court's decision may have on that interest*]_ _.

[*When appropriate, applicant in its statement of interest may add language such as the following*]

Applicant has appeared as amicus curiae before this and other courts on matters involving similar issues, namely _ _[*insert, e.g., case name, title of court, and case citation or docket number*]_ _.

[*Continue*]

[*When appropriate, applicant must provide authorship and monetary contribution information such as the following*]

The proposed amicus curiae brief was funded in part by _ _[*insert name of party, person, or entity who made a monetary contribution intended to fund preparation or submission of the brief*]_ _.

Applicant's counsel is familiar with the issues in this case and the scope of their presentation, and believes further argument is needed on the following points:

[*Attach proposed brief here or incorporate into application*]

Date: _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of applicant*]_ _

Copies: In court of appeal, the original and one copy of the application and the original and four copies of the brief (Cal Rules of Ct 8.44(b)(1), (6)); in the supreme court, the original and one copy of the application and the original and 13 copies of the brief (Cal Rules of Ct 8.44(a)(1), (6)); copies for service; office and client copies.

Comment: On service requirements, see §§14.43-14.44. The proposed brief must be served and must accompany the application and may be combined with it. Cal Rules of Ct 8.200(c)(4). For procedures in the supreme court, see §§14.50-14.54, and for procedures in the court of appeal, see §§14.29-14.44.

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§14.45A D. Answers to Amicus Briefs

If the court of appeal grants the application to file an amicus brief, any party may serve and file an answer to the brief within the time specified by the court in its order granting the application. Cal Rules of Ct 8.200(b)(5). A party may apply to the court for an extension of time to file the answer for good cause shown under Cal Rules of Ct 8.212(b)(3). On applications for extensions of time generally, see §§12.109-12.111.

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IV. APPLICATION PROCEDURE IN CALIFORNIA SUPREME COURT

A. Letter Urging Court to Grant or Deny Review

§14.46 1. Procedure

Any "person or entity wanting to support or oppose a petition for review" must send a letter to the California Supreme Court. Cal Rules of Ct 8.500(g). Any such letter must "describe the interest of the amicus curiae" and must conform to Cal Rules of Ct 8.504(e) on incorporating documents by reference and annexed material. The letter must include proof of service on each party to the action or proceeding. Cal Rules of Ct 8.500(g). The original and eight copies of the amicus letter must be filed with the supreme court. Cal Rules of Ct 8.44(a)(4). The court may elect to consider the letter and may cause the letter to be filed in the action or proceeding. The fact, however, that a person lodged the letter does not constitute permission for a future amicus brief to be filed if review is later granted; all persons seeking to file an amicus curiae brief on the merits shall comply as nearly as possible with the requirements of Cal Rules of Ct 8.520(d) and (f). Cal Rules of Ct 8.500(g)(3). This rule is generally interpreted to preclude any application for leave to file amicus briefs unless the supreme court has granted review.

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§14.47 2. Time for Submitting Letters

The supreme court does not formally accept amicus letters until a petition for review is filed. If letters are received before that time, the clerk will hold them until a petition is filed. Letters supporting or opposing review should be sent as soon as possible after the petition for review is filed. Answers to a petition for review may be filed within 20 days, after which the petitioner has 10 days to file a reply. Cal Rules of Ct 8.500(e)(4)-(5). The supreme court has 60 days after the filing of the petition for review to rule on it, but the 60-day deadline may be extended to 90 days. Cal Rules of Ct 8.512(b). If an amicus letter in support or in opposition to review is filed within 30 days after the petition for review is filed, it is unlikely that the supreme court will have ruled on the petition. Nonetheless, the earlier the letter is submitted, the more likely it is to have an impact.

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§14.48 3. Effect of Letters

Whether or not amicus letters are formally ordered filed, they are routinely distributed to the justices of the supreme court. It appears that amicus letters have a significant impact on the decision to grant or deny review. Several former and sitting supreme court justices have so stated publicly. The value of amicus letters supporting or opposing review is to demonstrate the importance of a particular case, and its potential impact on particular groups.

Most letters written under Cal Rules of Ct 8.500(g) support review. Opposition to review, arguing that a particular case is unimportant or that the decision of the court of appeal is unquestionably correct, is rarely effective. If valid, such grounds for denying review are usually obvious.

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§14.49 B. Letter Requesting or Opposing Depublication

In many cases, a party wishing to submit an amicus letter to the supreme court under Cal Rules of Ct 8.500(g) may also wish to request depublication. Depublication letters are governed by Cal Rules of Ct 8.1125. The rules prohibit combining a letter in support of a petition for review with a request for depublication; two separate letters must be written. Cal Rules of Ct 8.1125(a)(2). A request for depublication must be made within 30 days after the date on which the appellate court's decision becomes final. Cal Rules of Ct 8.1125(a)(4). A letter requesting depublication must not exceed ten pages and must be accompanied by proof of service on the rendering court and all parties. Cal Rules of Ct 8.1125(a)(2), (5). The request must "concisely state the person's interest and the reason why the opinion should not be published." Cal Rules of Ct 8.1125(a)(3). The court of appeal or "any person" may file a response to a request for depublication, which is also limited to ten pages and which must be served on the rendering court, all parties, and "any person who requested depublication." The response letter must be filed and served within 10 days of the date the depublication letter is received by the supreme court. Cal Rules of Ct 8.1125(b). The original and eight copies of a letter requesting or opposing depublication must be filed with the supreme court. Cal Rules of Ct 8.44(a)(4).

Generally, requests for depublication are more narrowly focused than amicus letters in support of review. The primary subject of a request for depublication is criticism of the court of appeal opinion, describing the adverse impact that will result if the opinion stands. Although the claimed adverse effect of a published opinion is a point that often militates in favor of granting review, amicus letters in support of petitions for review usually emphasize the importance of a legal issue and the need to resolve it definitively in the state's highest court. For an extensive discussion of depublication letters, see §21.17.

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C. Applications to File Amicus Curiae Briefs After Review Is Granted

§14.50 1. Procedure

When the supreme court grants review, a party wishing to submit an amicus curiae brief must first obtain permission via an application to the Chief Justice. Cal Rules of Ct 8.520(f)(1). The Attorney General is not required to seek permission unless it is representing another state officer or agency. Cal Rules of Ct 8.520(f)(8). To obtain permission, the party must serve and file a signed application with the court clerk. The request must (Cal Rules of Ct 8.520(f)):

- State the nature of the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter (see §§14.38-14.41);
- Identify any party or any counsel for a party in the pending appeal who authored the proposed amicus curiae brief in whole or in part, or who made a monetary contribution intended to fund the preparation or submission of the brief;
- Identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief, other than the amicus curiae, its members, or its counsel in the pending appeal;
- Set forth facts or questions of law that have not been adequately presented by the parties and their relevancy to the disposition of the case (see §14.52); and
- Be accompanied by the proposed brief (see §14.53).

For a form of this request, see §14.45.

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§14.51 2. Time of Application

Deadline. The application must be made no later than 30 days after all the parties' briefs, other than supplemental briefs, have been filed or could have been filed under Cal Rules of Ct 8.520, unless the Chief Justice grants additional time. Cal Rules of Ct 8.520(f)(2).

Consult with party on whose behalf the brief will be filed. Counsel contemplating filing amicus briefs in the supreme court should check with the attorney representing the party on whose behalf the proposed amicus brief is to be filed to learn the precise date on which the party's brief will be filed.

Extensions. Although filing deadlines may be extended by motion, extensions in the supreme court are much less common than in the courts of appeal. The Chief Justice is permitted to grant leave for late filing of an amicus brief, but only if there is "good cause." Cal Rules of Ct 8.520(f)(2). On motion procedure generally, see chap 11.

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§14.52 3. Facts or Questions of Law Not Adequately Presented by Parties

The request to obtain permission to submit an amicus brief must state "the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter." Cal Rules of Ct 8.520(f)(3). These matters can refer to a variety of different things. For example, in the request submitted in *Murphy v E.R. Squibb & Sons* (1985) 40 C3d 672, 221 CR 447, a substantial amount of factual information on the nature of the retail drug industry was submitted to the supreme court. This information was relevant to the issue of the possible effect of imposing strict liability on pharmacists. Another area that was extensively addressed in the amicus briefs filed on behalf of the defendant pharmacy was the relevant case law of other jurisdictions. Similarly, in *Peterson v Superior Court* (1995) 10 C4th 1185, 43 CR2d 836, hotel industry associations provided information about their industry and discussed the applicable statutory and decisional law of other states.

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§14.53 4. Must Submit Proposed Brief With Application

An application for leave to file an amicus brief in the supreme court must be accompanied by the proposed brief. It must be served on all parties. Cal Rules of Ct 8.520(f)(5). Amicus counsel must have the entire brief ready at the time of application, which may be as little as 60 days after review is granted. (Under Cal Rules of Ct 8.520(a), the petitioner has 30 days after the date of order granting review to file a brief on the merits and the respondent has 30 days from the date petitioner's brief is filed to serve its answer; under Cal Rules of Ct 8.520(f), an amicus brief must be submitted to the supreme court within 30 days after all the parties' briefs, other than supplemental briefs, have been filed or can no longer be filed under Cal Rules of Ct 8.520.) On requirements of the brief, see §§14.58-14.59.

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§14.54 5. Answers to Amicus Briefs

A party may submit an answer to the amicus brief within 20 days after the amicus brief is filed. The answer must be served on all parties and on the amicus curiae before its filing. Cal Rules of Ct 8.520(f)(7). The "answer" contemplated by the rule is a formal brief, in the nature of a reply brief. On reply briefs, see §§12.123-12.133.

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§14.55 D. Issues to Be Reviewed

Limitation of issues. The supreme court may specify the issues to be briefed by the parties. If it does not do so, the issues to be briefed are those in the petition for review and any answers that were filed. Cal Rules of Ct 8.516(a). Significantly, an entirely new set of briefs may be filed, directed to the issues under review, rather than to the case as a whole. Parties have the option, however, of relying on their court of appeal briefs. Cal Rules of Ct 8.520(a). Unless otherwise ordered, "the parties must limit their briefs and arguments to those issues and any issues fairly included in them." Cal Rules of Ct 8.516(a)(1). For an extensive discussion of rules governing briefs in the supreme court, see chap 22.

Keep focus narrow. Although an attorney representing a party appearing as amicus curiae may present a somewhat different perspective on a legal issue than that of a litigant, it is unwise to go beyond the issues properly before the court. Generally speaking, a party filing amicus briefs must accept the existing issues in a case. This principle is especially applicable to the supreme court, where the rules focus on presenting, defining, and briefing particular issues, rather than other aspects of a case.

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§14.56 E. Pending Related Cases

The supreme court can grant review, but it may defer any briefing or other action in the case "until the court disposes of another matter or pending further order of the court." Cal Rules of Ct 8.512(d)(2). This action is known as a "grant and hold" procedure and is commonly used when several cases involve the same or closely related issues. There may be briefing in the merits on one or several of these cases, but not all. An attorney contemplating an amicus brief in the supreme court should carefully study the "California Supreme Court Pending Cases," which appears in the online version of the *Los Angeles Daily Journal* and elsewhere. It may be desirable, or even necessary, to file amicus briefs in two or more related cases. However, it is also possible that a particular case may have been placed on a "grant and hold" order, precluding amicus briefs.

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§14.57 F. Importance of Amicus Curiae Briefs in Supreme Court

Substantial impact. It appears that amicus curiae briefs play a substantial role in the decision-making processes of the California Supreme Court. Present and former members of the court have affirmed the importance of amicus briefs in various public statements. Moreover, such briefs are being filed with increasing frequency, particularly in cases that will have a significant impact on a particular category of litigant or segment of society.

Statistical information. From 1994 to 2004, the participation of amici curiae in civil cases decided by the California Supreme Court increased slightly, while there were somewhat fewer amicus curiae briefs filed in criminal cases. In 2004, 57 civil cases were decided by the supreme court in written decisions, as well as 69 criminal cases (including juvenile and habeas corpus matters). Amicus curiae briefs were filed on both sides in 26 of the 57 civil cases (45.6 percent) and on one side in 16 of them (28.1 percent), representing a total of 42 civil cases (73.7 percent) in which amicus briefs were filed. There were only 15 civil cases (26.3 percent of the total) in which no amicus brief was filed.

The court adopted the practice of identifying any parties submitting amicus curiae briefs in each opinion. The parties filing amicus curiae briefs included a wide variety of governmental, business, labor, nonprofit, religious, and attorney groups. Among the friends of the court were the state Attorney General, the City of Los Angeles, the League of California Cities, various manufacturers, the Howard Jarvis Taxpayer Association, certain churches, various consumer groups, associations of lawyers, insurance companies, media groups, contractor groups, gay rights groups, and particular law firms and individual lawyers appearing on their own behalf.

NOTE: Although the number of criminal decisions increased substantially from 1994 to 2004, there were no cases in which amicus curiae briefs were filed on both sides, and only 13 cases (18.9 percent) in which an amicus brief was filed on one side. Of the 13 cases, there were five in which briefs were filed on behalf of the prosecution and eight in which the defendants were supported by amicus briefs submitted by private organizations, such as the California Public Defenders' Association and the American Civil Liberties Union.

Supreme court's view of amicus briefs. In *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 11 CR2d 51, the court made an express comment on amicus briefs in general. The California Society of Certified Public Accountants submitted, in an appendix to its amicus brief, several declarations, including factual statements outside the record. The plaintiff moved to strike the appendix and related portions of the society's brief. 3 C4th at 405. The supreme court noted that "[b]oth our rules and our practice accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs." 3 C4th at 405. It further stated that "[a]micus curiae presentations assist the court in broadening its perspective on the issues raised by the parties" and "facilitate informed judicial consideration of a wide variety of information and points of view that may bear upon important legal questions." 3 C4th at 405. The court denied the motion to strike, but indicated that in this case it did not consider the matters to which the plaintiff objected. See also *In re Marriage Cases* (2008) 43 C4th 757, 791 n10, 76 CR3d 683 (noting that "the court has benefited from the considerable assistance provided by [the 45] amicus curiae briefs in analyzing the significant issues presented by this case").

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V. REQUIREMENTS OF BRIEF

§14.58 A. Use Standard Rules for Briefs

Amicus brief must conform to requirements for parties' briefs. Like any other formal brief, an amicus curiae brief submitted to the court of appeal or to California Supreme Court should have headings, subheadings, and the usual topical index and table of authorities. Points should be made separately and supported by authority. See Cal Rules of Ct 8.204. On technical requirements of appellate briefs, see chaps 12-13 (court of appeal) and chap 22 (supreme court). An amicus brief must comply with Cal Rules of Ct 8.204 on number of pages, incorporation of documents by reference, and annexed material. Cal Rules of Ct 8.520(b). The brief must also conform to Cal Rules of Ct 8.44 on the number of copies that must be filed.

Because amicus curiae presentations assist the court by broadening its perspectives on the issues raised by the parties, the court, except in cases of obvious abuse of the amicus curiae privilege, will not employ orders to strike as a means of regulating their contents. *Cornette v Department of Transp*. (2001) 26 C4th 63, 77, 109 CR2d 1.

On applying for leave to submit an amicus brief to the supreme court, see §§14.50-14.54. On applying for leave to submit an amicus brief to the courts of appeal, see §§14.29-14.45.

Scope of fact coverage depends on points made in brief. Whether the brief should contain a statement of the case and a summary of the material facts depends on the nature of the points made by amicus curiae. Such matters may not need to be included, because presumably the court and counsel will have read the parties' briefs. It is often wise, however, to include a short factual summary so that the court, counsel, and other interested persons reading the brief will have a full picture of the case and need not speculate about matters in the record.

Attachments to brief. A party may attach to the brief copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible; these attachments cannot exceed a total of ten pages. Cal Rules of Ct 8.520(h). Note that a copy of an opinion required to be attached under Cal Rules of Ct 8.1115(c) does not count toward this 10-page limit. Cal Rules of Ct 8.520(h).

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.59 B. Indicate Whether Supporting a Party

§14.59 B. Indicate Whether Supporting a Party

If an amicus curiae brief supports the position of one of the parties, that fact must be noted on the cover of the brief. Cal Rules of Ct 8.200(c)(4), 8.520(f)(6). When counsel attaches the amicus brief to the application (see §14.53), counsel should prepare one document titled "APPLICATION OF _ _[*NAME(S)*]_ _ FOR LEAVE TO FILE _ _[*AMICUS/AMICI*]_ _ CURIAE BRIEF IN SUPPORT OF THE POSITION OF _ _[*NAME OF PARTY*]_ _; PROPOSED BRIEF."

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VI. ORAL ARGUMENT

§14.60 A. In General

Amicus curiae has no right to oral argument. Leave to file an amicus curiae brief does not confer a right to present an oral argument to the court. However, the court may apportion oral argument among two or more counsel or amicus curiae. See Cal Rules of Ct 8.256(c)(2), 8.524(g).

Coordinate arguments. If a litigant desires to share oral argument with a party that has filed an amicus brief, the attorneys for the litigant and for amicus curiae should carefully coordinate their strategy before oral argument. Typically, the amicus attorney will focus on one legal issue, often from a public policy perspective. For discussion of oral argument in the appellate courts generally, see chap 16.

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§14.61 B. In Supreme Court

Request permission for amicus curiae to argue in addition to party. Unless otherwise ordered by the court, only one counsel may argue for each side. To divide the time for oral argument, request permission from the court no later than 10 days after the case has been set for oral argument. Cal Rules of Ct 8.524(f)(2), (g). In no event may oral argument be divided into segments of less than 10 minutes, except that one counsel per side—unless additional counsel are authorized by the court—may reserve a portion of his or her time for rebuttal. Cal Sup Ct, IOPP V. The court leaves the decision to the parties of who will appear in oral argument.

Coordinate arguments. When the supreme court calendar has been finalized, it will indicate the names of the counsel who will argue, the order of argument, and the precise amount of time allowed for each attorney. All attorneys arguing on the same side of the case should carefully coordinate their plans to avoid duplication and inconsistency. A lawyer who frequently appears before the supreme court will sometimes present oral argument on behalf of amicus curiae, regardless of who drafted the brief. On oral argument in the supreme court generally, see §§22.60-22.69. See also chap 16.

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§14.62 C. In Courts of Appeal

Request permission to argue. If you wish to argue as amicus curia, submit a written request to the court of appeal. The court has discretion to grant or deny amicus curia the opportunity to argue. Cal Rules of Ct 8.256(c)(2). The court may apportion or expand the 30 minutes of argument allowed each side according to the respective parties' interests. Cal Rules of Ct 8.256(c)(2).

Do not need to designate who will argue. The courts of appeal do not require counsel to name in advance the person who will argue on behalf of amicus curiae. Counsel can sometimes advise the court of who will present oral argument on notes furnished by the court on the day of the argument. In some courts, counsel can simply tell the court that counsel would like to share time with amicus curiae who submitted a brief on the party's behalf.

Check local rules. Counsel wishing to share time with amicus curiae should consult the court clerk before oral argument on the procedure preferred by the court. For further discussion on oral argument in the courts of appeal, see chap 16.

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VII. AMICUS CURIAE BRIEFS IN APPELLATE DEPARTMENT OF SUPERIOR COURT

§14.63 A. Application Procedure

An amicus curiae brief may be filed in the appellate department of a superior court, although counsel must first obtain permission to do so from the appellate department's presiding or acting presiding judge. Cal Rules of Ct 8.882(d). The Attorney General is not required to seek permission to file an amicus curiae brief unless it is presenting a brief on behalf of another state officer or agency. Cal Rules of Ct 8.882(d)(5). For a form of application for leave to file an amicus brief that can be used in the appellate department of the superior court, see §14.45. On procedures used in appellate departments generally, see chap 10.

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§14.64 B. Brief

The amicus curiae brief in the appellate department may be subject to conditions imposed by the court. If the brief supports the position of one of the parties to the appeal, this fact should be stated in the brief's heading. On procedures used in appellate departments of superior courts generally, see chap 10.

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VIII. AMICUS CURIAE BRIEFS IN TRIAL COURT

§14.65 A. Authorization

An amicus curiae brief may be filed in a trial court at the court's discretion. *In re Veterans' Indus.* (1970) 8 CA3d 902, 924, 88 CR 303; *People v City of Long Beach* (1960) 183 CA2d 271, 276, 6 CR 658. Amicus briefs are submitted far less often in trial courts than in appellate courts.

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§14.66 B. When Appropriate

Submitting an amicus curiae brief to the trial court may be appropriate when amicus curiae is interested in the immediate effect of the trial court's decision (*e.g.,* a case involving how a county's jury panels should be drawn, a freedom of the press case in which the court has imposed a gag order, or a case in which a terminally ill plaintiff seeks an injunction to have life-support systems removed).

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Source: Civil Litigation/California Civil Appellate Practice/14 Amicus Curiae/§14.67 C. Procedure

§14.67 C. Procedure

To file an amicus curiae brief in the trial court:

- Notice a motion in the law and motion department before the case is set for trial;
- Apply to the presiding judge (or, if already assigned, to the trial judge) before trial commences; or
- Apply directly to the trial court during or after trial.

The brief is usually attached to the application. Counsel should check local court rules or telephone the court clerk for procedures on submitting an amicus brief to the trial court. For a detailed discussion of law and motion procedures in the trial court, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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15

Settlement on Appeal

The Honorable Kathleen M. Banke
Brendon Ishikawa

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§15.1 I. INTRODUCTION: SETTLEMENT MAY BE VIABLE OPTION ON APPEAL AND MEDIATION MAY BE MANDATORY

Settlement is an option while case is on appeal. Efforts to settle need not be forgotten once a judgment has been entered and the case is on appeal. The case is still far from being over, and both sides face varying degrees of risk of an adverse outcome.

Successful plaintiff should assess risks. A successful plaintiff is not likely to receive the benefit of a judgment while a case is on appeal, which may be a year or more. There is a risk the law will change. There is a risk the judgment will be reversed because of error by the trial court or insufficiency of the evidence, putting the plaintiff back at square one and facing a retrial. Worse, the court of appeal might direct that judgment be entered for defendant, ending the case.

Successful defendant should assess risks. A successful defendant faces similar concerns in the face of an appeal. There can be no closure of the case while it is on appeal. There is also the risk of an adverse outcome. There may be further trial court proceedings, with all the attendant risks. Or, the court of appeal might not only reverse, but direct that judgment be entered in the plaintiff's favor.

Advise client on option of settlement. Thus, as a case moves into the appellate court, counsel should always keep in mind the following: The appellate process is lengthy, generally taking a year or more. It is costly for both appellant and respondent, and it always has risks. Counsel should therefore at least raise the issue of settlement with the client and discuss the pros and cons. Although settlement may not be an option that is recommended or the client chooses, it is an option about which the client should be advised.

Appeals may be subject to mandatory mediation. Appeals arising in Los Angeles, San Francisco, Sacramento, and Riverside are subject to mandatory mediation.

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II. COURT-SUPERVISED SETTLEMENT CONFERENCES

§15.2 A. Conference Under Cal Rules of Ct 8.248

Prehearing conferences governed by Cal Rules of Ct 8.248. The basic framework for settlement conference programs in the courts of appeal is set forth in Cal Rules of Ct 8.248, which authorizes appellate courts to hold "prehearing conferences." Rule 8.248 reads as follows:

> **(a) Statement and conference**
> After the notice of appeal is filed in a civil case, the presiding justice may:
> (1) Order one or more parties to serve and file a concise statement describing the nature of the case and the issues presented; and
> (2) Order all necessary persons to attend a conference to consider a narrowing of the issues, settlement, and other relevant matters.
>
> **(b) Agreement**
> An agreement reached in a conference must be signed by the parties and filed. Unless the Court of Appeal orders otherwise, the agreement governs the appeal.
>
> **(c) Proceedings after conference**
> (1) Unless allowed by a filed agreement, no matter recited in a statement under (a)(1) or discussed in a conference under (a)(2) may be considered in any subsequent proceeding in the appeal other than in another conference.
> (2) Neither the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal.
>
> **(d) Time to file brief**
> The time to file a party's brief under rule 8.212(a) is tolled from the date the Court of Appeal mails notice of the conference until the date it mails notice that the conference is concluded.

Summary of prehearing conference rules. In short, Cal Rules of Ct 8.248 establishes the following parameters for prehearing conferences:

- The prehearing conference is discretionary with the appellate court.
- A prehearing conference can be held in a civil case at any time after a notice of appeal is filed.
- Any number of issues relevant to the disposition of the appeal can be discussed at the conference, including narrowing the issues on appeal and settlement.

Notice of settlement. If the case is settled on appeal, as a whole or as to any party, the appellant must *immediately* "serve and file a notice of settlement" with the reviewing court. Cal Rules of Ct 8.244(a)(1). If oral argument or a prehearing conference is imminent, the appellant must provide notice of settlement to the reviewing court by telephone or "other expeditious method." Cal Rules of Ct 8.244(a)(2). If the record on appeal has not been filed in the court of appeal, appellant must also "immediately" serve a copy of the notice of settlement on the superior court clerk. Cal Rules of Ct 8.244(a)(1). The reviewing court may sanction an appellant or appellant's attorney for the failure to promptly notify the court that the case has settled. *Huschke v Slater* (2008) 168 CA4th 1153, 1160, 86 CR3d 187 (sanctions of $6000 against appellant's attorney who notified court of settlement 1 day before oral argument and over 10 months after case had settled).

Within 45 days after filing a notice of settlement, the party must file an abandonment under Cal Rules of Ct 8.244(b) (if the record has not yet been filed) or a request to dismiss under Cal Rules of Ct 8.244(c) (if the record has already been filed in the appellate court). For good cause shown, the court may extend the 45-day period. Cal Rules of Ct 8.244(a)(3). If the appellant does not file an abandonment or a request for dismissal within the time specified, the court may dismiss the appeal as to that appellant and order each side to bear its costs. Cal Rules of Ct 8.244(a)(4).

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§15.3 B. Local Rules on Prehearing Settlement Conferences

Prehearing conference procedures vary among courts. Prehearing conferences are not mandatory. Rather, Cal Rules of Ct 8.248 merely authorizes the courts of appeal to hold such conferences, while defining their purpose broadly. The decision to hold prehearing conferences is left to the individual courts, as are the procedures for implementing a prehearing conference program.

Consult local rules and practice. It is therefore not surprising that the six appellate districts have adopted different practices and procedures for holding prehearing settlement conferences. In some districts, the practices and procedures even vary among the different divisions. Therefore, check local rules and policy statements carefully to insure compliance with local procedures. A summary of these rules can be found in the chart in §15.4. For further discussion, see §§15.5-15.14.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.4 1. Chart: Summary of Provisions in Local Rules Governing Settlement Conferences

§15.4 1. Chart: Summary of Provisions in Local Rules Governing Settlement Conferences

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Court	Local rule	Who can request	Time	Briefing/ Record
First District	1st App Dist Local R 3	Joint request	Anytime before close of briefing	Neither briefing nor record preparation stayed, but extension of time may be granted
Second District	No formal settlement conference policy	N/A	N/A	N/A
Third District	No formal settlement conference policy	N/A	N/A	N/A
Fourth District				
Division One	4th App Dist, Div 1 IOPP §§VIII-IX, noting that settlement guidelines are sent to parties at beginning of appeal	Both parties or any two opposing parties if more than two parties	Until 30 days after completion of briefing	Generally not stayed
Division Two	4th App Dist Local R 4	Any party or the presiding justice may so order	Presiding justice may order settlement conference at any time; a request from a party for a settlement conference prior to completion of briefing shall be made within 30 days after clerk mails notice	Briefing stayed when case is accepted for settlement conference program, but record preparation not stayed unless so ordered

			of settlement conference program	
Division Three	4th App Dist, Div 3 IOPP §IV	Joint request or any party	Before, during, or after briefing, but usually not after oral argument has been calendared	Briefing stayed once court mails notice of date and time for settlement conference; record preparation not stayed without specific court order
Fifth District	5th App Dist Local R 2	Joint request or on court order	No deadline	Briefing stayed when court orders scheduling of conference; no provision staying record preparation
Sixth District	No formal settlement conference program	N/A	N/A	N/A

Comment: This is a limited summary. Local rules should be read thoroughly. See discussion of local rules in §§15.5-15.14.

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§15.5 2. First Appellate District

Rule 3 generally governs settlement procedures. Conference procedures in the First District Court of Appeal are governed by 1st App Dist Local R 3, titled "Settlement Conferences in Civil Appeals." This rule applies to all civil appeals, except appeals from proceedings under Welf & I C §§601 and 602 (dependent child and ward of court) and Welf & I C §366.26 (adoption and termination of parental rights), and appeals from original proceedings ancillary to a criminal prosecution. 1st App Dist Local R 3(a).

Parties may request settlement conference. A settlement conference will be scheduled if jointly requested in writing by counsel for the parties or ordered by the court. 1st App Dist Local R 3(b)(1)-(2). To obtain a settlement conference by request, all parties must join in a written request. The request may be prepared and submitted by one party, but it must state that it is being made on behalf of all parties and that they all join in the request. 1st App Dist Local R 3(b)(1). The request may take the form of a letter.

Timing. A written request for a settlement conference can be made at any time during the appellate process before the close of briefing. 1st App Dist Local R 3(b)(1).

Court may order conference without parties' request. The panel to which the appeal has been assigned can order a settlement conference at any time, whether or not the parties have requested one. 1st App Dist Local R 3(b)(2).

Settlement proceedings do not stay record preparation or briefing schedule. The pendency of settlement proceedings does not suspend preparation of the record or briefing. The court may, however, grant an application for more time, or the parties may stipulate to an extension. 1st App Dist Local R 3(b)(3).

Settlement conference judge. A justice in a division other than the one to which the appeal is assigned serves as the settlement conference judge. 1st App Dist Local R 3(c)(1). The judge gives written notice of the date and time of the conference, and all subsequent communications regarding the settlement must be directed to the settlement conference judge. 1st App Dist Local R 3(c)(1).

Attendance is mandatory. All parties and their counsel must appear at the conference. 1st App Dist Local R 3(c)(2). If a party has potential insurance coverage applicable to any of the issues, a representative of the insurer with full authority to negotiate a settlement must attend the conference. 1st App Dist Local R 3(c)(2).

Continuances. The settlement conference judge can continue the conference to allow further opportunity for negotiation and settlement and can make any other orders necessary to facilitate the settlement conference procedure. 1st App Dist Local R 3(c)(1).

Confidentiality of proceedings. All settlement conference proceedings are confidential, which means that the participants cannot communicate any information disclosed at the conference to anyone not participating in it. 1st App Dist Local R 3(e).

Sanctions. Any violation of Rule 3 by counsel or a party may result in monetary sanctions. 1st App Dist Local R 3(g).

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3. Second Appellate District

§15.6 a. Divisions One, Two, Three, Four, Five, and Seven [Deleted]

The second appellate district repealed its Policy Statement for Voluntary Settlement Conferences in Civil Cases, effective April 22, 2002.

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§15.7 b. Division Six [Deleted]

Division Six has not adopted any formal guidelines for settlement conferences and, as such, is probably not affected by the Second District Court of Appeal's repeal of its Policy Statement for Voluntary Settlement Conferences in Civil Cases, effective April 22, 2002.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.8 c. Settlement Conference and Mediation Program for Appeals in Los Angeles Superior Court Cases [Deleted]

§15.8 c. Settlement Conference and Mediation Program for Appeals in Los Angeles Superior Court Cases [Deleted]

The material in this section has been moved to §15.14C.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.8A d. Form: Mandatory Docketing Statement [Deleted]

§15.8A d. Form: Mandatory Docketing Statement [Deleted]

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.8B e. Form: Confidential Mediation Information Form [Deleted]

§15.8B e. Form: Confidential Mediation Information Form [Deleted]

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.8C f. Form: Confidentiality Agreement [Deleted]

§15.8C f. Form: Confidentiality Agreement [Deleted]

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.8D g. Form: Stipulation for Dismissal [Deleted]

§15.8D g. Form: Stipulation for Dismissal [Deleted]

The material in this section has been moved to §15.14C.

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§15.9 4. Third Appellate District

Until mid-1995, the Third District Court of Appeal had a mandatory settlement conference program in which all parties were required to file settlement conference statements and the court selected appeals for participation in the settlement program. Former 3d App Dist Local R 1-10 (repealed 1995). The Third District has since repealed its local settlement conference rules and currently has no formal settlement conference program. The parties can ask the court to schedule a settlement conference, but whether a conference is scheduled is strictly in the discretion of the court.

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5. Fourth Appellate District

§15.10 a. Division One

Informal guidelines. Division One has published informal guidelines for settlement conferences, a copy of which may be obtained from the clerk's office. See 4th App Dist Div 1 IOPP §§VIII-IX.

Written request for settlement conference. The settlement conference process begins when the parties file a joint written request for a settlement conference. A form stipulation is on the reverse side of the court's guidelines, but this form is not mandatory. If the appeal involves more than two parties, the settlement process can be commenced on the stipulation of any two opposing parties. The parties can file a stipulation requesting a settlement conference any time up to 30 days after the final brief is filed.

Selection of settlement judge. On receipt of a form stipulation, the presiding justice may appoint a settlement conference judge. The stipulation allows the parties to request that a specific justice be appointed or that an individual who is "not a sitting member of the Appellate Court" be appointed. In the latter case, the parties must agree to pay the individual reasonable compensation. The parties' request is not binding, and the presiding justice retains absolute discretion over the appointment of settlement conference judges. The presiding justice may also deny a request for a settlement conference.

Suspension of briefing schedule. Ordinarily, the briefing schedule is not suspended during the settlement conference process.

Procedures for conference. The settlement conference judge establishes the procedures for the settlement conference. The judge can require the filing of settlement conference briefs if the conference takes place before the briefing on appeal. The judge may, and usually will, also require the attendance of parties or their authorized agents.

Court-initiated settlement conference. Occasionally the court of appeal will, on its own initiative, select a case suitable for possible settlement by reviewing the Civil Case Information Statements. The court then sends a questionnaire to all counsel in the selected case to get additional information concerning possible issues on appeal. The settlement judge is a superior court judge sitting by assignment who will conduct a conference call with all counsel after reviewing the questionnaire responses to determine whether a settlement conference would be beneficial. The court attempts to schedule a settlement conference after the record has been filed but before briefing has begun, and counsel may be asked to provide limited briefing for the settlement conference.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.11 b. Division Two

§15.11 b. Division Two

Local Rule 4 governs procedures. Division Two has adopted the settlement conference procedures of 4th App Dist Local R 4. This rule applies to all civil appeals except appeals from proceedings under Welf & I C §§300, 601, and 602 or former CC §§221 and 232, and appeals from original proceedings ancillary to a criminal prosecution. 4th App Dist Local R 4(a).

Clerk mails copy of rule. Fourth Appellate District Rule 4 requires the court clerk, on receipt of a notice of appeal, to mail a copy of the settlement conference rule to all counsel, advising them of the availability of a settlement conference. 4th App Dist Local R 4(b).

Request by parties or court order. A settlement conference can be requested by any party or ordered by the court. A written request for a settlement conference by a party must be served and filed within 30 days after the date of mailing of notice of 4th App Dist Local R 4 by the court clerk. 4th App Dist Local R 4(d)(1). Opposition to a request for a settlement conference must be served and filed within 15 days after the filing date of the request. 4th App Dist Local R 4(d)(1). Whether or not a request is made by a party, the presiding justice can order a settlement conference at any time during the pendency of an appeal. 4th App Dist Local R 4(c)(1). The court will provide written notice of the date and time of a settlement conference. 4th App Dist Local R 4(c)(2)

Suspension of briefing schedule, preparation of record. As soon as a case is accepted for a settlement conference, all further proceedings, including the filing of briefs, are suspended until further order of the court. 4th App Dist Local R 4(c)(3). The only exception is preparation of the record, which is not suspended unless the court issues a specific order directing suspension. 4th App Dist Local R 4(c)(3).

Settlement conference statement is mandatory before completion of briefing. If a settlement conference is scheduled before the completion of briefing, the parties must serve and file an original and one copy of a settlement conference statement at least 15 days before the conference. 4th App Dist Local R 4(d)(2). The parties may file a joint statement in lieu of individual statements. 4th App Dist Local R 4(d)(2). Failure to timely file a settlement conference statement may result in sanctions, including dismissal of the appeal. 4th App Dist Local R 4(d)(2).

Contents of settlement conference statement. Under 4th App Dist Local R 4(d)(2), every settlement conference statement must contain the following:

- The trial court name, case title, and case number;
- The name of the justice who rendered the judgment or order appealed and the date of its entry;
- The date the notice of appeal was filed;
- The names, addresses, and telephone numbers of counsel for all parties to the appeal;
- A brief description of the judgment or order appealed;
- A concise statement of the case, including a brief procedural history and all facts material to consideration of the issues presented; and
- The issues expected to be raised in the briefs.

Additional information may be required when settlement conference scheduled after completion of briefing. If a settlement conference is scheduled after the completion of briefing, the court may request additional information from the parties. The parties must complete any postbriefing settlement questionnaires and respond to all confidential settlement conference inquiries within 15 days after the mailing date of the court's request. 4th App Dist Local R 4(e). Failure to timely respond may result in sanctions, including dismissal of the appeal. 4th App Dist Local R 4(e).

Private attorney may serve as settlement conference mediator. The court maintains a list of experienced lawyers with expertise in specified areas of law who are willing to serve as settlement conference mediators. 4th App Dist Local R 4(f)(1). The court generally designates one of them to mediate the conference.

Appellate justice may serve as settlement conference mediator. Alternatively, the court can designate a justice to serve as the settlement conference mediator. 4th App Dist Local R 4(f)(1). A justice who serves as the mediator cannot later participate in the disposition of the appeal on its merits. 4th App Dist Local R 4(g)(1). A justice who merely orders that a settlement conference be held, or who signs orders granting relief from any default under Rule 4 or

extending the time to act or other procedural orders, is not disqualified from participating in the disposition of the appeal on the merits. 4th App Dist Local R 4(g)(2).

Attendance is mandatory. Counsel for every party to the appeal and their clients must attend the settlement conference. 4th App Dist Local R 4(f)(3). Failure to attend may result in sanctions, including dismissal of the appeal. 4th App Dist Local R 4(f)(3). The presiding justice, a justice designated by the presiding justice, or the settlement conference mediator may excuse a client's personal appearance on request and a showing that hardship or unusual circumstances make the client's appearance impossible or impracticable. 4th App Dist Local R 4(f)(6). If personal appearance is excused, counsel must have full authority to settle the case or the client must be available by telephone. 4th App Dist Local R 4(f)(6).

Persons who may attend. The settlement conference mediator can invite any parties to the action who are not parties to the appeal, or anyone with an interest in the action, to attend the settlement conference in order to facilitate settlement. 4th App Dist Local R 4(f)(4). Any party may file a request for the attendance of such party or person at least 15 days before the settlement conference. 4th App Dist Local R 4(f)(4).

Preparation is mandatory. Counsel must confer with their clients before the settlement conference and be thoroughly familiar with the case and prepared to present their contentions in detail. 4th App Dist Local R 4(f)(5).

Continuances. The settlement conference mediator can continue the conference to allow for continued negotiations. 4th App Dist Local R 4(f)(2).

Stipulation to dismiss on settlement. When a complete settlement has been agreed to in writing, the parties must promptly file a stipulation to dismiss the appeal on the ground that the case has been settled. The stipulation shall specify the allocation of costs on appeal and state whether the remittitur is to issue immediately. 4th App Dist Local R 4(f)(7).

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.12 c. Division Three

§15.12 c. Division Three

Procedures governed by division's internal operating practices and procedures. Division 3 does not have a local rule governing settlement procedures during appeal. However, 4th App Dist Div 3 IOPP §IV describes and governs the division's settlement program.

Mandatory Settlement Conference Information Form. On receipt of a notice of appeal, the court clerk will mail to all parties a copy of the Settlement Conference Information Form (SCIF) along with a copy of the notice of appeal. Each party must file the original and one copy of the completed form with the clerk of the court within 10 days of the date of the clerk's mailing of the notice of appeal and form. The information requested by the form is confidential, and parties are not required to serve opposing counsel with a copy of the completed form. The form requests information including:

- Trial judge's name;
- Judgment amount, if any;
- Postjudgment costs and fees;
- Stays in effect, if any;
- Jurisdictional impediments to appeal;
- Briefing status;
- Case synopsis;
- Appellant's issues;
- Respondent's issues;
- Related appeals and/or trial court cases;
- Settlement history, incentives, and disincentives; and
- Recent developments since last settlement discussions.

Request by parties or court order. A settlement conference may be held on the stipulation of all the parties, on the written request of one party, or by order of the court. A request by a party for a settlement conference "may be made in confidence," *i.e.,* need not be served on opposing counsel. 4th App Dist Div 3 IOPP §IV(D)(2). Parties will be notified only if the case is assigned for a settlement conference.

Timing. Settlement conferences may be ordered before, during, or after briefing, but are generally not scheduled after an appeal has been set for oral argument except for good cause. 4th App Dist Div 3 IOPP §IV(E)(1).

Settlement conference officer. The settlement conference officer is appointed by the presiding justice and may be the supervising attorney of the judicial settlement program, an individual justice, an assigned pro tem justice, or another attorney. 4th App Dist Div 3 IOPP §IV(E)(2).

Personal attendance required. Counsel must be present at the conference. The following persons must also attend: (1) each individual party, (2) an officer or employee of each corporate party, and (3) a claims representative of each insurance company or, if a party is uninsured or self-insured, an authorized agent. Attendance by counsel claiming settlement authority, except corporate house counsel, does not satisfy these attendance requirements. Any exceptions must be approved in advance by the court. A written request to appear by telephone must be filed and served at least 5 court days before a settlement conference is scheduled, but such requests are rarely granted. 4th App Dist Div 3 IOPP §IV(E)(3).

Additional participants. The court may order other necessary persons, including nonparties, to attend the settlement conference. Or, the settlement conference officer may invite any person having an interest in the action to attend. Any party may serve and file a written request for the attendance of such a person at least 5 court days before a settlement conference. 4th App Dist Div 3 IOPP §IV(E)(4).

Settlement briefs. If the conference occurs before briefing or record preparation, the conference officer may order the parties to provide settlement conference briefs. 4th App Dist Div 3 IOPP §IV(E)(5).

Preparation is mandatory. Counsel must confer with their clients before the settlement conference and be thoroughly familiar with the case and prepared to present their contentions in detail. Counsel must also review their

SCIFs for completeness and accuracy and notify the conference officer of material changes or omissions at least 3 court days before the settlement conference. 4th App Dist Div 3 IOPP §IV(E)(6).

Continuances. Parties should attempt to agree to a continuance by stipulation before requesting a continuance. Any such request should be made in writing, with reasons stated, and be served and filed at least 5 court days before the conference. Continuances are not granted, except for good cause. 4th App Dist Div 3 IOPP §IV(E)(9).

Suspension of briefing schedule, preparation of record. The time for preparing and filing briefs is suspended as of the mailing date of a notice ordering a settlement conference. Record preparation is not automatically stayed without a court order. 4th App Dist Div 3 IOPP §IV(H).

Confidentiality. All discussions and information imparted during a settlement conference are confidential and the conference officer cannot testify about them. 4th App Dist Div 3 IOPP §IV(E)(11).

Private mediations. The presiding justice will entertain stipulated requests to stay appellate proceedings to allow private mediations. Such requests shall not exceed 60 days except for good cause. The request must specify the identity of the mediator and the scheduled day or dates of the mediation. 4th App Dist Div 3 IOPP §IV(G).

Disqualification of settlement conference officer. A justice is not disqualified to hear an appeal merely because he or she rules on a settlement conference request or signs orders relating to procedural aspects of the settlement process. If the case is not settled, neither the conference officer not any other court personnel present at a conference will participate further in the disposition of the appeal on its merits. 4th App Dist Div 3 IOPP §IV(I).

Sanctions. The court may impose sanctions for failure to appear at a settlement conference, failure to participate in good faith or to cooperate in good faith with the settlement conference officer, or failure to comply with a court order or rule. Sanctions may include monetary awards or, if appellant fails to comply, dismissal of the appeal. 4th App Dist Div 3 IOPP §IV(J).

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§15.13 6. Fifth Appellate District

Settlement conferences governed by Rule 2. The fifth appellate district conducts settlement conferences in accordance with 5th App Dist Local R 2. Rule 2 applies to all appeals in civil cases except appeals from proceedings under Welf & I C §§300, 601, and 602 or former CCP §§221 and 232, and appeals from original proceedings ancillary to a criminal prosecution. 5th App Dist Local R 2(a).

Clerk mails copy of rule. Fifth Appellate District Local Rule 2 requires the court clerk, on the filing of a record on appeal, to send a copy of the rule to counsel for all parties, informing them of the availability of a settlement conference. 5th App Dist Local R 2(b).

Request by parties or court order. A settlement conference may be requested by the parties or ordered by the court. 5th App Dist Local R 2(c), (f). A written request must be filed with the court and served on all parties. 5th App Dist Local R 2(c). There is no specified time in which a written request must be made. On receipt of a written request, the court schedules a settlement conference before a justice of the court and gives notice of the date and time of the conference. 5th App Dist Local R 2(c). Regardless of whether a party requests one, a settlement conference may be ordered by the court at any time. 5th App Dist Local R 2(f).

Suspension of briefing schedule, preparation of record. The briefing schedule is suspended when the court sets a settlement conference, either by request of the parties or on its own motion. 5th App Dist Local R 2(e)-(f). The briefing schedule remains suspended until the settlement conference judge decides to terminate settlement proceedings orders the briefing schedule to resume. 5th App Dist Local R 2(e). Local Rule 2 does not provide for suspending preparation of the record on appeal.

Settlement conference statement. No later than 10 days before the settlement conference, each party must file with the court clerk and serve on all other parties a settlement conference statement, which must contain the following (5th App Dist Local R 2(d)):

- Case title and case number;
- Identification of trial court;
- Date of judgment or order appealed from;
- Name of justice or justices who made the disposition or dispositions from which the appeal is taken;
- The date the notice of appeal was filed;
- The names, addresses, and telephone numbers of counsel for all parties to the appeal;
- A brief description of the trial court disposition from which the appeal is taken;
- A concise statement of the case, including a brief procedural history and all facts material to consideration of the issues presented by the appeal; and
- The issues to be raised in the briefs on the appeal or cross-appeal.

Attendance is mandatory. Counsel for every party must attend the settlement conference. 5th App Dist Local R 2(g). Clients must also appear except in the "rare case" when hardship or other unusual circumstance makes it impossible or impracticable to do so. If clients cannot attend, they must be available for consultation by telephone. 5th App Dist Local R 2(g). Failure to attend may result in sanctions, including dismissal of the appeal. 5th App Dist Local R 2(g).

Preparation is mandatory. Counsel must confer with their clients before the settlement conference and be thoroughly familiar with the case and prepared to present their contentions in detail. 5th App Dist Local R 2(g).

Participation of settlement conference judge in appeal. A justice who participates in a settlement conference may not participate in disposition of the appeal on its merits. 5th App Dist Local R 2(h).

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§15.14 7. Sixth Appellate District

The sixth appellate district has not adopted rules or guidelines for settlement conferences and generally does not even hold them. This fact, however, should not deter counsel from seeking the court's assistance in settling a case. Even if the court declines to schedule a settlement conference with a justice of the court, the court is likely to assist counsels' efforts to settle the case themselves or with the help of outside mediators. For example, the court may grant reasonable extensions of time to file briefs. See §15.17.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.14A III. COURT-SPONSORED MEDIATION

§15.14A III. COURT-SPONSORED MEDIATION

Three appellate districts have formal mediation programs. Although each has its own particular procedures, these programs have several characteristics in common:

- The initial identification and selection of an appeal for referral to the court's mediation program is made by the presiding justice or the mediation program coordinator;
- Mediation is mandatory for appeals that are selected;
- Mediations are conducted by trained volunteer attorneys; and
- Mediations are conducted free of charge to the parties up to a preset number of hours.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.14B A. First Appellate District

§15.14B A. First Appellate District

All civil appeals eligible. All civil appeals in the first appellate district are eligible for referral to the court's mediation program. 1st App Dist Local R 2(b). Cases are selected by the administrator of the mediation program, who acts under the supervision of the administrative presiding justice or a designated supervising justice. 1st App Dist Local R 2(a)-(b). Parties can also request mediation if their appeal is not selected by the administrator. 1st App Dist Local R 2(b).

Case Screening Form. Within 10 days of filing the notice of appeal, the appellant must file with the court of appeal and serve on all other parties a Case Screening Form, which is used by the program administrator to determine whether the appeal is suitable for mediation. All other parties must file and serve their Case Screening Form within 15 days of the filing of the notice of appeal. 1st App Dist Local R 2(d)(1). A copy of the Case Screening Form can be found at http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/forms/csscreen.pdf.

Briefing and record preparation not stayed. Selection of an appeal for mediation does not stay briefing or record preparation, although the parties may apply for or stipulate to extensions of time under Cal Rules of Ct 8.212(b). 1st App Dist Local R 2(d)(3).

Assignment of mediator; compensation. The program administrator assigns the mediator, who may be replaced on a showing of good cause by a party or by request of the mediator. 1st App Dist Local R 2(c). Mediations are free of charge to the parties for the first 3 hours, after which the mediation may be terminated by the mediator unless the parties and the mediator agree on a fee to continue the mediation. 1st App Dist Local R 2(c). A list of mediators used by the first appellate district's mediation program can be found at http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/faq/mediators.pdf.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.14C B. Second Appellate District

§15.14C B. Second Appellate District

NOTE: Information on the second appellate district's mediation program can be found in the court's Mediator's Handbook, available at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/mediation.htm.

All civil appeals eligible. All civil appeals in the second appellate district are eligible for mediation. Participation is voluntary; however, once the parties agree to participate, they must comply with the procedures set out in the court's scheduling letter or risk sanctions for failure to comply. Personal attendance of all parties and counsel is required at all mediation sessions. If a party is not an individual, then a personal representative with full settlement authority must attend for that party.

Requesting mediation on Mandatory Docketing Statement. After the notice of appeal has been filed, a Mandatory Docketing Statement will be mailed to the appellant, who must return this form to the superior court within 20 days and indicate whether the parties agree to participate in the court of appeal's mediation program. An example of this form can be found at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/documents/handbook.pdf.

Additional ways of requesting mediation. If the appellant did not indicate the parties' agreement to participate in mediation on the Mandatory Docketing Statement, the parties can request mediation at a later date by any of the following means:

- Contacting the mediation coordinator to schedule a mediation;
- Making a confidential request to the mediation coordinator, who may then contact the opposing party to discuss participating in mediation; or
- Invitation from the court of appeal, although participation remains voluntary.

Briefing and record preparation not stayed. Participation in the mediation program does not stay briefing or record preparation, although the parties can request extensions of time under the applicable local rules of court.

Assignment of mediator; compensation. The mediation coordinator assigns the mediator from the court's panel. The mediator is required to volunteer a total of 6 hours: 2 hours in preparation and 4 hours for the mediation itself. After 6 hours, and with the agreement of all of the parties, the mediator can charge his or her hourly rate.

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§15.14D C. Third Appellate District

Eligible civil appeals. All civil appeals in the third appellate district are eligible for referral by the court to mandatory mediation. 3d App Dist Local R 1(f)(6).

Actions stayed pending mediation. When an appeal is selected for the mediation program, Cal Rules of Ct 8.121 (filing notice designating record on appeal), 8.124(a)(1) (election of use of appendix), and 8.216 (filing proposed briefing schedule) are suspended until completion of the mediation. 3d App Dist Local R 1(f)(6)(A).

Parties may stipulate to mediation. The parties to an appeal may stipulate to mediation if their appeal is not ordered to participate in the program, although the court has discretion to accept or reject the stipulation. 3d App Dist Local R 1(c), (f)(7).

Assignment of mediator; compensation. The mediation coordinator assigns the mediator, who may be replaced on a showing of good cause by a party or by request of the mediator. 3d App Dist Local R 1(f)(5). The first 4 hours of mediation are conducted free of charge; mediations exceeding 4 hours can be terminated by the mediator, although the mediator and the parties can agree on a fee for continued services. 3d App Dist Local R 1(e)(5).

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.14E D. Voluntary Mediation in Appellate Districts Without Formal Programs

§15.14E D. Voluntary Mediation in Appellate Districts Without Formal Programs

Nothing prevents parties in appellate districts without formal court-sponsored mediation programs from participating in voluntary private mediation. There are a growing number of private mediators and appellate specialists who serve as neutrals in voluntary mediations, and in appropriate cases appellate counsel should strongly consider private mediation as part of effective appellate advocacy.

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IV. INDEPENDENT SETTLEMENT NEGOTIATIONS

§15.15 A. Appellate Specialists

Consider appellate specialists to negotiate settlement. Whether or not a court of appeal has a formal settlement conference program, counsel should explore the possibility of settlement. Settlement negotiations are likely to be most productive if the parties have experienced appellate counsel who are familiar with the standards of review and the unique jurisdictional and procedural rules applicable to appeals.

Appellate specialists will not rehash old arguments to persuade client to settle. The party prevailing in the trial court is not likely to be persuaded to settle by a rehash of the same arguments made during the trial. Experienced appellate counsel, however, will bring a new perspective to the case and may motivate respondent to move away from an intractable "I won" position. Conversely, the party who lost at the trial may be fixated on its position and convinced that the court of appeal will "right the wrong" done below. Again, experienced appellate counsel may be able to convince appellant that the odds against prevailing on appeal are not nearly so optimistic and that serious consideration should be given to settling the case.

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§15.16 B. Professional Mediators

Consider using professional mediators. The parties may wish to use a professional mediator to assist in settlement negotiations. A professional mediator is trained and skilled in identifying and capitalizing on the factors that will motivate a party to settle and can significantly enhance the likelihood of a settlement.

Retired appellate court justices as mediators. Retired appellate court justices are also available as mediators through various independent mediation and dispute resolution services. A strong and respected retired appellate court justice can be helpful in settling a case on appeal. The justice not only knows the rules and standards that are unique to the appellate process, he or she can educate counsel and the parties about the risks and realities of that process.

It may take an appellate justice, for example, to convince a respondent that jury verdicts are not rubber-stamped and that an error may well result in a reversal on appeal. Or an appellant may simply refuse to believe, until told by an appellate court justice, that the court of appeal will not reweigh the evidence and will affirm the judgment if it is supported by any credible evidence, despite substantial evidence to the contrary.

However, appellate justices are not appointed to the bench because of their mediation skills and generally have little or no mediation training. Only a small minority of justices are "good" settlement judges. Thus, counsel should not have high expectations that a sitting or retired appellate justice will be able to settle a tough case unless the justice happens to be good mediator. In fact, a good, knowledgeable superior court judge may be preferable to a nonsettlement-experienced appellate judge.

Do your homework. Take the time to find a good judge, with either appellate or superior court experience, by talking to colleagues. Do not simply rely on lists of persons supplied by professional mediation services.

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§15.17 C. Appellate Court and Independent Settlement Efforts

Courts of appeal generally assist independent settlement efforts. Appellate courts generally accommodate the parties' settlement efforts. The courts routinely grant reasonable extensions of time to file briefs, sometimes for several months, to permit the parties to engage in settlement discussions.

Keep court of appeal informed. Counsel should be careful not to abuse the court's trust and use vague representations of "ongoing settlement negotiations" as a ploy for more time to file a brief. Keep the court apprised of the status of settlement negotiations in as much detail as is reasonably possible, *i.e.*, that counsel have met and conferred or that a mediation is scheduled. It is also important to inform the court as soon as the case, or any part of it, is settled (see Cal Rules of Ct 8.244(a)) or, conversely, as soon as it is apparent that the case is not going to settle. See *Huschke v Slater* (2008) 168 CA4th 1153, 1160, 86 CR3d 187 (sanctions of $6000 against appellant's attorney who notified court of settlement 1 day before oral argument and more than 10 months after case had settled).

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V. STRATEGIES FOR MAKING SETTLEMENT CONFERENCES EFFECTIVE

§15.18 A. Timing

Importance of timing. Because settlement discussions can occur at almost any stage in the appellate process, counsel should consider when settlement discussions might prove most fruitful.

After notice of appeal is filed but before record is completed. Early settlement discussions, shortly after a notice of appeal is filed and before completion of the record, may be effective if the parties are motivated to avoid the time and expense of an appeal and desire closure of the case. At this early stage, because little money and time has been invested in the appellate process, there is little pressure to recoup costs as part of a settlement. Indeed, some professional mediators and appellate justices who handle settlement conferences believe that the cases that are going to settle can usually be settled at the outset, saving both the parties and the courts substantial time and resources. Many appellate specialists, however, say that they cannot judge the merits of the appeal before examining the record.

After record is filed but before briefing. After the record is filed, but before briefing begins, is relatively early in the appellate process and may be a good time to discuss settlement. At this point, appellate counsel will have had an opportunity to review critical portions of the record and to identify and evaluate the issues on appeal. Having the record can also be of great assistance if an appellate court justice or mediator is involved, because there can be no dispute about what it contains, and the issues can be discussed in a concrete and highly focused manner. Although the parties will have incurred some costs in procuring the record, settlement at this juncture avoids the more substantial costs of preparing briefs on appeal.

After opening brief is filed. Sometimes a settlement conference is more productive after the filing of one or more briefs on appeal. This is likely to be the case when the party prevailing in the trial court believes there is nothing to talk about on appeal. A well-prepared appellant's opening brief may, and should, cause respondent to reassess his or her position, and possibly open the door to settlement discussions.

After respondent's brief is filed. Similarly, a well-prepared respondent's brief can, and should, cause appellant to reassess the chances that the outcome on appeal will be favorable. A respondent's brief may not only persuade appellant that he or she will lose, but that the result will be even worse if the case is retried. A respondent's brief may also persuade appellant that the court could issue a published opinion with negative ramifications in future cases.

Dangers of waiting to settle shortly before oral argument. Be wary of reaching a settlement on the eve of oral argument or thereafter. Unlike in the trial court, where settlements are welcome at any time and the parties have an absolute right to file a dismissal with prejudice, the parties do not have absolute control over the dismissal of an appeal. Once the record on appeal has been filed, a request for dismissal must be approved by the court of appeal, which might not do so if it has already invested substantial time in reviewing the case and preparing to hear oral argument. See §15.29. If you do settle just before or after oral argument, you may want to make sure the settlement is final and all documentation is complete so that an opinion will not undercut the agreement or otherwise allow the opposing parties to back out. Conditioning the settlement on the dismissal of the appeal will be desirable in some cases.

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B. Preparation

§15.19 1. Know the Facts and the Law

Preparation is essential. Prepare thoroughly for a settlement conference. This, too, is another forum in which you are presenting your case on appeal and trying to persuade the settlement conference judge or mediator of the merits of the appeal.

Reduce the case to its essence. Skirmishes about tangential issues are no more helpful at the settlement stage than in the appeal itself. Focus on the heart of the matter. Try to express your position in one page just as an exercise.

Use record to your advantage. If the record has been prepared, consider bringing the critical portions to the settlement conference. It can be helpful to flag important sections for quick reference by the settlement conference judge and the parties, and it demonstrates a command of the record and establishes credibility with the settlement conference judge and opposing counsel.

Bring list of cases or copies of opinions. Bring to the settlement conference a list of case citations or copies of cases relevant to the issues being raised on appeal.

Become familiar with rules unique to the appellate process. Counsel must be conversant with the standard of review for each issue. It will seriously detract from counsel's credibility if he or she insists on making a jury argument and ignores the standards of review that the court will apply on appeal. Likewise, counsel must be prepared to address special rules on appeal, such as the need to "preserve" error through proper objection and the requirement that error be prejudicial. A thorough understanding of the substantive law, the standards of review, and the special rules on appeal will establish counsel's credibility and greatly strengthen counsel's position in the settlement process.

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§15.20 2. Have Settlement Proposal in Mind

Several courts of appeal require both parties to join in a request for a settlement conference because the conferences are rarely productive if one party shows up merely to see "what happens." The chances of settlement are greatly enhanced when both parties are serious about the settlement process and wish to bring the matter to a conclusion. Therefore, after conferring with the client, counsel should come to the settlement conference with a settlement proposal in mind. Of course, counsel must be willing to modify that proposal in accordance with the recommendations of the settlement conference judge.

It is important to be realistic. Losing parties need to recognize that respondent has a judgment in hand. Neither a token offer nor a reiteration of an offer made before judgment is likely to be taken seriously.

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§15.21 3. Be Familiar With Particular Style and Procedures of Settlement Conference Justice

As with any appearance before a judge, it is often helpful to know the particular style and manner in which an appellate settlement conference judge conducts a settlement conference. For example, if the justice typically asks counsel to begin with a mini-summation of the case on appeal, counsel can be fully prepared to begin on that note. Counsel may be able to learn from colleagues about a particular justice's demands and idiosyncrasies and be better prepared for the "give and take" of the settlement conference. Remember, you usually have to persuade the settlement officer that you have a good chance of prevailing on appeal before you can convince the other side.

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§15.22 4. Keep Positive Attitude That Case Will Settle

Settlement is most likely to occur when the parties believe the case can and should be settled and are committed to the settlement process. If this attitude is not shared, a settlement conference is likely to be a waste of time. Thus, you might have to convince the client that navigating the shoals of the appellate process may not be in their best interest and that serious efforts should be made to settle the case.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.23 5. Considerations in Deciding to Settle

§15.23 5. Considerations in Deciding to Settle

A number of factors weigh heavily in deciding on whether to pursue an appeal or to settle. Counsel should also consider and, if applicable, discuss with the client:

- The legal merits of the appeal;
- The delay in final disposition of the case;
- The cost of an appeal;
- The risk that the law could change while the case is on appeal;
- The result if the client wins on appeal, *i.e.*, further litigation in the trial court, with all its delays, costs, and additional risks;
- The emotional impact of continuing litigation;
- The distraction from business or personal affairs by continuing litigation;
- The risk, for institutional litigants, of making bad law, especially if the facts of the particular case are not favorable; and
- Interest on the judgment of 10 percent (CCP §685.010(a)).

JUDICIAL PERSPECTIVE: The appellant has been unsuccessful in the trial court. It is usually an uphill battle to reverse an adverse trial court judgment, especially if the standard of review is "substantial evidence." The standard of review may be quite narrow. For example, if the ground of appeal is the insufficiency of the evidence, then the review of the trial court begins and ends with the determination of whether there was *any* substantial evidence in the court below to sustain the judgment. If there is, the matter is ended. *Bowers v Bernards* (1984) 150 CA3d 870, 873, 197 CR 925. If the issue on appeal is whether the trial court abused its discretion, the scope of review is even more limited in that appellate courts will disturb discretionary trial court rulings *only* on a showing of "a clear case of abuse" and a "miscarriage of justice." *Blank v Kirwan* (1985) 39 C3d 311, 216 CR 718. In other words, appellant must show that not only did the judge abuse his or her discretion but that such abuse was prejudicial.

Appellant must consider whether he or she is in a position to post an appeal bond, if one is required to stay execution on the judgment. Most bonding companies require 150 to 200 percent collateral. Thus, if defendant is appealing from an adverse judgment, he or she may not be able to post the required bond.

Even with error in the record, the judgment or order will not be disturbed unless the error was prejudicial. Although many appellant attorneys, convinced of the righteousness of their case, think that any error in their client's case is prejudicial, frequently when analyzed in the cold light of day, that error cannot be said to have affected the outcome of the case and the judgment probably will not be reversed.

Procedural errors can be fatal to appeal. For example, inadmissible hearsay may have been admitted at trial, but if no timely objection was made to the evidence, the objection is waived. Appellant's counsel may have made other legal errors that could affect the appeal, *e.g.,* failure to request jury instructions, failure to offer relevant evidence, failure to make an adequate offer of proof, or failure to call a key witness. Also, failure to make a timely motion for new trial or to timely file the notice of appeal are fatal to the appeal.

A fairly common problem faced by appellant is attempting to take an appeal from a nonappealable order. When this occurs, the appeal will probably never be heard on the merits.

If appellant has lost a large monetary judgment in the trial court, interest may be running on the judgment at the rate of 10 percent per year. What can start out as a rather modest award can escalate to a large judgment by the time the appeal is heard and finally decided.

There are special considerations for appellants and respondents in certain types of appeals. For example, the losing party in a summary judgment case is generally thought to have an advantage on appeal because, historically, most orders granting summary judgments have been reversed. Although that trend has declined recently, the reason seems clear. An order granting a summary judgment deprives the losing party of his or her day in court. It is a drastic remedy,

and one, therefore, that most judges use sparingly. Also, the appellate court will review the entire record to determine whether there is a triable issue of fact that can be decided from the opposing affidavits or evidence or the reasonable inferences from them. The appellate court may also disagree with the trial judge's ruling on evidentiary objections and so consider excluded evidence. Conversely, the losing party, complaining about evidence to which objection was made, may have waived the objection by failing to obtain a ruling from the court on each objection. This error is seen much too often on appeal from summary judgments. Similarly, appellants stand a better chance when a dismissal has been entered after a demurrer has been sustained without leave to amend.

Some issues may be personal to the parties, which may favor settlement of the case on appeal. The emotional toll on litigants is usually great. If the case was pending for years in the trial court and is then appealed, it may take more years before the appellate process is completed. The parties can have no personal closure while the legal process continues. By this time, it is usually better for them to try to put the dispute behind them and get on with their lives. Other personal issues include the age and health of the parties. Are they of an age or so infirm that they may not survive appeal? What if one party dies during appeal? If the case involves a personal injury award to the plaintiff for noneconomic damages and the plaintiff dies on appeal, are the damages wiped out?

Finally, but most important, the parties must consider the equities of the dispute. While one party may have prevailed in the trial court, was the result fair and equitable? Justices of the courts of appeal have sworn to uphold the law. However, they also try to be fair and equitable. This factor should be objectively considered by both sides to the appeal.

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§15.24 6. Be Patient With Settlement Process

The settlement process requires a great deal of patience. Most settlements take at least a day, and often more, to hammer out, and counsel must be prepared to stick with the process to reach a final resolution. If the parties seem to be making progress during the conference, settlement conference judges are almost always willing to continue the conference for further settlement negotiations.

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VI. DISPOSITION OF CASE AFTER SETTLEMENT ON APPEAL

§15.25 A. Dismissal of Appeal

Dismissals are governed by Cal Rules of Ct 8.244(b)-(d). The procedures for dismissal vary, depending on whether the record on appeal has been filed in the court of appeal.

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1. Dismissal Before Record Is Filed in Court of Appeal

§15.26 a. Procedure

Dismissal by notice or stipulation of abandonment. A dismissal before the record is filed in the court of appeal can be achieved in one of two ways. Appellant can file a notice of abandonment, or the parties can file a stipulation of abandonment in the superior court clerk's office. Filing either a notice or stipulation of abandonment operates to dismiss the appeal and restores jurisdiction to the superior court. The clerk of the superior court must promptly send a copy of the notice or stipulation of abandonment to the clerk of the court of appeal and to the parties. Cal Rules of Ct 8.244(b). For a form of the notice of abandonment, see §15.27. For a form of the stipulation of abandonment, see §15.28.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.27 b. Form: Notice of Abandonment of Appeal

§15.27 b. Form: Notice of Abandonment of Appeal

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15.27-1 Notice of abandonment of appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _ _[*NAME OF COUNTY*]_ _

[*Title of case*]

NOTICE OF ABANDONMENT OF APPEAL
(CAL RULES OF CT 8.244(b))

To the clerk of the court:

The parties having reached a full and complete settlement of the above-captioned matter, _ _[*name of party filing notice*]_ _**, under California Rules of Court 8.244(b), hereby abandons the appeal to the** _ _[*number*]_ _ **District Court of Appeal, which was filed on** _ _[*date*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _**for** _ _[*Plaintiff/Defendant*]_ _ **and Appellant** _ _[*name of party*]_ _

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.28 c. Form: Stipulation of Abandonment of Appeal

§15.28 c. Form: Stipulation of Abandonment of Appeal

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15.28-1 Stipulation of abandonment of appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION OF ABANDONMENT OF APPEAL
(CAL RULES OF CT 8.244(b))

To the clerk of the court:

The parties having reached a full and complete settlement of the above-titled matter, hereby stipulate, through their respective counsel, that the appeal filed by _ _[*name*]_ _ **on** _ _[*date*]_ _**, to the** _ _[*number*]_ _ **District Court of Appeal is abandoned under California Rules of Court 8.244(b).**

Date: _ _ _ _ _ _ _ _[*Name of law firm*]_ _
By __[*Signature*]__
Attorney for _ _[*plaintiff/defendant*]_ _ **and** _ _[*appellant/respondent*]_ _**,** _ _[*name*]_ _

Date: _ _ _ _ _ _ _ _[*Name of law firm*]_ _
By __[*Signature*]__
Attorney for _ _[*plaintiff/defendant*]_ _ **and** _ _[*appellant/respondent*]_ _**,** _ _[*name*]_ _

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2. Dismissal After Record Is Filed in Court of Appeal

§15.29 a. Procedure

Dismissal after record is filed is governed by Cal Rules of Ct 8.244(c). Under Rule 8.244(c), dismissal after the record has been filed in the court of appeal can be achieved in one of two ways:

- Appellant can file a request to dismiss; or
- The parties can file a stipulation to dismiss the appeal.

A stipulation for dismissal under Cal Rules of Ct 8.244(c) must be filed in the court of appeal. A form for the stipulation to dismiss is in §15.31. A stipulation is the most commonly used method. If a unilateral abandonment is filed, it usually comes very early in the appellate process, shortly after the record is filed and before any briefing.

Court has discretion to reject abandonment or stipulation to dismiss. The court of appeal is not required to accept a stipulation to dismiss an appeal. Rather, the court has discretion to accept or reject. Cal Rules of Ct 8.244(c). Generally, however, the courts of appeal will accept an appellant's abandonment or a stipulation for dismissal, particularly if the abandonment or stipulation is filed a reasonable length of time before the appeal is set for oral argument and the court has not invested substantial work in the case.

At times the courts of appeal have taken cases off the oral argument calendar at the last minute because of a settlement. At other times the courts have agreed to hold off issuing an opinion on being notified that the case was settled immediately after oral argument. Indeed, the court itself has sometimes suggested at oral argument that the parties sit down and settle the case.

However, not all courts of appeal take this approach. If an abandonment or a stipulation to dismiss is made after the court has invested substantial time in reviewing the case and in preparing to hear oral argument, the court may reject the abandonment or stipulation and decide the case.

Examples. The parties in *Fireman's Fund Ins. Cos. v Quackenbush* (1997) 52 CA4th 599, 608, 60 CR2d 732, reached a settlement after oral argument and supplemental briefing and stipulated to a dismissal of the appeal. The court of appeal refused to dismiss because it considered the request to be too late and because important issues were involved. Similarly, in *Arden Group, Inc. v Burk* (1996) 45 CA4th 1409, 1411 n1, 53 CR2d 492, the appellants filed a "motion to dismiss" the day before oral argument after they had already obtained an order expediting the appeal. The court refused to dismiss, noting that appellants offered no explanation why the court was not apprised of settlement negotiations earlier and that no "apology" was made to the court for "wasting [its] limited resources." A stipulation for dismissal was also rejected in *Lucich v City of Oakland* (1993) 19 CA4th 494, 500, 23 CR2d 450. The parties had reached a settlement after oral argument, advised the court of appeal, and stated that they would have the settlement documentation completed within several weeks. Several days before the end of this time frame, the court issued its opinion. Appellant filed a petition for rehearing, asking the court to grant the petition and then dismiss the appeal under the parties' settlement and stipulation. The court of appeal concluded that the settlement and request for dismissal were too late. Indeed, the court felt it was an abuse of the appellate process to "test the waters" at oral argument, reach a settlement, and then ask the court to refrain from issuing an opinion. 19 CA4th at 502.

Similarly, in *State ex rel State Lands Comm'n v Superior Court* (1995) 11 C4th 50, 60, 44 CR2d 399, the supreme court denied a stipulation for dismissal filed after review had been granted. The settlement was conditioned on both dismissal and continued "depublication" of the court of appeal's opinion. The supreme court denied the stipulation on the ground that the case presented an issue of continuing public importance. 11 C4th at 61. The court also agreed with *Lucich v City of Oakland, supra,* that dismissal requests that would affect a published appellate opinion raise special concerns. Although courts have discretion to grant requests for dismissals in such cases, they are not obligated to do so. 11 C4th at 62.

Other courts of appeal have taken a slightly different approach in handling requests for dismissals made late in the appellate process. Instead of denying the requests outright, the courts have granted them, but in an opinion deciding the merits of the appeal. See, *e.g.*, *Lara v Cadag* (1993) 13 CA4th 1061, 1065, 16 CR2d 811 (counsel advised court at

oral argument that case had been settled; court granted stipulation for dismissal but issued published opinion on merits).

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.30 b. Form: Abandonment of Appeal; Proposed Order Dismissing Appeal

§15.30 b. Form: Abandonment of Appeal; Proposed Order Dismissing Appeal

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15.30-1 Abandonment of appeal; proposed order dismissing appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

REQUEST FOR ABANDONMENT OF APPEAL (CALIFORNIA RULES OF COURT 8.244(c)); PROPOSED ORDER DISMISSING APPEAL

To the clerk of the court:

The parties have reached a full and complete settlement of this matter. Accordingly, _ _[*name*]_ _ **abandons** _ _[*his/her/its*]_ _ **appeal in this action filed on** _ _[*date*]_ _**, and requests that the appeal be dismissed,** _ _[*with each party to bear its own costs*]_ _**.**

Date: _ _ _ _ _ _

_ _[*Name of law firm*]_ _
By __[*Signature*]__
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant** _ _[*name*]_ _

ORDER DISMISSING APPEAL

Pursuant to the notice of abandonment filed by appellant _ _[*name*]_ _**, the appeal in this matter is hereby dismissed** _ _[*without cost to either party*]_ _ **under California Rules of Court 8.244(c). The remittitur shall issue forthwith.**

Date: _ _ _ _ _ _

__[*Signature*]__
Judge of the Court of Appeal

Comment: While this form has been routinely accepted by many courts of appeal, at least one (Second District, Division Two) has rejected an abandonment that included a provision that each party bear its own costs. Therefore, check with the court before including such a provision. If the court will not accept an abandonment with such a provision, simply delete it and make sure the agreement to bear costs is reflected in the settlement agreement.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.31 c. Form: Stipulation for Dismissal of Appeal; Proposed Order Dismissing Appeal

§15.31 c. Form: Stipulation for Dismissal of Appeal; Proposed Order Dismissing Appeal

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15.31-1 Stipulation for dismissal of appeal; proposed order dismissing appeal

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR DISMISSAL OF APPEAL (CAL RULES OF CT 8.244(c)); PROPOSED ORDER DISMISSING APPEAL

To the clerk of the court:

The parties, having reached a full and complete settlement of this matter, stipulate that the appeal filed by appellant, _ _[*name*]_ _**,** _ _[*appeal number*]_ _ **be dismissed. The parties further stipulate that each party bear its own costs, and request that the Court issue its remittitur forthwith.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[p*laintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and respondent,** _ _[*name*]_ _

ORDER DISMISSING APPEAL

Upon the stipulation and request of all parties, the appeal in this matter is hereby dismissed without costs to either party under California Rules of Court 8.244(c). The remittitur shall issue forthwith.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

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§15.32 3. Effect of Dismissal

The dismissal of an appeal leaves the trial court judgment intact. Thus, a dismissal has the effect of "affirming" the lower court judgment. See CCP §913 (dismissal of appeal is with prejudice to filing another appeal unless dismissal is expressly without prejudice to another appeal); *LeMat Corp. v Barry* (1969) 275 CA2d 671, 680 n10, 80 CR 240 (citing former CCP §955, replaced by CCP §913, which stated that dismissal operated as affirmance of judgment). Therefore, the judgment becomes final and operates as collateral estoppel in any future case.

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§15.33 4. Immediate Issuance of Remittitur

As part of an abandonment or a stipulation for dismissal, counsel should ask the court of appeal to issue its remittitur immediately. See Cal Rules of Ct 8.264(b)(2)(B) (order of dismissal under appellant's request or parties' stipulation is final immediately). Doing so eliminates the normal waiting period for the remittitur to issue, and promptly reinvests the trial court with jurisdiction, allowing the parties to file a satisfaction of judgment and attend to other matters regarding settlement.

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§15.34 5. Costs on Appeal

The parties should specify in an abandonment or stipulation for dismissal how the costs on appeal are to be allocated. Frequently, the parties agree that each side will bear its own costs on appeal. See form in §15.30. However, this is not a hard-and-fast rule, and in complex cases, the costs on appeal can be substantial and may be a matter of negotiation. The court of appeal should be apprised of the parties' decision so that it can issue an appropriate directive as part of its order granting a request to abandon or a stipulation for dismissal. As noted in §15.30, one court has rejected an abandonment that included a provision that the parties bear their own costs on appeal. If confronted with this situation, delete the provision about costs in the abandonment and cover the issue of costs in the settlement agreement.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.35 6. Filing Acknowledgment of Satisfaction of Judgment in Trial Court After Appeal Dismissed

§15.35 6. Filing Acknowledgment of Satisfaction of Judgment in Trial Court After Appeal Dismissed

Because the dismissal of an appeal has the effect of affirming the trial court judgment, the appellant should make sure an acknowledgment of satisfaction of judgment is filed in the trial court after dismissal. This step assures the paying party that no further action to satisfy the judgment can be taken and assures creditors that there are no outstanding judgments. For a form of acknowledgment of satisfaction of judgment, see California Judicial Council Form EJ-100, reprinted in California Judicial Council Forms Manual (Cal CEB 1981).

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§15.36 7. Filing Dismissal With Prejudice After Appeal Dismissed

Parties typically file a request for a dismissal of the action with prejudice in the trial court after dismissal of the appeal. Although this is technically not necessary, because the dismissal confirms the trial court judgment, most parties feel more secure if both an acknowledgment of satisfaction of judgment and a dismissal are filed. There is also no harm in filing a request for dismissal with prejudice. Be aware, however, that such a dismissal is a legal nullity and will not undo the judgment, which continues to have collateral estoppel effect. See *McClain v Rush* (1989) 216 CA3d 18, 26, 264 CR 563; *Sandoval v Superior Court* (1983) 140 CA3d 932, 939 n3, 190 CR 29.

For the form of a request for dismissal, see California Judicial Council Form 982(a)(5), reprinted in California Judicial Council Forms Manual (Cal CEB 1981).

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B. Stipulated Reversal

§15.37 1. Presumption in Favor of Granting Stipulations to Reverse

Stipulated reversal is sometimes preferred method of settlement. There may be cases in which leaving the trial court judgment intact is not desirable, and thus, dismissing an appeal is an inadequate means to implement a settlement. An alternative to dismissal is a stipulated reversal, followed by immediate issuance of a remittitur. This tactic puts the parties back into the position they were in the trial court before judgment was entered, allowing them to file a dismissal of the action with prejudice.

Propriety of stipulated reversals. For several years, the courts of appeal were divided on the propriety of stipulated reversals. Some courts felt that allowing the parties to stipulate to a reversal demeaned the appellate process, while others viewed a stipulated reversal as the appellate equivalent of a stipulated judgment in the trial court, finding it perfectly proper to give parties an alternative procedural device to reach a settlement.

The California Supreme Court seemingly resolved this debate in *Neary v Regents of Univ. of Cal.* (1992) 3 C4th 273, 10 CR2d 859, ruling in favor of stipulated reversals. Indeed, the court ruled that "as a general rule, the parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule." 3 C4th at 277. (On the meaning of "extraordinary circumstances," see §15.39.) The supreme court emphasized that the primary role of the courts, including the appellate courts, is to assist parties in resolving their disputes. Thus, "[s]imple fairness requires that the first and most weighty consideration be given to the parties' interests and that they be accommodated except in the extraordinary case.… The courts exist for litigants. Litigants do not exist for courts." 3 C4th at 280.

Later, however, the *Neary* presumption in favor of stipulated reversals was superseded by CCP §128(a)(8), effective January 1, 2000, disapproving reversals of trial court judgments based on posttrial stipulations by the parties. See *Muccianti v Willow Creek Care Ctr.* (2003) 108 CA4th 13, 133 CR2d 1. Code of Civil Procedure §128(a)(8) now states public policy grounds for courts not to allow stipulated reversals, citing possible erosion of public trust and disincentive for pretrial settlements, but allows reversals if the court finds no possibility that the interests of the parties or nonparties will be adversely affected, and that the reasons of the parties requesting reversal outweigh the presumption against its approval. CCP §128(a)(8)(A)-(B).

Thus, whether stipulated reversals will remain a part of the appellate settlement process remains to be seen.

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§15.38 2. Appellate Court Disclaimer on Merits of Trial Court Judgment

As noted by the supreme court in *Neary v Regents of Univ. of Cal.* (1992) 3 C4th 273, 282, 10 CR2d 859, a stipulated reversal does not "erase or rewrite the record of a trial." The court files remain a matter of public record, and anyone can chart the history of a case, including the verdict, judgment, and reversal. If a reversal is pursuant to stipulation, there "will be no inference that the jury or trial court erred." 3 C4th at 283. The court of appeal can also make that explicit in its order and state that "the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment." 3 C4th at 283.

Note, however, that *Neary* does not say anything about collateral estoppel. Several cases suggest that a stipulated reversal might not eliminate the collateral estoppel effect of the reversed judgment, but this issue has not been directly addressed by any court. See *Sandoval v Superior Court* (1983) 140 CA3d 932, 190 CR 29; *Louie Queriolo Trucking, Inc. v Superior Court* (1967) 252 CA2d 194, 60 CR 389.

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Source: Civil Litigation/California Civil Appellate Practice/15 Settlement on Appeal/§15.39 3. Local Rules on Stipulated Reversals; First Appellate District

§15.39 3. Local Rules on Stipulated Reversals; First Appellate District

Parties seeking a stipulated reversal in the first appellate district must comply with 1st App Dist Local R 4. The parties must file a motion that includes a joint declaration of counsel that (1st App Dist Local R 4):

- Describes the parties and the factual and legal issues presented at trial;
- Indicates whether the judgment involves important public rights or unfair, illegal, or corrupt practices, or torts affecting a significant number of persons, or otherwise affects the public or a significant number of persons not parties to the litigation (if the judgment is against a state licensee, the declaration must also disclose whether it exposes such person to any possible disciplinary proceeding); and
- Discloses whether the judgment sought to be reversed may have collateral estoppel or other effects in potential future litigation and, if so, whether any third parties who might be prejudiced by stipulated reversal of the judgment have received notice of the motion.

The parties must also provide a sufficient showing to support the findings required by CCP §128(a)(8) (findings that court of appeal must make to reverse or vacate judgment by stipulation). 1st App Dist Local R 4.

A copy of the judgment must also accompany the motion. 1st App Dist Local R 4. The procedure described above may be useful in other districts as well. Local rules and practices should be consulted. For further discussion of motions in appellate court, see chap 11.

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§15.40 4. Immediate Issuance of Remittitur and Allocation of Costs on Appeal

As in the case of a dismissal, parties seeking a stipulated reversal should also request the court of appeal to issue its remittitur immediately. This will revest jurisdiction in the trial court so that the parties can file a request for dismissal and close the case. See §15.33.

The parties should also specify in their request for a stipulated reversal how they have agreed to allocate the costs on appeal. See §15.34.

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§15.41 5. Filing Dismissal With Prejudice in Trial Court Following Stipulated Reversal

A reversal has the effect of returning the parties to the position they were in immediately before the entry of judgment in the trial court. There is, in other words, no longer any judgment. See *Erlin v National Union Fire Ins. Co.* (1936) 7 C2d 547, 549, 61 P2d 756 (unqualified reversal generally places parties in the same position as if case had never been tried); *McCoy v Hearst Corp.* (1991) 227 CA3d 1657, 1659, 278 CR 596 (discussing general rule and exception when appellate court reverses on grounds of insufficiency of evidence); *Bank of America v Superior Court* (1990) 220 CA3d 613, 620, 269 CR 596 (same). The parties can then terminate the litigation by filing a dismissal of the action with prejudice in the trial court. See §15.36. But note that there is authority suggesting that a stipulated reversal might not abrogate the collateral estoppel effects of the judgment. See §15.38.

Filing an acknowledgment of satisfaction of judgment is inappropriate because a judgment that is subject to execution and satisfaction no longer exists.

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16

Oral Argument

Arthur E. Schwimmer

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I. RIGHT TO ORAL ARGUMENT

§16.1 A. Appeals

Parties to every appeal, civil and criminal, have a right to oral argument. *People v Pena* (2004) 32 C4th 389, 9 CR3d 107; *Lewis v Superior Court* (1999) 19 C4th 1232, 1253, 82 CR2d 85; *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 871, 187 CR 557; *People v Brigham* (1979) 25 C3d 283, 285, 157 CR 905. The right is implicit in Cal Const art VI, §§2-3 and Cal Rules of Ct 8.524, 8.256. Parties are entitled to the presence at oral argument of each judge who will participate in deciding the appeal. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 872, 187 CR 557. See §16.16.

JUDICIAL PERSPECTIVE: It is customary for the court of appeal to inform the parties which judges will be sitting on their case. In a four-judge division, the presiding judge generally names the judges who will be sitting on each case. The parties are not, however, entitled to know which judge has been as signed to write the opinion. Some appellate lawyers think they can guess the author by the questions asked. Counsel's energies are better spent responding to the court's questions.

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Source: Civil Litigation/California Civil Appellate Practice/16 Oral Argument/§16.2 B. Other Proceedings

§16.2 B. Other Proceedings

There is no right to oral argument on motions or applications, but the court has discretion to permit or require it. Cal Rules of Ct 8.54(b). There is no right to oral argument on a petition for rehearing. *Metropolitan Water Dist. v Adams* (1942) 19 C2d 463, 468, 122 P2d 257. On the right to oral argument in original writ proceedings, see California Civil Writ Practice §§24.8-24.13 (4th ed Cal CEB 2008).

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§16.2A C. Multiple Parties and Amicus Curiae

Supreme court. In the supreme court, no more than one counsel may argue for each side in a non-death penalty case, even if there is more than one party on each side, unless the court orders otherwise. If you wish to share argument with other counsel, you must make the request no later than 10 days after the date of the order setting the case for oral argument. Cal Rules of Ct 8.524(f).

Court of appeal. In the court of appeal, no more than one counsel may argue for each separately represented party, unless the court orders otherwise. Cal Rules of Ct 8.256(c)(3). On written request, the court has the discretion to grant or deny any amicus curiae the opportunity to argue; amici may be ordered to share a party's time or the court may expand the allotted time. Cal Rules of Ct 8.256(c)(2).

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II. GENERAL PROCEDURE

A. Overview

§16.3 1. Frequency of Scheduled Argument

Under Cal Rules of Ct 8.256(a), a court of appeal must hear oral arguments at least once each quarter. In practice, each district or division hears arguments monthly. The supreme court hears oral argument "on a day or days as determined by the Chief Justice." The sessions are held in San Francisco, Los Angeles, and Sacramento. Special sessions may be held elsewhere by order of the Chief Justice, or with the assent of four or more of the associate justices. Cal Rules of Ct 8.524(b); Cal Sup Ct, IOPP V.

JUDICIAL PERSPECTIVE: Generally, most divisions devote 2 days a month to oral argument: 1 day for civil cases, and 1 day for criminal cases.

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§16.4 2. Notice of Argument

When a case is set for hearing, the court clerk notifies the parties of the time and place for hearing at least 20 days before the argument date (*i.e.,* oral argument). Cal Rules of Ct 8.256(b). For good cause, the presiding justice may shorten the notice period. If so, the clerk "must immediately notify the parties by telephone or other expeditious manner." Cal Rules of Ct 8.256(b).

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§16.5 3. Time Permitted for Argument

Unless ordered otherwise, in a civil case in the court of appeal or supreme court, counsel for each side (even if there is more than one party on each side) is allowed 30 minutes for oral argument, including time for rebuttal. In the court of appeal, if multiple parties represented by separate counsel, or counsel for amicus curiae, request argument, the court has discretion to apportion or expand the time allowed for argument according to the respective parties' interests. Cal Rules of Ct 8.256(c), 8.524; *People v Brigham* (1979) 25 C3d 283, 286 n4, 157 CR 905. The supreme court has discretion to expand the 30-minute time limit for oral argument (see Cal Rules of Ct 8.524(a)) but generally denies such requests.

In view of the many cases on each oral argument calendar, the courts of appeal expect most arguments to take considerably less than 30 minutes, and some divisions give priority on the day's calendar to cases in which counsel for all parties give short estimates. The third appellate district limits each party to 15 minutes unless the court grants additional time under an application filed within 10 calendar days after the case is set for oral argument. If the application is granted, the time allotted to the other side or sides will be similarly enlarged. 3d App Dist Local R 3.

JUDICIAL PERSPECTIVE: Counsel should make his or her oral argument short, concise, and to the point. Unless a case is extremely complex, or the issues varied and numerous, counsel should devote no more than 5 or 10 minutes to emphasize the key points already argued in the briefs.

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§16.6 4. Order of Argument

The petitioner, appellant, or moving party has the right to "open and close." In cases of multiple appeals or multiple petitions for review, the court will specify the order of argument. Cal Rules of Ct 8.256(c)(1), 8.524(d).

A party entitled (or ordered) under Cal Rules of Ct 8.256(c)(1) or 8.524(d) to present the opening argument should expressly reserve time for "closing argument," *i.e.,* rebuttal, and tell the court the amount of time (within the party's overall time estimate) that it wishes to reserve. The supreme court deems rebuttal waived if it is not reserved at the time of check-in with the clerk. See Notice to Counsel Appearing for Oral Argument Before the Supreme Court of California in App G.

JUDICIAL PERSPECTIVE: It is the practice in our division (Division 6 in the Second District) to automatically grant rebuttal argument, if any, to appellant. California Rules of Court 8.256(c)(1) gives appellant or the moving party the right to open and close. If counsel has doubts about the court's practice in allowing rebuttal argument, at the beginning of oral argument he or she should inform the court that a portion of appellant's time will be reserved for rebuttal argument.

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§16.7 5. Submission and Decision

When cause is submitted. In the supreme court and courts of appeal, the cause is submitted for decision at the close of oral argument, or on approval of a waiver of oral argument, or after the time has expired for filing any postargument supplemental briefs permitted by the court. Cal Sup Ct, IOPP VII(A); Cal Rules of Ct 8.256(d)(1).

Vacation of submission. A submission may be vacated on written order stating the court's reasons and setting a timetable for resubmission. Cal Sup Ct, IOPP VII(B) (order by Chief Justice); Cal Rules of Ct 8.256(e)(1).

Filing of decision. The decision on appeal is usually filed within 90 days after its submission or resubmission. See Cal Const art VI, §19; Govt C §68210.

JUDICIAL PERSPECTIVE: If the court asks for supplemental briefs at oral argument but says nothing about the submission date, counsel may wish to respectfully inquire about the submission date. It may be advantageous to the parties and the court to extend the submission date so that the court has sufficient time to digest new material. A respectful inquiry reminds the court of this option.

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§16.7A 6. Media Coverage of Oral Argument

Counsel should consult Cal Rules of Ct 1.150 and local appellate rules regarding media coverage of oral argument. For example, 1st App Dist Policy Statement B states that if the press wishes to bring television cameras into the courtroom during oral argument, the Judicial Council form titled Request to Conduct Film and Electronic Media Coverage and Order (MC-500, MC-510) must be completed; the presiding justice of each division may grant or deny the request for courtroom cameras and recording equipment. One of the provisions of Cal Rules of Ct 1.150 requires the clerk of the court to promptly inform the parties when a request is made for film or electronic coverage of courtroom proceedings. Cal Rules of Ct 1.150(e)(1). "The judge may hold a hearing on the request or may rule on the request without a hearing." Cal Rules of Ct 1.150(e)(2). Additionally, there are a variety of factors enumerated in Cal Rules of Ct 1.150(e)(3) for the court to consider when ruling on the request.

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B. Motion for Calendar Preference

§16.8 1. Authorization

A party (either appellant or respondent) may be entitled to, or in the court's discretion may be granted, calendar preference in setting the date for oral argument. See Cal Rules of Ct 8.240. The claim of preference may be based on a statute or rule specifically granting preference to appeals in particular types of cases (see, *e.g.,* CCP §§44-45, 1062.5). The claim of preference may also be based on the legislative policy of statutes granting a trial-setting preference in certain civil actions (see, *e.g.,* CCP §§36, 1062.3). In addition, preference may be based on "good cause." See §11.96.

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§16.9 2. Timing

A motion for calendar preference must be served and filed "promptly," allowing the court discretion in determining the timing of the filing. Cal Rules of Ct 8.240. By analogy, a motion for calendar preference in the supreme court should be filed no later than the last day for filing the petitioner's reply brief on the merits. See Cal Rules of Ct 8.520(a)(3).

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C. Telephonic Oral Argument

§16.10 1. Authorization

Three appellate districts, the first (San Francisco), fifth (Fresno) and sixth (San Jose), permit any one or more of the parties to present oral argument by telephone rather than by personal appearance in court. See 1st App Dist IOPP §21; 5th App Dist Local R 4; 6th Dist Teleconferencing Oral Arg Procedures (see App F).

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§16.11 2. Procedure

The telephonic conference procedures generally have certain features in common. Deciding whether to elect this option is ordinarily within the discretion of each party and its counsel, but in a particular case the court may direct counsel to appear in person. The election must be made in accordance with each court's specific procedures. The court generally informs the parties of these procedures when it notifies the parties that the appeal is ready to be set for oral argument. If one or more parties elects to argue by telephone, then on the oral argument date the court or its agent initiates a telephone conference call. All counsel, the court, and all other persons in the courtroom are then able to hear the proceedings. There is usually a small fee for the telephonic conference procedure ($20 to $25). See 1st App Dist IOPP §21; 5th App Dist Local R 4; 6th Dist Teleconferencing Oral Arg Procedures (see App F).

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§16.12 3. Advantages and Disadvantages

The purpose of this option is to reduce the parties' costs and provide greater convenience to counsel. Often, these advantages are sufficient reason to elect this option. Nevertheless, in each case counsel and clients should carefully weigh the advantages against the loss of opportunity for eye contact with the judges and the inability to personally observe the judges' reactions to each side's arguments and to adjust one's argument accordingly.

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D. Waiver of Argument

§16.13 1. Right to Waiver

Counsel may waive the right to oral argument. *Philbrook v Newman* (1905) 148 C 172, 178, 82 P 772; see *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 870, 187 CR 557; Cal Rules of Ct 8.256(d). The supreme court, however, does not allow waiver of oral argument once a case is placed on calendar. See Notice to Counsel Appearing for Oral Argument Before the Supreme Court of California in App G.

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§16.14 2. Courts Apparently Encourage Waiver

Many districts or divisions word their initial communication to counsel regarding oral argument in such a way as to encourage waiver. For example, a notice setting the time and place for oral argument may also state that argument will be deemed waived unless counsel requests it within the time specified in the notice, or a prenotice letter may state that the court does not deem argument useful in the particular case but will schedule argument if counsel requests it within a specified time. Some notices state the time and place scheduled for argument and simply ask counsel to indicate in a space on the form whether argument will be presented or is waived. Despite a court's seeming encouragement of waiver, in every case counsel should exercise his or her own judgment on whether to request argument or to waive it.

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§16.15 3. Considerations For and Against Waiver

Considerations for both appellant and respondent. In deciding whether to waive argument in the court of appeal, counsel should consider several factors:

- Appearance (in person or, where permitted, by telephone) for argument is advisable even if only to briefly emphasize or clarify certain facts or arguments and to be available to answer any questions from the court.
- Preparation for oral argument, which generally occurs months after briefing has been completed, usually brings fresh perspective and ideas for oral arguments, which should never merely repeat arguments in the briefs.
- The justices in most districts or divisions confer formally only on cases in which counsel have not waived argument. The request for oral argument thus has the beneficial effect of causing the court to refocus on the case together, perhaps triggering new insights or questions that will generate useful discussion at oral argument. See, *e.g.,* 3d App Dist IOPP §VIII.
- Oral argument often can permit counsel to find out where the court may be leaning in its decision. In some districts or divisions, the court will either issue a tentative opinion (see §16.17) or circulate among the members of the appellate panel a preliminary draft of its opinion *before* oral argument. Oral argument provides an opportunity to change such opinions.

On the other hand, if after consideration of these factors and the purposes of oral argument (see §16.18), appellant's counsel is convinced that nothing would be gained by presenting argument or inviting questions, a waiver is appropriate. Generally, however, for the reasons stated above, the appellant in a civil case should not waive oral argument.

Considerations for respondent alone. A respondent should never waive oral argument if appellant has not waived it. However, it is occasionally appropriate, after hearing appellant's argument, for respondent to submit without presenting argument while expressing willingness to answer any questions from the court. In most cases, however, a consideration of the purposes of oral argument (see §16.18) as well as the reasons listed above will suggest that some presentation, however brief, is desirable.

Even if appellant waives oral argument, respondent should consider requesting it in order to be available to answer the court's questions or otherwise to meet the goals of oral argument.

JUDICIAL PERSPECTIVE: Whether representing appellant or respondent in either a civil or a criminal case, some attorneys consider it akin to malpractice to waive oral argument. Even if counsel thinks argument is unnecessary in the case in which opposing counsel wishes to waive, it is advisable to appear if only for the purpose of asking the court if it has any questions.

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§16.16 E. Waiver of Presence of Judge

If oral argument is not waived, a judge not present at the argument is barred from participating in the decision unless the parties stipulate to the absent judge's participation. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557. On occasions when a judge is absent, the presiding justice, just before argument of each case begins, usually requests such a stipulation and advises the parties that the absent judge will listen to a tape recording of the oral argument. The possibility of a request for a waiver should be anticipated in advance of oral argument. Counsel should carefully consider whether the purpose of presenting rather than waiving oral argument in the particular case will be met without an opportunity for eye contact and interaction with the absent judge. If it will not, counsel should politely decline to stipulate, and the court will reschedule the oral argument, usually to the next month's calendar.

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Source: Civil Litigation/California Civil Appellate Practice/16 Oral Argument/§16.17 F. Tentative Opinion and Memorandum of Issues (Fourth Appellate District, Division Two)

§16.17 F. Tentative Opinion and Memorandum of Issues (Fourth Appellate District, Division Two)

Availability of procedure. The Fourth District Court of Appeal, Division Two (San Bernardino County) provides the parties, in every case in which any party has requested oral argument, with the court's tentative opinion in the case or a memorandum describing the key issues disputed among the judges. The tentative opinion or memorandum is mailed to the parties at least 10 days before the hearing date.

Accompanying letter. A tentative opinion is accompanied by a clerk's letter that either:

- Encourages waiver of oral argument (thus indicating that the tentative opinion is unanimous) and limits each party's argument to 15 minutes;
- Invites oral argument (thus indicating that only two judges concur in the tentative opinion) and limits each party's argument to 15 minutes; or
- Advises the parties to address a specific issue in the tentative opinion and states that there is no majority supporting the opinion.

A memorandum is also accompanied by a clerk's letter describing the key issues disputed among the members of the panel.

Purpose. This procedure allows the parties to make a more informed decision on whether to waive oral argument and, if oral argument is presented, to better focus their arguments. The procedure is fully described and its benefits analyzed in Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 Santa Clara L Rev 1 (1995).

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III. PREPARATION FOR ARGUMENT

§16.18 A. Purposes of Oral Argument

Counsel should not assume, despite preargument preparation by the court (which frequently includes drafting a tentative decision), that each judge is sufficiently familiar with the facts, issues, contentions, and legal principles. There may be matters on which one or more of the judges is uninformed, is doubtful, or has questions. Moreover, after the briefs have been filed and the case is reexamined, it may develop that the briefs do not adequately highlight the critical facts, issues, or law; apply the proper standards of review; or anticipate and thoroughly answer weaknesses in the case, the opponent's arguments, or the questions the court will ask. Thus, oral argument is the parties' last chance to inform and persuade the court. And it is the only opportunity on appeal for a dialogue between the parties and the decision-makers.

Specifically, the purposes of oral argument include:

- Identifying and clarifying the critical facts, and persuading the court to adopt counsel's view on which facts are critical. As Justice Jackson stated: "[M]ost contentions of law are won or lost on the facts." Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 ABA J 801, 803 (1951).
- Focusing on the critical legal issues and on the dispute within each issue, and persuading the court to adopt counsel's view of the dispositive issues and legal principles.
- Simplifying the case (as compared with the presentation in the brief), thus persuading the court that counsel's arguments are correct and that opposing counsel's are incorrect, and affecting the attitude with which the court will review the case.
- Amplifying legal and public policy arguments made in the brief, discussing later-decided cases, and emphasizing justice and fairness.
- Humanizing a case, explaining how the issues and their resolution directly affects people's lives.
- Eliciting the court's views about which facts, issues, and arguments are dispositive, and even the court's tentative decision, in order to have a meaningful opportunity to respond, dissuade, and persuade. Identifying and responding to the court's concerns is a major goal of oral argument.
- For respondent, oral argument is usually the only opportunity to respond to appellant's reply brief.

JUDICIAL PERSPECTIVE: Oral argument allows counsel to ascertain whether the justices understand the points raised in the briefs. It also allows for a justice sympathetic to counsel's argument to use counsel's responses to the justice's questions as a device to influence the other justices.

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B. Factors in Preparation

§16.19 1. The Record

Because the outcome of nearly every case depends primarily on its facts, have the critical facts of the case clearly in mind. Because at least several months have elapsed since completion of briefing, devote whatever time is necessary to refamiliarize yourself with the entire record, including exhibits.

Be ready to find page references to critical facts or portions of the record quickly and easily. Use a method you are comfortable with, such as tabbing the pertinent pages of the record or preparing a separate index in which critical matters and their page references are listed, perhaps issue by issue. Some appellate specialists incorporate such an index into an "argument book." See §16.23.

If the record is voluminous, consider photocopying pertinent pages. The particular method is less important than your ability to use it effectively during the course of argument.

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§16.20 2. Issues and Contentions

Review each party's version of the dispositive issues and the arguments on each issue. You must understand how those issues were treated in the lower court and in the briefs. Because there are restrictions on raising new issues or contentions at oral argument (see generally 9 Witkin, California Procedure, *Appeal* §§770-772 (5th ed 2008)), be prepared to defend any new perspective on an argument presented at oral argument as one that is within, and is only a variation on, a theme contained in the briefs.

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§16.21 3. Authorities

Familiarize yourself with relevant authority. Counsel must be familiar with the line of authority (*e.g.,* constitutional, statutory, rule, case, and secondary authorities) on which the case rests. Thorough familiarity includes detailed knowledge of the key authorities cited in the briefs, including the procedural history, critical facts, and holdings of key cases. Take copies or summaries of key cases and statutes to oral argument to aid in detailed discussion of the authorities if it becomes necessary. Also, be generally familiar with related authorities to be prepared for questions the court may ask.

Bring your research up to date. Shepardize your and your adversary's key cases for subsequent history (such as grants of rehearing, review, or depublication) and recently decided cases; check for amendments to cited statutes and for new legislation. Pay particular attention to unfavorable authority and be prepared to deal with it. Your adversary and the court are likely to find it and refer to it at the argument.

Consider preargument letter for new authority. It may be desirable to bring a significant new authority to the court's attention by letter prior to oral argument. If the authority is favorable or even dispositive, a letter permits you to fully explain why. If it is unfavorable, a letter permits you to distinguish or otherwise discuss it more thoroughly than you might have an opportunity to do at oral argument, and the court will appreciate your candor in dealing with the adverse authority forthrightly. In either event, a preargument letter permits the court and all parties to engage in a more informed dialogue at the hearing, and avoids the potential danger of postargument letter briefing, in which your adversary might be granted the last word on the subject.

Service and filing. Most appellate districts and divisions allow service and filing of such letters without leave of court at any time before the date of argument. The supreme court requires such letters to be served and filed (original and eight copies, with proof of service) no later than 10 days prior to the date set for argument, except in unusual circumstances, on application and for good cause shown. See Notice to Counsel Appearing for Oral Argument Before the Supreme Court of California in App G. For ethical and practical reasons, if it is close to the argument date, serve the letter by a method (personal service or fax) to ensure that your adversary will receive it and have an opportunity to review the cited authority before oral argument. The first appellate district advises the parties in its oral argument notice that any additional authorities must be submitted within a prescribed time (10 to 15 days) before oral argument. 1st App Dist IOPP §20(c).

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§16.22 4. Necessity to Be Selective

Select most important issues. Because of time limits, interruptions from judges, and their probable interest in only certain matters, you may be unable to argue every major issue. Without careful preparation, you could be forced to conclude argument without having made your main point. To avoid this, decide in advance which issue or issues must be argued and which issues may be omitted. Organize your argument and time so that:

- The key issue or issues are discussed first and adequately, allowing time for answering questions from the court; and
- Secondary issues may then be discussed, in order of decreasing importance, if time permits *and* if it appears necessary.

Respondent's special considerations. Respondent should not only prepare an affirmative discussion of the issue or issues considered critical but should anticipate and plan to respond to appellant's strongest arguments.

When tentative opinion or memorandum of issues is used. In the Fourth District Court of Appeal, Division Two (San Bernardino County), the court informs the parties before oral argument of its tentative opinion or of the issues in dispute among the judges. See §16.17. Counsel should focus their arguments accordingly.

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§16.23 5. Notes or Outline of Argument

To be effective, oral argument must be well-organized, informative, and understandable. Most attorneys find a detailed set of notes, or a comprehensive outline, to be helpful if not essential. Counsel should not read an argument to the court, but at least one distinguished appellate advocate believes that writing and rewriting one's intended presentation during the preparation stage may help counsel master both the substance and best phrasing of the arguments. See Stern, *Tips for Appellate Advocacy*, 15 Litigation 40, 41 (1989).

One method that many attorneys find useful is an "argument book." The book contains a comprehensive outline of the argument, including answers to anticipated questions and opposing arguments, copies of key cases, critical transcript pages and exhibits, and any other essential items. It should be tabulated for ease in locating the relevant section.

JUDICIAL PERSPECTIVE: Never read from a prepared text. It sounds stilted and inhibits the exchange of ideas through questions and answers. It is a good idea to have a list of where key passages may be found in the record. If opposing counsel misstates the record, telling the court about the error and where it can be found wins points. If you cannot immediately supply the court with the information about the error, you might send a brief letter to the court after oral argument, pointing out where in the record the court will find the correct information.

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§16.24 6. Identifying Weaknesses and Anticipating Questions

Pinpoint weaknesses of your own case. Understanding the weaknesses of your client's case is one of the most important factors in preparing for oral argument. Read and analyze your adversary's brief or briefs objectively. Confront forthrightly the facts, legal authorities, and policies that seem to operate against your client's case and devise answers to them.

Anticipate difficult questions. Try to anticipate every difficult question the court may ask; prepare the best answers you can (including any necessary citations to the record and to authorities), and plan how to return smoothly to your prepared argument once you have completed your answer; even better, interweave your answer to the court's question into your argument. See Shapiro, *Questions, Answers and Prepared Remarks*, 15 Litigation 33 (1989).

Present arguments to colleagues and lay persons. One useful method of identifying weaknesses and anticipating the court's questions is to present your argument to colleagues or lay persons, encouraging them to express their concerns about the case and to ask questions. If it is practicable to stage a moot court, using attorneys (or retired appellate judges) as the panel, do so. See Cole, *Moot Courts: Scrimmage for the Appellate Lawyer*, 15 Litigation 37 (1989).

Prepare to engage comfortably with appellate court. Whatever method or methods you use, your ultimate goals are to test your principal arguments and responses to questions for coherence, persuasiveness, and equitable appeal, and to practice your presentation so that you are able to engage comfortably in a dialogue with the court.

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§16.25 7. Court's Preargument Procedures

Counsel should understand the nature of the court's preparation for oral argument. Before oral argument, a judge or a member of the judge's staff prepares a calendar memorandum or proposed opinion and distributes it to the other judges on the panel. Many districts or divisions of the courts of appeal hold a preargument conference to discuss the issues. After that conference, a preliminary opinion is often drafted if one has not already been prepared. For details of each district's or division's preargument procedures, see California Courts of Appeal Internal Operating Practices and Procedures (IOPP).

The California Supreme Court does not set a case for oral argument until at least a majority of the justices have tentatively concurred in a calendar memorandum proposing a resolution of the issues in the case. For this and other details of that court's preargument procedures, see Cal Sup Ct IOPP VI(D)(4).

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§16.26 8. Judges' Backgrounds

Learn about members of appellate panel. Each judge brings to the decision-making process a background and philosophy that, when all else is equal, may well influence the result. See Cardozo, The Nature of the Judicial Process 12, 167 (1921). Counsel should do some research on the judges who may decide the case to develop a sense of their probable attitude toward the specific issues and toward oral argument in general.

Find out who will decide your case. If necessary, call the court clerk to learn who the panel members will be, or at least who will be on the bench for that oral argument calendar. Some divisions, and occasionally the supreme court, use judges from other courts sitting by assignment, and in the court of appeal such a judge may be the one principally responsible for preparing the calendar memorandum or proposed decision. Avoid surprise, know your bench in advance, and if possible, use that knowledge in shaping your argument and responses to questions.

Read, watch, and listen. Find and read prior relevant published opinions by the panel members, and ask other attorneys about each judge. Two useful sources of biographical information are Bogen, Thompson & Smith, California Courts and Judges (softbound, revised annually), and Daily Journal Corp., Judicial Profiles (looseleaf, supplemented quarterly). Internet user groups and bulletin boards can also be a valuable source of information. If possible, attend oral arguments held before the panel on a day before your case is scheduled to be heard, or observe the arguments preceding yours on the appointed day.

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§16.27 9. Materials to Take to Lectern

To be properly prepared for presentation of argument, you should take to the lectern notes or an outline of the prepared argument (see §16.23), an outline or a summary of answers to anticipated questions (see §16.24), copies or summaries of key authorities (see §16.21), and the full appellate record or copies of critical pages (see §16.19). Some attorneys find it useful to incorporate these materials into an "argument book," with each section tabbed for easy reference during argument. See §16.23.

Notes, outlines, and summaries should be set in a large typeface or font for ease in reading to enable you to keep your eyes on, and voice directed toward, the court.

JUDICIAL PERSPECTIVE: Running back and forth from the lectern to counsel table to grab the record or other documents is both time consuming and distracting.

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§16.28 10. Visual Aids

With modern computer technology, charts and other visual aids can often be included in the briefs, and their use at oral argument, always rare, should be unnecessary. If, however, a visual aid is important to your argument, notify the clerk and your adversary beforehand of your intent to use one and, if possible, have it reproduced in a form that the clerk can distribute to each judge at or before the outset of your argument. Also, consult court policy and local rules on the use of such aids. The Fourth District Court of Appeal, for example, has a policy prohibiting computers and other electronic devices in its courtrooms without prior court authorization.

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IV. ENGAGING IN ARGUMENT

§16.29 A. Demeanor

Counsel should project confidence and credibility to attract the judges' careful attention. In particular:

- Be alert and assertive but not aggressive or belligerent.
- Speak clearly in a conversational tone, loudly enough to be heard and not too fast for comprehension. Vary your volume and avoid speaking in a monotone.
- Use language carefully; avoid colloquialisms and clichés; and use humor sparingly, if at all, and only in a way that is appropriate to the circumstances.
- Although you may glance at your outline or notes, maintain as much eye contact with the judges as possible. Doing so helps convey your belief in your position and enables you to obtain nonverbal clues to the judges' reactions to your arguments and to your answers to their questions, and to shape your presentation accordingly.
- Avoid distracting clothing, such as a loud tie, or distracting mannerisms, such as tossing your head back or running your fingers through your hair. You want the court to focus entirely on your argument. Use gestures only if appropriate for emphasis.
- Remain at the lectern and stay close to the microphone.
- Be respectful of the court. Address a member of the court as "Your Honor"; refer to a member of the court as "Justice _____" if you are certain of the judge's name.
- Be courteous in references to the trial judge and opposing counsel.
- Generally, do not object to or interrupt your adversary's argument; this is not a trial. The few exceptions are discussed immediately below.

JUDICIAL PERSPECTIVE: There is a certain tradition and comity in the court of appeal that militates against objecting in the middle of opposing counsel's argument. Unlike a trial court, an appellate court is not going to make an immediate ruling from the bench. Nonetheless, an objection would be considered appropriate if one party during oral argument refers to matters outside the record or argues issues not raised in the brief. In this situation, an attorney could say: "Excuse me, Your Honor. This is not in the record; the argument is improper" or "Counsel is arguing an issue outside the brief." Very seldom, however, does one party interrupt another.

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§16.30 B. Presentation

Make your argument interesting. Your goal is to persuade. To achieve that goal, you must attract and keep the attention not only of the judge who had the principal responsibility for the calendar memorandum or tentative opinion but of the other two (or six) judges who may be less familiar with the case.

Be concise and clear. Keep your argument as simple, brief, and easy to understand as the subject matter permits. If the briefs argued several issues, tell the court which one or ones you intend to address. If possible, begin by giving the court in just a few sentences the most compelling reasons for deciding in your client's favor, including any dispositive facts. Emphasize the logic and common sense of your position. If a particular decision is controlling, refer to it; but unless absolutely necessary do not engage in lengthy discussions of cases. When applicable, argue that your position is supported by a particular public policy or by fundamental fairness itself. Do not merely repeat the arguments from your brief. See 1st App Dist IOPP §20(d); 6th App Dist IOPP §II(A)(3).

Despite court's apparent familiarity with case, pursue argument. At the calendar call or at the start of argument, the court may inform counsel that the court is familiar with the facts, issues, and arguments in the briefs. Do not feel compelled to forgo argument, but follow the suggestions in the previous two paragraphs. Frequently, one or more of the judges will begin to ask questions and a useful colloquy will result.

Respond to court's concerns. The court may inform you at the outset of argument (or occasionally by letter before argument) of a particular issue the court wants counsel to address. See, *e.g.,* 1st App Dist IOPP §20(d). Address that issue immediately, even if doing so requires you to substantially rearrange your planned presentation. You should welcome any communication by the court of its views or concerns, whether by statement or question, and muster all your persuasive power to respond to it; a decision in your client's favor may turn on your success in doing so. For further discussion, see §16.31.

Special considerations for respondent. If you represent respondent, listen carefully to your adversary's argument. Briefly add to your notes or outline, perhaps in the margin, important points you need to address in light of appellant's argument and the judges' questions and comments. You may wish to begin your argument by covering an issue or question the court thought important; if not, follow the suggestions in the first two paragraphs of this section.

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§16.31 C. Responding to Questions

Welcome the court's questions and respond to them immediately. With careful preparation, you have probably anticipated many of the court's questions. Direct and thoughtful answers to questions are often the most important part of an argument. Some counsel, at or near the outset of their argument, expressly ask the court to inform them of the court's concerns as argument progresses so that counsel will have the opportunity to respond to them.

Make sure you understand a question before answering. If necessary, ask for clarification or repeat the question in your own words. If the question can be answered with a simple yes or no, a longer answer is unnecessary. If you do not know the answer to a question, say so and request permission to answer it in a letter after the argument; do not bluff.

Respond to a question even if it seems irrelevant. If a question seems irrelevant, answer it but explain why the matter is unnecessary to decide the case and bring the attention of the court back to what you consider relevant.

Limit application of your argument if necessary. Do not be intimidated into making an inappropriate concession of fact or law; it could become the linchpin of an adverse decision. See *Browne v Superior Court* (1940) 16 C2d 593, 599, 107 P2d 1 (counsel's statement in course of oral argument may be considered an admission or waiver of issues on appeal). Because the judges may test the outer limits of your argument by using hypothetical cases, make sure you explain why the principle you espouse would or would not apply in those cases. Be careful not to insist on an application of your argument beyond reason or common sense.

Do not presume hostility to your case. Do not assume that the judge who asks you a challenging question favors your opponent. The judge may be seeking your assistance in persuading another member of the panel.

JUDICIAL PERSPECTIVE: Do not be disheartened by sharp or curt questions from the bench. Some judges play devil's advocate through their questions. This helps them test their own reasoning, which may be in line with yours. If a judge is rude, it may be a reflection on the judge, and not on you.

Be flexible. The key to successful oral argument is flexibility. Sometimes the court's questions and comments and your responses to them will occupy the entire time allotted for your argument. If a crucial point in your planned presentation was not covered during your colloquy with the court, ask for permission to briefly state it.

If court is silent during your argument, try to elicit questions. In some cases, the court may remain silent during your presentation. Do not attempt to expand your argument to fill the time estimate you gave the court. However, at the end of each major point of your argument, or before you conclude your oral presentation, consider telling the court that you would appreciate it if the court would inform you of any questions or concerns about, or disagreements with, your argument so that you may respond to them.

When it appears to respondent's counsel that its client will prevail. If you represent respondent and it is *clear* to you at the conclusion of appellant's opening argument that your client will prevail, consider telling the court it appears to have the matter well in hand, and offer to answer any remaining questions it may have. If you have misjudged the situation, the court will usually inform you quickly by comment or question.

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§16.32 D. Rebuttal

Reserve rebuttal time at the outset of opening argument, but use it only if necessary to rehabilitate your client's case or to correct an important misstatement by your adversary. Do not raise new points. Select only a few critical matters and discuss them briefly. If by the conclusion of respondent's argument you sense that your client has won, tell the court that unless it has any questions you will waive rebuttal.

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§16.33 E. Postargument Letter Briefs

During oral argument, the court may ask for, or counsel may request and the court may grant permission to file, a supplemental brief. The court usually directs that such a brief be filed in letter form within a short time following the argument. If one side's request is granted, the other side ordinarily (but not necessarily) is granted an equally short time in which to reply. See, *e.g.,* 6th App Dist IOPP §II(A)(3). See also Notice to Counsel Appearing for Oral Argument Before the Supreme Court of California in App G.

Under these rules, counsel may make the request by letter after oral argument and before the decision in order to bring an important new case or other authority to the court's attention. Include in the request that the court vacate its submission of the case to consider the additional authority. Whether to grant or deny such requests rests in the court's discretion.

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17

Decision on the Merits; Proceedings After Remand

Jose H. Garcia
Jacques LeBoeuf
Daniel Webb Howard

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I. SUBMISSION OF CASE

§17.1 A. When Submission Occurs

Submission of a case signifies that the court has heard oral argument, or that argument has been waived, and that the time for filing all briefs or other papers, including any supplementary briefs, has passed. Cal Rules of Ct 8.256(d), 8.524(h); Cal Sup Ct, IOPP VII(A). In most cases, the Chief Justice of the California Supreme Court, or the presiding justice in the court of appeal, will order the case submitted at the conclusion of oral argument. However, when the parties submit additional briefs after argument, the court of appeal typically orders that the case be deemed submitted on the filing of the last supplementary brief.

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§17.2 B. Effect of Submission

Submission obligates the court to proceed to a decision because no judge may receive a salary if any case before that judge remains pending and undecided for 90 days after submission. Cal Const art VI, §19; Govt C §68210. A judge's failure to render a decision within 90 days of submission is not grounds for attacking the decision that is ultimately rendered. *Hassanally v Firestone* (1996) 51 CA4th 1241, 59 CR2d 625.

JUDICIAL PERSPECTIVE: The amount of time it takes for an appellate court to render a decision can vary widely. For example, for the quarter ending April 1, 1996, the amount of time taken by the seven divisions of the second appellate district to render a decision ranged from 20 to 71 days. The average time was 34 days. My division has a precalendar conference 1 week before oral argument. We confer and try to work out any disagreement. By the time of oral argument, there are relatively few cases about which disagreements remain.

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Source: Civil Litigation/California Civil Appellate Practice/17 Decision on the Merits; Proceedings After Remand/§17.3 C. Court May Vacate Submission

§17.3 C. Court May Vacate Submission

If there is some reason for vacating submission, the court may make such an order, stating the reason and providing for resubmission of the case. Cal Rules of Ct 8.256(e), 8.524(h)(2); Cal Sup Ct, IOPP VII(B) (order by Chief Justice).

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II. OPINION, DECISION, AND JUDGMENT

§17.4 A. Opinion Defined

The opinion is a statement of the reasons for the appellate court's decision. See Cal Const art VI, §14. It usually contains a discussion of the facts and an explanation of the court's acceptance or rejection of the parties' legal contentions. Because the reasons for the decision are based on applicable law, the opinion generally refers to supporting cases, statutory law, or both. On the publication of opinions, see chap 21. On the content and form of an opinion, see 9 Witkin, California Procedure, *Appeal* §§782-812 (5th ed 2008).

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§17.5 B. Judgment and Decision Defined and Distinguished

Although "decision" and "judgment" are often used interchangeably, there is a distinction between the two concepts. A judgment is the reviewing court's determination that an order or a judgment appealed from shall be affirmed, reversed, or modified. A decision refers not only to the judgment but also to intermediate determinations of ancillary matters, such as granting or denying an application or motion, or issuing an alternative writ or order to show cause. The part of the decision on appeal that constitutes the judgment is generally stated at the conclusion of the opinion. See Witkin, *New California Rules on Appeal*, 17 S Cal L Rev 232, 249 (1944).

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§17.6 C. Significance of Distinction Among Decision, Judgment, and Opinion

Distinction affects date of finality. The distinction between a decision or judgment and an opinion has a practical significance. Modification of an opinion does not postpone the date the decision becomes final, but modification of the judgment does. Only modification of the judgment will start the time for rehearing or review running again. Cal Rules of Ct 8.264(c)(2). An order dismissing an appeal involuntarily is considered a "decision" under Rule 8.264(b) for the purpose of determining when it becomes final. Cal Rules of Ct 8.264(b)(1).

Distinction affects nature of precedent. Another important distinction exists between a decision or judgment and an opinion. Even if a majority of the appellate panel concurs in the decision, the decision is not binding precedent unless a majority also concurs in the opinion, *i.e.,* the underlying reasons. If a majority of the panel does not concur, the decision effectively determines only the litigation before the court. If a majority concurs in only part of the opinion, the decision is binding precedent only for the portions of the opinion in which the majority concurs. See *Amwest Sur. Ins. Co. v Wilson* (1995) 11 C4th 1243, 1266, 48 CR2d 12.

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§17.7 D. Rendition of Judgment

When the opinion, concluding with the court's decision or judgment, is signed by a qualified majority of justices, it is filed with the appellate court clerk who must send copies of the opinion "showing the filing date to the parties and, when relevant, to the lower court or tribunal." Cal Rules of Ct 8.264(a). The filing of an opinion in a reviewing court, which concludes with a statement of the judgment, constitutes the rendition of the judgment on appeal. *Rubenstein v Rubenstein* (2000) 81 CA4th 1131, 1145, 97 CR2d 707; 9 Witkin, California Procedure, *Appeal* §831 (5th ed 2008). The filing date determines when the judgment becomes final. Cal Rules of Ct 8.264(b). See §17.6.

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III. AFFIRMANCE, MODIFICATION, AND REVERSAL OF THE TRIAL COURT'S JUDGMENT

A. Extent of Appellate Court's Authority

§17.8 1. Reviewing Court's Powers on Appeal

When a case on appeal is submitted for decision, the reviewing court may affirm, reverse, vacate, or modify the judgment or order appealed from, and "may direct the proper judgment or order to be entered, or direct a new trial or further proceedings." CCP §43.

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§17.9 2. Restrictions on Reviewing Court's Powers

The reviewing court's power is restricted, however, by precedent (see §§5.48-5.57), by the law governing appellate review when the judgment or the findings are attacked as being unsupported by the evidence (see §§5.18-5.22), and by Cal Const art VI, §13 when error is assigned (see §§5.29-5.39).

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§17.10 3. Effect of Finding of Error

Generally, when the court finds an error requiring reversal, it does not consider other points raised. Discussion of issues not necessary to the decision in the case would have no binding precedential value and would be merely advisory. *Young v Three for One Oil Royalties* (1934) 1 C2d 639, 648, 36 P2d 1065; *Agricultural Labor Relations Bd. v Laflin & Laflin* (1979) 89 CA3d 651, 662 n11, 152 CR 800. For a thorough discussion of the general rule and exceptions to it, see 9 Witkin, California Procedure, *Appeal* §§416-458 (5th ed 2008).

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B. Affirmance

§17.11 1. When Court Will Affirm Judgment

Generally, trial court orders and judgment are presumed to be correct, and the burden is on appellant to demonstrate error. The appellate court will affirm a judgment if it determines that the judgment or order appealed from is supported by substantial evidence (see §§5.18-5.22), that the court did not abuse its discretion (see §§5.23-5.28), and that, if there was error, it was not prejudicial and did not result in a miscarriage of justice (see §§5.29-5.39).

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2. Effect of Affirmance

§17.12 a. General Rule

The general rule is that an affirmance ends the litigation by sustaining the trial court's decision. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 701, 107 CR2d 149. Respondent can enforce the judgment, the trial court cannot modify it, and further attack on the judgment is improper. See 9 Witkin, California Procedure, *Appeal* §853 (5th ed 2008).

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§17.13 b. Exceptions to General Rule

There are some exceptions to the general rule:

- Affirmance of an order granting a new trial leaves no final judgment in effect and subjects the case to retrial. *Kramer v Gaddis* (1976) 56 CA3d 837, 843, 128 CR 860; *Freeman v LaMorte* (1957) 148 CA2d 670, 675, 307 P2d 734.
- A second exception is that affirmance of a void judgment or order is itself void and imparts no validity to the void judgment (*Pioneer Land Co. v Maddux* (1895) 109 C 633, 42 P 295) or order (*Hager v Hager* (1962) 199 CA2d 259, 18 CR 695). A judgment void on its face or otherwise subject to collateral attack is not protected by affirmance on appeal unless the basis for collateral attack has become res judicata in the appeal. A purported affirmance of a nonexistent portion of the judgment is also ineffective. *Blache v Blache* (1951) 37 C2d 531, 233 P2d 547.
- A third exception is that even after affirmance the trial court retains jurisdiction to correct clerical errors. See California Trial Practice: Civil Procedure During Trial §25.80 (3d ed Cal CEB 1995).

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§17.14 c. Effect on Trial Court Jurisdiction

Although affirmance returns jurisdiction to the trial court for the purpose of enforcing the judgment, the trial court is without power to modify or otherwise render a different judgment. An exception to this rule occurs when the appellate court affirms the judgment with directions. See, *e.g., Vandenbergh v Davis* (1961) 190 CA2d 694, 12 CR 222 (judgment affirmed; trial court directed to determine attorney fees and add to amount of judgment).

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§17.15 3. Summary Affirmance

Summary affirmance is equivalent to dismissal of the appeal, leaving the parties where they stood before the notice of appeal was filed. 9 Witkin, California Procedure, *Appeal* §853 (5th ed 2008). Summary affirmance is used sparingly because the appellate court cannot usually determine whether the appeal is insubstantial without studying the record. If review of the record is necessary, the court usually hears the appeal and permits respondent to submit a request in respondent's brief that a penalty be assessed against petitioner if the appeal is found to be frivolous or taken for the purpose of delay. In rare cases, when the insubstantiality of the appeal is evident or can be established by judicial notice or other simple documentary showing, the court may properly affirm summarily. See, *e.g., Webman v Little Co. of Mary Hosp.* (1995) 39 CA4th 592, 46 CR2d 90 (failure to produce adequate record can result in dismissal of appeal or summary affirmance of judgment); *Electronic Equip. Express v Donald H. Seiler & Co.* (1981) 122 CA3d 834, 176 CR 239 (summary affirmance on cross-appeal, noting respondents' failure to provide record or argument on issues raised in notice of cross-appeal); *Efron v Kalmanovitz* (1960) 185 CA2d 149, 8 CR 107; *Christian v Christian* (1960) 183 CA2d 720, 7 CR 154.

JUDICIAL PERSPECTIVE: I've never used the device of summary affirmance. If appellant has failed to produce an adequate record, dismissal of the appeal is more likely.

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§17.16 4. Affirmance With Sanctions

If the reviewing court finds an appeal frivolous or taken for the purpose of delay, it may affirm the judgment and impose sanctions. CCP §907; Cal Rules of Ct 8.276(a); *Marriage of Flaherty* (1982) 31 C3d 637, 654, 183 CR 508; *Hersch v Citizens Sav. & Loan Ass'n* (1983) 146 CA3d 1002, 1012, 194 CR 628; *Pollock v University of S. Cal*. (2003) 112 CA4th 1416, 6 CR3d 122. For further discussion, see §§20.10-20.34.

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C. Modification

§17.17 1. Modification Is Proper to Correct Errors

Modification of the trial court's judgment is the proper remedy for several types of errors. It is used most often when the judgment contains an obvious error, *e.g.,* a clerical error in the computation of damages. *Campbell v Southern Pac. Co.* (1978) 22 C3d 51, 63, 148 CR 596, 603. See also *Nunes v Nunes* (1964) 62 C2d 33, 41 CR 5 (judgment for divorce affirmed as modified by striking provision clouding title). When the trial court has inadvertently omitted a cause of action, the appropriate course is for the appellate court to amend the judgment to reflect the manifest intent of the trial court. *Prichard v Liberty Mut. Ins. Co.* (2000) 84 CA4th 890, 901, 101 CR2d 298.

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§17.18 a. Incorrect or Inadequate Factual Determination in Nonjury Trial

If the error involves incorrect or inadequate factual determinations in a nonjury trial, the appellate court may change the trial court's factual determinations. CCP §909. Furthermore, if, as a result of the change, the judgment entered by the trial court is erroneous as a matter of law, the appellate court may also modify the judgment and affirm it as modified. *People v Good* (1963) 223 CA2d 298, 35 CR 825; *Hardy v Hardy* (1958) 164 CA2d 82, 330 P2d 281.

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§17.19 b. Judgment That Does Not Conform to Pleading or Evidence

Sometimes a judgment is erroneous because it incorrectly exceeds the amount prayed for (*Frost v Mighetto* (1937) 22 CA2d 612, 71 P2d 932) or does not conform to the evidence (*Riff v Mayhew* (1949) 90 CA2d 712, 203 P2d 812; *Yahr-Donen Corp. v Crocker* (1947) 80 CA2d 675, 182 P2d 209). In that event, the court may correct the judgment and affirm it as modified. For further discussion of types of errors correctable by modification, see 9 Witkin, California Procedure, *Appeal* §§859-862 (5th ed 2008).

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§17.20 c. Record Must Indicate Correct Judgment

Reversal rather than modification is the proper remedy when the record does not clearly show what the correct judgment should be. See, *e.g., Eby v Bensemon* (1960) 177 CA2d 756, 2 CR 503. See generally *Boyle v Hawkins* (1969) 71 C2d 229, 232 n3, 78 CR 161.

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§17.21 2. Three Methods of Modification

The reviewing court may modify a judgment or an order in one of three ways:

- **Modify judgment and affirm as modified.** It may order the judgment or the order modified and affirm it as modified. *City of Newport Beach v Sasse* (1970) 9 CA3d 803, 813, 88 CR 476; *Rosenthal v Rosenthal* (1966) 240 CA2d 927, 50 CR 385.
- **Remand to trial court with directions to modify.** It may remand the case to the trial court with directions to modify the judgment or order in a specified way and affirm it as so modified. *Larson v Barnett* (1950) 101 CA2d 282, 291, 225 P2d 297; *Elliott v Agajanian* (1937) 19 CA2d 244, 251, 64 P2d 1159.
- **Require consent to modification as condition of affirmance.** Finally, the court may require as a condition of affirmance that the parties consent to modification in the form of a remission or an addition, or, alternatively, that the judgment be reversed. If the consent is filed, "the finality period runs from the filing date of the consent." Cal Rules of Ct 8.264(d). For further discussion, see §§17.22-17.25.

JUDICIAL PERSPECTIVE: In my experience, when an error required only modification of the judgment, the case was remanded to the trial court with directions to modify rather than being modified by the court of appeal and affirmed as modified. Remand allows the trial court to issue a new minute order necessary to reform the judgment.

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§17.22 3. Consent to Modification as Condition of Affirmance

The reviewing court has the authority to modify a judgment for damages if the correct amount is clearly ascertainable from the record. When the amount is uncertain, the appellate court has no authority to modify the judgment, even if it appears erroneous. See §17.20. However, the court may render a conditional judgment; *i.e.,* it may give one of the parties the choice of either consenting to a proposed modification (usually in the form of a specific reduction of, or addition to, the amount of damages awarded) or accepting reversal of the judgment and a new trial on the issue of damages alone. This power to render a conditional judgment, or a judgment in the alternative, is implied in CCP §43.

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§17.23 a. Tactical Considerations for Urging Conditional Judgment

When appellant's main contention is that the damages awarded were excessive, appellant may be wise to urge the reviewing court to modify and affirm the judgment, or to affirm the judgment on the condition that respondent consent to a specified remission. This tactic may be preferable to seeking a reversal and remand for new trial, with the attendant uncertainty, cost, and delay of retrial.

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§17.24 b. Procedure

If the reviewing court orders that a judgment be reversed and a new trial granted, or that the judgment be affirmed conditioned on the prevailing party's consent to a remission in the judgment, or conditioned on the losing party's consent to an addition in the judgment, then, unless otherwise ordered, the judgment of reversal and granting of a new trial becomes final 30 days after the decision is filed unless the party to the remission or addition files two copies of a written consent in the reviewing court within that time. One copy must be transmitted with the remittitur to the superior court. If a consent is filed, the finality period runs from the filing date of the consent. Cal Rules of Ct 8.264(d). For a form of the consent, see §17.25.

Accordingly, the reviewing court may order that, if the proposed remission or addition is made within the prescribed time, the judgment will be affirmed; otherwise, it will be reversed, or it will be reversed and remanded to the trial court for trial only on the damage issue. *Burnett v National Enquirer* (1983) 144 CA3d 991, 1018, 193 CR 206 (punitive damage issue); *Rosener v Sears, Roebuck & Co.* (1980) 110 CA3d 740, 757, 168 CR 237 (same).

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§17.25 c. Form: Consent to Modification of Judgment

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17.25-1 Consent to modification of judgment

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

CONSENT TO MODIFICATION OF JUDGMENT

This Court, having ordered that the judgment of the Superior Court of California for the County of _ _[*county*]_ _**, entered on** _ _[*date*]_ _**, in favor of** _ _[*name of party*]_ _**,** _ _[*e.g., plaintiff and respondent*]_ _**, and against** _ _[*name of party*]_ _**,** _ _[*e.g., defendant and appellant*]_ _**, be reversed and a new trial granted, or that, in the alternative, the judgment be affirmed on the condition that**

[*Set forth in the exact words the condition on which the judgment will be affirmed*]

_ _[*e.g., respondent consent to a remission of the judgment in the sum of $3000*]_ _**.**

[*or*]

_ _[*e.g., appellant consent to an addition to the judgment in the sum of $3000*]_ _**.**

[*Continue*]

_ _[*Name(s) of consenting party(ies)*]_ _ **consent(s) under the terms and conditions of the above order and, under California Rules of Court 8.264(d), to the alternative of modification of the judgment as set forth in the order of this court and, particularly, without limiting the generality of the foregoing, that the judgment be modified by** _ _[*set forth exact form of modification, e.g., reducing the principal amount of the judgment in the amount of $3000*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*appellant(s)/respondent(s)*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name of consenting party*]_ _
_ _[*Appellant/Respondent*]_ _

Copies: Original and one copy to file with the reviewing court clerk (Cal Rules of Ct 8.264(c); see Comment below); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: Two copies of the written consent must be filed with the reviewing court within 30 days after the decision is filed; one copy is sent to the trial court with the remittitur. If the party required to file a written consent has not done so within the prescribed 30-day period, the judgment of reversal and granting of a new trial becomes final. If the consent is filed, the finality period runs from the filing date of the consent. Cal Rules of Ct 8.264(d).

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§17.26 D. Reversal

The reviewing court may reverse all or a part of the judgment or order from which an appeal is taken. The court may also reverse as to some of the parties and affirm as to others. Reversal may be general and unqualified ("the judgment is reversed"), or it may include directions to the trial court.

- **General and unqualified reversal.** A general and unqualified reversal of all or of part of the judgment is proper when the appellate court finds that prejudicial error occurred and a different result would have been probable in the absence of the error. For full discussion of prejudicial error, see §§5.29-5.39.
- **Reversal with directions.** Whenever the reviewing court directs the trial court to make any change in the judgment or order, to enter a certain judgment, to proceed with a new trial, or to carry out instructions on further proceedings, it issues a reversal with directions. Reversal with directions does not necessarily denote disapproval of the entire judgment; it may mean that the reviewing court upheld the lower court on all but a minor point.

If the court reverses the judgment on which fees and costs are awarded, it must also reverse the judgment for fees and costs. *Metropolitan Water Dist. v Imperial Irrig. Dist*. (2000) 80 CA4th 1403, 1436, 96 CR2d 314.

Court's duty to report reversal for attorney misconduct or misrepresentation. A court that reverses a judgment because of counsel's misconduct, incompetent representation, or willful misrepresentation must report the matter to the State Bar of California, which may result in disciplinary action. Bus & P C §6086.7.

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§17.27 1. Partial Reversal

Partial reversal may occur only if portion of judgment is severable. The reviewing court may reverse part of a judgment, with or without directions, only if that part is severable. *Gonzales v R.J. Novick Constr. Co.* (1978) 20 C3d 798, 144 CR 408; *American Enter. v Van Winkle* (1952) 39 C2d 210, 216, 246 P2d 935.

Test for severability. The court in *American Enter. v Van Winkle, supra,* stated the test for severability as follows (39 C2d at 217):

> The test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or interdependent upon, the matters or issues which have not been attacked.... "[T]o be severable, and therefore appealable, any determination of the issues so settled by the judgment … must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed."

When partial reversal generally occurs. Partial reversal of a severable judgment generally occurs in three situations:

- Appeal from a portion of the judgment or order;
- Appeal by fewer than all the parties; and
- Appeal from the entire judgment or order.

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a. Appeal From Severable Portion of Judgment

§17.28 (1) Court's Review of Severable Judgment Limited to Portion From Which Appeal Is Taken

A party may appeal from part of a judgment or order and, if the appellate court finds that the judgment or order is severable and that there was reversible error in the portion appealed from, it will reverse in part. When the portion appealed from is severable, the appellate court has no jurisdiction to review the remainder. See *American Enter. v Van Winkle* (1952) 39 C2d 210, 216, 246 P2d 935. Following this rule, the court has held that when the appeal raises only one severable issue that the court affirms, appellant may not then argue that the court should have considered an issue raised by respondent's cross-appeal when that issue was conditional only, *i.e.*, to be abandoned if the court affirmed that portion of the judgment appealed from by appellant. *Gonzales v R.J. Novick Constr.* Co. (1978) 20 C3d 798, 804, 144 CR 408.

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§17.29 (2) When Appeal Is Only From Portion of Judgment, Respondent May Need to File Cross-Appeal to Protect Right to Appeal Unfavorable Portions of Verdict

Generally speaking, a party aggrieved by a judgment must file an appeal in order to challenge it. *American Enter. v Van Winkle* (1952) 39 C2d 210, 221, 246 P2d 935. The courts thus view a respondent who fails to cross-appeal as acquiescing in the judgment in its entirety. Therefore, in most instances, remand does not entitle a respondent who was aggrieved by a portion of the judgment, but who failed to file a cross-appeal, to receive a new trial on the issues encompassed within that unfavorable portion. *Gonzales v R.J. Novick Constr. Co.* (1978) 20 C3d 798, 144 CR 408. For example, the reversal of an award of punitive damages does not entitle the defendant to a new trial on liability and compensatory damages. *Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 774, 63 CR2d 859. Remand in this instance is limited to a new trial on punitive damages.

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§17.30 (3) Partial Appeal of Nonseverable Judgment Treated as Appeal From Entire Judgment

If a judgment is not severable, a partial appeal is not permitted. Instead, the reviewing court will treat the purportedly partial appeal as an appeal from the entire judgment, and may reverse, affirm, or modify the whole judgment. *American Enter. v Van Winkle* (1952) 39 C2d 210, 217, 246 P2d 935 (judgment affirmed as modified after consideration of inseparable issues of rights of parties in property and whether there was a taking, even though issues were not all raised on appeal); *Robinson v Puls* (1946) 28 C2d 664, 667, 171 P2d 430 (reversible error occurred on legal issues; entire judgment reversed because impracticable to separate legal and equitable issues on appeal). Thus, the appellate courts may rule that an unappealed portion of the judgment is nonseverable from that portion appealed and reverse parts of the judgment with which the appellant has no quarrel. *Hamasaki v Flotho* (1952) 39 C2d 602, 609, 248 P2d 910.

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§17.31 (4) Trial Court Consideration of Issues on Remand That Appellate Court Failed to Address

An issue on remand is whether the *trial court* may rule that portions of the judgment that the appellate court did not address are nonseverable and order a new trial of unappealed issues on its own accord. No published opinion from the California courts addresses this specific issue. But there are good arguments on both sides of the issue. On one hand, the "law of the case" doctrine (discussed in §§17.86-17.105) may preclude the trial court from ruling portions of the judgment nonseverable when the appellate court has failed to do so. The doctrine holds that a trial court on remand must follow those points of law either decided explicitly or by necessary implication by the appellate court. *Olson v Cory* (1983) 35 C3d 390, 399, 197 CR 843; *Lindsey v Meyer* (1981) 125 CA3d 536, 541, 178 CR 1. When the appellate court reviews only a portion of a judgment, it arguably decides by necessary implication that the portion of the judgment reviewed is severable from the remainder. If this is the case, the trial court on remand should retry only those issues raised in the appeal.

On the other hand, most of the cases holding that an appellate court decided a point of law by "necessary implication" involve the fundamental issue of whether the appellate court had the power to hear the appeal in the first place. See *Olson v Cory, supra* (law of the case precluded respondent from raising issue of appealability on second appeal because first appellate court decided issue by necessary implication when it heard first appeal); *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 579, 145 CR 665 (issue of whether plaintiff had standing to sue was necessarily involved in first appeal and impliedly decided in favor of plaintiff's standing). In contrast, an unqualified reversal on an appeal from a portion of the judgment below raises not a jurisdictional issue, but an interpretive issue. In addition, the interrelationship of the issues might become more clear as the parties prepare for the second trial, which militates in favor of giving the trial court discretion to determine whether the issues are nonseverable. Under this latter interpretation, a losing respondent might successfully argue before the trial court on remand that the issues are nonseverable and justice requires a full retrial.

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§17.32 (5) Issue of Severability When Jury Renders General Verdict

The issue of severability may also arise when a jury renders a general verdict. The court may be unable to identify on which theory the jury based its verdict and therefore unable to determine the type of damages that would be proper. *Huang v Garner* (1984) 157 CA3d 404, 425, 203 CR 800, disapproved on other grounds in *Aas v Superior Court* (2000) 24 C4th 627, 649, 101 CR2d 718 (reversed for retrial of issues of liability and damages when court could not identify theory on which jury returned general verdict for plaintiffs and therefore could not determine proper type of damages).

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§17.33 (6) Inadequate Damages Resulting From Jury Compromise

When a plaintiff appeals an award of inadequate damages, the appellate courts hesitate to reverse the trial court judgment on the issue of damages alone. As a general rule, "it is only when the verdict allows a substantial, even though inadequate, amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue." *Hamasaki v Flotho* (1952) 39 C2d 602, 607, 248 P2d 910. On the other hand, when the jury awards a sum that is both inadequate and insubstantial, the appellate courts tend to view the insubstantiality of the award as evidence that the jury "compromised" the issues of liability and damages. 39 C2d at 602. In other words, the jury may have awarded the plaintiff an insubstantial sum because it was unconvinced of the defendant's fault yet sympathetic to the plaintiff's plight. If the appellate court finds evidence of a jury compromise, it must either deny all relief to appellant, or order a new trial on both the issue of liability and the issue of damages. 39 C2d at 608.

However, the issue that arises on remand is whether the trial court should retry the liability issue when the plaintiff appealed only the inadequacy of damages, and the appellate court's opinion does not explicitly order a retrial on liability. Given the general rule that a partial reversal leaves those portions of the trial court judgment not appealed intact, if the appellate court's opinion gives no indication that a jury compromise produced the inadequate damages award, then the trial court should retry only the damages issue. Nonetheless, in light of *Hamasaki,* if the opinion clearly indicates that the reviewing court believes that a jury compromise produced the inadequate damages award, then the trial court should assume the appellate court intended to reverse on both liability and damages. Thus, it should retry both issues.

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§17.34 (7) Failure to Instruct on Comparative Negligence Requires New Trial on Liability

When the appellate court reverses because the trial court failed to instruct on comparative negligence, whether the reversal entitles the defendant to a new trial on liability or merely damages is not immediately obvious. But because comparative negligence reduces a defendant's damages by apportioning fault, it goes directly to liability. In other words, a trial court's failure to instruct on comparative negligence infects both the finding of liability and the damages award. Thus, when an appellate court reverses for failure to instruct on comparative negligence, the appellant should receive a new trial on the issue of liability. See *Patrick v Maryland Cas. Co.* (1990) 217 CA3d 1566, 1575, 267 CR 24.

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§17.35 (8) Marital Dissolution Cases

Some severability issues are unique to marital dissolution cases. A party may appeal from a decree of dissolution of marriage that decides property rights without appealing from the part of the decree that dissolves the marriage. Fam C §2341(b); *Harrold v Harrold* (1954) 43 C2d 77, 271 P2d 489; *Marriage of Fink* (1976) 54 CA3d 357, 126 CR 626. Moreover, an appeal may be taken from a decision on a bifurcated family law issue that is certified for appeal by the trial court and accepted for review by the court of appeal. CCP §904.1(a)(10); Fam C §2025. For discussion of certification and appeal of bifurcated issues, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§19.88-19.90 (Cal CEB Annual). In the absence of certification for appeal, an order to bifurcate a family law proceeding for separate hearings on dissolution and on property issues is not an appealable order. 54 CA3d at 360.

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§17.36 b. Appeal by Fewer Than All Parties

The general rule is that when the litigation involves multiple parties and fewer than all parties appeal, the judgment of the trial court becomes final for the nonappealing parties even if it is reversed for the other parties. *Lake v Superior Court* (1921) 187 C 116, 200 P 1041; *General Ins. Co. v Workers' Compensation Appeals Bd.* (1980) 104 CA3d 278, 283, 163 CR 537. This rule does not apply when the judgment is not severable. See *Estate of Sanderson* (1960) 183 CA2d 740, 6 CR 893. In other words, when a portion of a judgment adverse to a nonappealing party is so interwoven with the whole that appeal from one part affects the others, the reviewing court may reverse the entire judgment if necessary to achieve justice. *Estate of McDill* (1975) 14 C3d 831, 840, 122 CR 754; *Blache v Blache* (1951) 37 C2d 531, 233 P2d 547; *Harvey v White* (1963) 213 CA2d 275, 28 CR 601.

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§17.37 c. Appeal From Entire Judgment

Even if the appeal is taken from the entire judgment or order, the reviewing court may properly order a partial reversal if the error complained of is severable and does not affect other issues (*Hasson v Ford Motor Co.* (1977) 19 C3d 530, 552, 138 CR 705, overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607) or does not affect other appealing parties (see *Noack v Zellerbach* (1936) 14 CA2d 249, 57 P2d 1390). The court may order an unqualified reversal (see §§17.38-17.44) or a reversal with directions (see §§17.45-17.56) on the erroneously decided severable issue.

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2. Unqualified Reversal

§17.38 a. General Rule on Effect of Unqualified Reversal

A general and unqualified reversal (1) vacates the judgment or order of the trial court, (2) restores the proceedings and the litigants to the status they had before the cause was tried, except that, as far as applicable, on retrial the reviewing court's opinion must be followed, and (3) ordinarily has the effect of remanding the cause for a new trial. Thus, the reviewing court need not expressly direct that the cause be remanded for retrial when it reverses the judgment. *Weisenburg v Cragholm* (1971) 5 C3d 892, 896, 97 CR 862; *Lewis v Upton* (1984) 151 CA3d 232, 236, 198 CR 494; *Salaman v Bolt* (1977) 74 CA3d 907, 914, 141 CR 841. An unqualified reversal also vacates all supplementary proceedings and nullifies incidental matters or claims based on the judgment. See, *e.g., Charles L. Harney, Inc. v Durkee* (1951) 107 CA2d 570, 580, 237 P2d 561 (when judgment reversed, special order after judgment also reversed); *First-Trust Joint Stock Land Bank v Meredith* (1937) 19 CA2d 103, 105, 64 P2d 977 (when judgment reversed, proceeding for execution on reversed judgment also reversed).

A trial court that is given no specific instructions at all—or that is simply told to conduct further proceedings consistent with the court of appeal's opinion—has jurisdiction to interpret the appellate court's decision—*i.e.,* to decide what types of proceedings would or would not be "consistent" with the opinion. *Harris v Hensley* (1931) 214 C 420, 6 P2d 253.

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b. Exceptions to the Right of Full Retrial

§17.39 (1) Appellate Court Clearly Intends That Judgment Be Entered for One Party

An unqualified reversal does not remand the case for trial if the appellate court opinion as a whole makes clear the court's intent that the trial court enter judgment for one of the parties. *Moore v City of Orange* (1985) 174 CA3d 31, 219 CR 301; *Stromer v Browning* (1968) 268 CA2d 513, 518, 74 CR 155. However, the trial courts should interpret this exception narrowly, and should not enter judgment for one of the parties in cases "where the prior opinion does not unmistakably express an intent to bar retrial." *Bank of America v Superior Court* (1990) 220 CA3d 613, 623, 269 CR 596. Moreover, the trial court should not infer an intent to bar retrial when the parties continue to dispute the facts, raising the possibility that they will present new evidence on retrial. 220 CA3d at 623.

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§17.40 (2) Reversal of Order Granting New Trial

Reversal of an order granting a new trial automatically reinstates the original trial court judgment unless the losing party has filed a protective cross-appeal from the judgment. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 699, 106 CR 1.

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§17.41 (3) Reversal of Judgment Notwithstanding the Verdict (JNOV)

Similarly, if the appellate court reverses a JNOV without directions, the reversal entitles the prevailing party to entry of judgment in conformity with the verdict. *Ferran v Mulcrevy* (1935) 9 CA2d 129, 131, 48 P2d 984.

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§17.42 (4) Reversal of Order Denying JNOV

After reversal of a trial court's judgment notwithstanding the verdict (JNOV), another trial is unnecessary; the successful appellant is entitled to have judgment entered in accordance with the verdict. *Ferran v Mulcrevy* (1935) 9 CA2d 129, 48 P2d 984. Conversely, when a trial court denies a motion for JNOV and the appellate court finds the evidence insufficient to support the verdict, CCP §629 controls the appellate court's disposition of the appeal. In this situation, §629 requires that judgment be entered for appellant; a retrial is inappropriate. *Bank of America v Superior Court* (1990) 220 CA3d 613, 269 CR 596. See also *Morton v California Sports Car Club* (1958) 163 CA2d 685, 329 P2d 967.

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§17.43 (5) Reversal for Insufficiency of Evidence

Whether the appellate court directs a judgment NOV under CCP §629, or, alternatively, reverses the trial court's decision for insufficiency of evidence, the same result obtains. In both cases the appellant prevails without retrial. *Bank of America v Superior Court* (1990) 220 CA3d 613, 624, 269 CR 596. When the appellate court directs judgment NOV or reverses for insufficiency of evidence, it has necessarily determined that the respondent received a full and fair opportunity to present his evidence at trial. 220 CA3d at 624. Thus, mere failure of the appellate court to comply with the technical requirements of §629 should not subject the appellant to the prospect of further litigation. In *McCoy v Hearst Corp*. (1991) 227 CA3d 1657, 278 CR 596, the appellate court, called on to interpret the California Supreme Court's reversal of the trial court judgment, held that "[w]hen a judgment for the plaintiff is reversed for insufficiency of the evidence the appellate court is, in effect, advising the trial court that a nonsuit, directed verdict or JNOV should have been entered." 227 CA3d at 1661.

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§17.43A (6) Reversal of Erroneously Denied Directed Verdict

When the trial court erroneously denies a defense motion for a directed verdict and permits the matter to proceed to a jury verdict in favor of the plaintiff, the remedy on appeal is to direct the court to enter judgment in favor of the defendant. *Quinn v City of Los Angeles* (2000) 84 CA4th 472, 484, 100 CR2d 914.

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§17.44 c. Effect of Partial Reversal Without Qualification

A partial reversal occurs when the appellate court reverses the trial court judgment on a specific issue or issues, but does not address the remainder of the judgment in its opinion. A partial reversal is "unqualified" where the appellate court provides no specific directions regarding how the issues put at large by the partial reversal should be retried. A partial unqualified reversal has the same effect on that part of the judgment or order reversed that an unqualified reversal has on the whole judgment or order. *Hall v Superior Court* (1955) 45 C2d 377, 289 P2d 431; *Rogers v Bill & Vince's, Inc.* (1963) 219 CA2d 322, 325, 33 CR 129.

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§17.45 3. Reversal With Directions

When reversing a judgment or order on appeal, the reviewing court is not limited to a general or unqualified reversal. It may also direct the trial court to enter the proper judgment or order, and it may direct a new trial or further proceedings. CCP §43.

In nonjury cases, an appellate court may direct the entry of any judgment or order, and it may make any further or other order as may be required. CCP §909. Although appellate courts have broad authority to issue directions with a reversal, several types of directions are given most often. See §§17.35-17.44.

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§17.46 a. Direction to Enter Different Judgment

Authorization. The power to direct entry of the proper judgment or order (CCP §43) is invoked only when the reviewing court, as a matter of law, can determine all the parties' rights on the basis of the record. If conflicting evidence was submitted at trial on the issue being decided on appeal, and if the evidence is insufficient to sustain judgment for respondent, the reviewing court will order a general reversal, rather than direct entry of a different judgment, because other relevant evidence may become available for presentation on retrial. *Pollitz v Wickersham* (1907) 150 C 238, 251, 88 P 911; *Williams v Dougan* (1950) 100 CA2d 421, 429, 223 P2d 631; *Scalf v Eicher* (1935) 11 CA2d 44, 55, 53 P2d 368. But when the facts are undisputed or indisputable and the record shows that only one judgment is proper, the reviewing court will order entry of judgment in appellant's favor. *Continental Cas. Co. v Phoenix Constr. Co.* (1956) 46 C2d 423, 440, 296 P2d 801; *Pacific Home v County of Los Angeles* (1953) 41 C2d 844, 854, 264 P2d 539; *Heinly v Lolli* (1969) 2 CA3d 904, 916, 82 CR 914.

When it usually occurs. A direction to enter judgment is usually appropriate when the appeal was taken on an agreed statement of facts. *Cocking v State Farm Mut. Auto. Ins. Co.* (1970) 6 CA3d 965, 971, 86 CR 193. It is also proper when a motion for nonsuit, directed verdict, or judgment notwithstanding the verdict was denied that should have been granted. See, *e.g., Williams v Fairhaven Cemetery Ass'n* (1959) 52 C2d 135, 141, 338 P2d 392; *Cohen v Penn Mut. Life Ins. Co.* (1957) 48 C2d 720, 730, 312 P2d 241.

Methods for directing entry of different judgment. The court may reverse and vacate a judgment and direct the trial court to enter a different judgment as set out expressly in the appellate opinion. See, *e.g., Pastor v Younis* (1965) 238 CA2d 259, 265, 47 CR 684. The court may also reverse a judgment, remand for additional findings on the amount of damages, for example, and direct entry of a different judgment in appellant's favor in an amount dictated by those findings. See, *e.g., Los Angeles Mut. Ins. Co. v Cawog* (1973) 30 CA3d 378, 387, 106 CR 307.

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b. Other Directions Given on Reversal

§17.47 (1) Direction to Allow Amendment of Pleadings

The appellate court may reverse with directions that the trial court allow amendment of the pleadings. *Chitwood v County of Los Angeles* (1971) 14 CA3d 522, 92 CR 441; *Coffelt v Coffelt* (1964) 229 CA2d 659, 40 CR 513. The appellate court's directions on specific amendments do not deprive the trial court of discretion to allow other amendments on reversal. *Ellis v Witmer* (1906) 148 C 528, 531, 83 P 800.

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§17.48 (2) Direction to Dismiss Action

When an action has become moot pending appeal, and the appellate court does not want to impliedly affirm the judgment by dismissing the appeal, the court will reverse the judgment and direct dismissal of the action as moot by the trial court. *Paul v Milk Depots, Inc.* (1964) 62 C2d 129, 41 CR 468; *Lee v Gates* (1983) 141 CA3d 989, 992, 190 CR 682. See also *Bell v Board of Supervisors* (1976) 55 CA3d 629, 637, 127 CR 757; *Callie v Board of Supervisors* (1969) 1 CA3d 13, 19, 81 CR 440. Reversal with directions to dismiss is also proper when the lower court had no jurisdiction to entertain the proceeding. *In re McGee* (1951) 36 C2d 592, 599, 226 P2d 1.

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§17.49 (3) Direction to Retry on Fewer Than All Issues

The appellate court may direct retrial of a limited issue if it can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial. *Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 63 CR2d 859; *Brewer v Second Baptist Church* (1948) 32 C2d 791, 801, 197 P2d 713; *Walker v Given Int'l* (1979) 100 CA3d 54, 160 CR 647. Frequently this occurs when the appellate court affirms on a liability issue but reverses with directions to retry the damages issue. *Shoemake v F.H. Woodruff & Son* (1964) 227 CA2d 587, 38 CR 817. In some cases, however, when the reviewing court determines that an inadequate award of damages was the result of a compromise verdict on issues of liability and damages, the court will remand for retrial of both issues rather than solely on the issue of damages. *Clifford v Ruocco* (1952) 39 C2d 327, 329, 246 P2d 651; *Wilson v R.D. Werner Co.* (1980) 108 CA3d 878, 883, 166 CR 797.

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§17.50 (4) Direction to Reenter Original Judgment

When a trial court's judgment is superseded by a void modified judgment, the appellate court may direct reentry of the original judgment as of the date of transmission of the remittitur. *Avery v Associated Seed Growers, Inc.* (1963) 211 CA2d 613, 631, 27 CR 625 (appellate court directed reinstatement of original judgment effective on transmission of remittitur when modified judgment was void for lack of notice and hearing; general reversal would have reinstated original judgment, which would have been unjust because time to move for new trial or appeal from original judgment had expired).

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§17.51 (5) Direction on Conclusions and Findings

The reviewing court may direct the trial court to strike all or part of certain conclusions and findings, to make new conclusions and findings, and to enter a new judgment in accordance with these changes. *De Witte v Calhoun* (1963) 221 CA2d 473, 482, 34 CR 491.

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§17.52 (6) Direction to Conduct Further Proceedings

The appellate court may direct that the judgment be reversed and remanded for further proceedings consistent with the views expressed in the opinion. *Finch v Brenda Raceway Corp.* (1994) 22 CA4th 547, 556, 27 CR2d 531; *Estate of Hearst* (1977) 67 CA3d 777, 786, 136 CR 821; *Trotsky v Los Angeles Fed. Sav. & Loan Ass'n* (1975) 48 CA3d 134, 155, 121 CR 637. When given this type of instruction, the trial court has jurisdiction to interpret the appellate court's decision; error in the exercise of its jurisdiction may be reviewed on appeal from the new judgment. *Harris v Hensley* (1931) 214 C 420, 6 P2d 253; *Estate of Dargie* (1941) 48 CA2d 101, 119 P2d 438. The practice of reversing and remanding with the direction to conduct further proceedings consistent with the opinion was criticized by the court in *Coffee-Rich, Inc. v Fielder* (1975) 48 CA3d 990, 1002, 122 CR 302.

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c. Effect of Directions on Trial Court

§17.53 (1) Jurisdiction of Trial Court on Remand

Jurisdiction of a cause is revested in the trial court on reversal and remand, but only such jurisdiction as is defined in the remittitur. *Hampton v Superior Court* (1952) 38 C2d 652, 242 P2d 1; *Frankel v Four Star Int'l* (1980) 104 CA3d 897, 902, 163 CR 902. The limit and extent of lower court proceedings after remand depends on the reviewing court's order. *Tsarnas v Bailey* (1962) 205 CA2d 593, 23 CR 336. On retrial of a case after reversal with instructions, the trial court must follow the directions. *Kenney v Kenney* (1954) 128 CA2d 128, 274 P2d 951 (overruled on other grounds in *See v See* (1966) 64 C2d 778, 785, 51 CR 888); *Carter v Superior Court* (1950) 96 CA2d 388, 215 P2d 491. Thus, when the reviewing court orders a reversal with directions, its directions are mandatory. For discussion of remittitur, see chap 18.

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§17.54 (2) Trial Court's Nonconforming Actions Are Void

Any trial court action that does not follow the appellate court's direction is void. *Frankel v Four Star Int'l* (1980) 104 CA3d 897, 902, 163 CR 902. For instance, when a cause is remanded with a direction to enter a particular judgment, the trial court must enter the judgment exactly as directed. *Hampton v Superior Court* (1952) 38 C2d 652, 242 P2d 1. It cannot allow the filing of amended or supplemental pleadings or retry the case. *Overstreet v County of Butte* (1962) 57 C2d 504, 20 CR 631; *Hampton v Superior Court, supra*. Similarly, when the appellate court reverses and directs the trial court to determine a particular issue, *e.g.,* damages, in accordance with the principles set forth in its opinion and then to enter judgment for plaintiff, the trial court must do specifically as directed; it has no authority to retry any other issue or to make any other findings. *Rice v Schmid* (1944) 25 C2d 259, 153 P2d 313; *Kenney v Kenney* (1954) 128 CA2d 128, 274 P2d 951 (overruled on other grounds in *See v See* (1966) 64 C2d 778, 785, 51 CR 888).

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§17.55 (3) Remedy for Inadvertent Omission From Appellate Court's Directions

The trial court is bound by the specific directions of the reviewing court, even if the reviewing court inadvertently omits from its instructions essential elements within the issues necessarily decided in the appeal. The aggrieved party's remedy in this situation is a petition for rehearing in the appellate court. *Hampton v Superior Court* (1952) 38 C2d 652, 242 P2d 1.

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§17.56 d. Relief When Directions Not Followed

Appeal of the judgment on retrial is a proper remedy when the trial court violates the reviewing court's specific and mandatory directions on reversal of the original judgment. *Rice v Schmid* (1944) 25 C2d 259, 153 P2d 313. Often, however, an appeal from a subsequent judgment or order made in violation of the reviewing court's directions will lead to hardship and the expense of an unnecessary trial. *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1. A writ of mandate to compel the trial court to comply with the reviewing court's directions (*Lamb v Owen* (1929) 98 CA 106, 276 P 628), or a writ of prohibition to restrain the trial court from exceeding its authority under the directions (*Hampton v Superior Court, supra*), is proper and may afford more effective relief. See *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 234, 177 CR 239; *Carter v Superior Court* (1950) 96 CA2d 388, 215 P2d 491.

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§17.57 4. Summary Reversal

Available for patently erroneous judgments. On *very rare* occasions, reviewing courts summarily reverse a patently erroneous judgment or order on motion. In *Melancon v Walt Disney Prods.* (1954) 127 CA2d 213, 273 P2d 560, the appellate court granted respondent's motion for summary reversal, holding that the power to do so exists. The court said that nothing could be gained by denying the motion, because the issue on appeal had been previously determined adversely to appellant by the California Supreme Court in a related matter. See also *Estate of Geltman* (1957) 152 CA2d 560, 314 P2d 78 (reversal ordered on motion for summary reversal with directions to enter different order); *People v Browning* (1978) 79 CA3d 320, 145 CR 45 (summary reversal granted in criminal case).

Waiver of oral argument may be necessary. Litigants have a constitutional right to oral argument in both civil and criminal appeals. *People v Pena* (2004) 32 C4th 389, 9 CR3d 107; *Moles v Regents of Univ. of Cal*. (1982) 32 C3d 867, 187 CR 557; *People v Brigham* (1979) 25 C3d 283, 157 CR 905. See also §§11.53, 16.1. Consequently, it appears that the appellate court's power to reverse can be exercised only after oral argument has been held or waived.

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§17.58 5. Reversal on Stipulation

When the parties to an appeal stipulate that the judgment or order appealed from should be set aside (*e.g.,* as a condition of settling the appeal), an order directing judgment according to the parties' agreement may, in limited circumstances, be made by the reviewing court. However, CCP §128(a)(8) contains a presumption against approving stipulated reversals based on public policy grounds, including possible erosion of public trust and disincentive for pretrial settlements. See *Muccianti v Willow Creek Care Ctr.* (2003) 108 CA4th 13, 19, 133 CR2d 1; *Hardisty v Hinton & Alfert* (2004) 124 CA4th 999, 1005, 21 CR3d 835. Code of Civil Procedure §128(a)(8) allows reversals if the court finds no possibility that the interests of the parties or nonparties will be adversely affected, and that the reasons of the parties requesting reversal outweigh the presumption against its approval. CCP §128(a)(8)(A)-(B). For an extensive discussion of stipulated reversals, see §§15.37-15.41.

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E. Restitution After Reversal or Modification

§17.59 1. Right to Restitution

Availability. If applicable to the appeal taken, there is a right to restitution if, before reversal or modification, one party profits at the expense of the other because of the trial court's erroneous order or judgment. For example, reversal often entitles the appellant to recover money he has expended or property he has used to either satisfy or stay the trial court judgment. The opposing party may have partially or fully executed its favorable judgment against the appellant before the appellate court reversed that judgment.

When a judgment or an order is reversed or modified, the reviewing court is authorized to order restitution "on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored." CCP §908. Under §908, the court may order restitution if it concludes it is in the interests of justice. *San Francisco Unified Sch. Dist. v State* (1982) 131 CA3d 54, 72, 182 CR 525. Restitution is usually granted on the theory that denial would result in unjust enrichment of the party who collected under a judgment that was later reversed. See, *e.g., Rogers v Bill & Vince's, Inc.* (1963) 219 CA2d 322, 33 CR 129.

Even when the reversal is not conclusive of the rights of the parties, as when a new trial is ordered or the cause is remanded for further proceedings, at least one court has held that restitution is mandatory in "uncomplicated cases," without regard to the possible further result. *Rogers v Bill & Vince's, Inc., supra*.

Scope. A party seeking restitution may seek not only the physical property taken, but also an accounting of profits earned on the property during the period it was held by the other party. *Erickson v Boothe* (1954) 127 CA2d 644, 274 P2d 460; *Stockton Theatres, Inc. v Palermo* (1953) 121 CA2d 616, 264 P2d 74.

Authority of trial court. Although the appellate court possesses the statutory right to order restitution under CCP §908, the trial court also has inherent power to order it, independent of statute, unless restitution would be inequitable or the parties contract that payment is to be final. *Schubert v Bates* (1947) 30 C2d 785, 789, 185 P2d 793; *Rogers v Bill & Vince's, Inc., supra*.

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§17.60 2. Methods of Obtaining Restitution

An appellant who wins reversal of a judgment may move for restitution in the appellate court, which that court may grant under CCP §908. On appellate court motions, see chap 11. However, relief is normally sought in the trial court, either by motion (*Bank of America v McLaughlin* (1940) 37 CA2d 415, 99 P2d 548) or in an independent action (*Stockton Theatres, Inc. v Palermo* (1953) 121 CA2d 616, 619, 264 P2d 74).

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§17.61 a. Motion

Granting or denying a motion for restitution rests in the trial court's sound discretion (*Bank of America v McLaughlin* (1940) 37 CA2d 415, 99 P2d 548), controlled by equitable principles (*Holmes v Williams* (1954) 127 CA2d 377, 273 P2d 931). See CCP §1005 for time requirements for notice of motion. The order on the motion is appealable, but the order will not be disturbed on appeal without a showing of a manifest abuse of discretion. *Rogers v Bill & Vince's, Inc.* (1963) 219 CA2d 322, 325, 33 CR 129. If the trial court abuses its discretion by improperly denying restitution, it will be directed to enter an order granting restitution. See, *e.g., Holmes v Williams, supra*. No setoff is available to the party opposing the motion for restitution. *Buckman v Tucker* (1937) 9 C2d 403, 71 P2d 69. But the trial court may, under equitable principles, limit the type, manner, or amount of restitution, or it may deny the motion. See, *e.g., Bank of America v McLaughlin, supra; Hansen v d'Artenay* (1936) 13 CA2d 293, 57 P2d 202.

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§17.62 b. Independent Action

A successful appellant may choose to bring an independent action for recovery of property and rights lost by an erroneous judgment or order. Because the action is equitable in nature (see, *e.g., Bank of America v McLaughlin* (1940) 37 CA2d 415, 418, 99 P2d 548), restitution is generally ordered, but it will be denied if the result would be unjust. See generally *Stockton Theatres, Inc. v Palermo* (1953) 121 CA2d 616, 619, 264 P2d 74. Although setoffs or counterclaims are not allowed in motion proceedings, they are permitted in independent actions. *Buckman v Tucker* (1937) 9 C2d 403, 408, 71 P2d 69. An independent action is like any other action based on implied contract in which a multiplicity of actions is to be avoided. Denial of the right of counterclaim in a suit for restitution would tend to promote multiplicity of suits, because plaintiff would be able to proceed to judgment on his or her claim, while defendant would be compelled to bring an independent action on his or her claim. *Buckman v Tucker, supra*.

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F. Effect of Appellate Decision on Right to Interest and Costs

§17.63 1. Interest Earned on Judgment

Interest accrues at an annual rate of 10 percent per annum on the principal amount of an unsatisfied money judgment. CCP §685.010(a). Interest is limited to simple interest. *Westbrook v Fairchild* (1992) 7 CA4th 889, 9 CR2d 277 (trial court erred in compounding interest during period between verdict and amended judgment, as well as postjudgment from date of amended judgment). In *Westbrook*, the court concluded that California's constitution, together with the relevant statutes, limit interest awarded by the trial court to the legal rate (10 percent simple interest). There is no statutory authority to compound interest. The court also found that there was no equitable power in a trial court to compound interest.

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§17.64 2. Date Judgment Begins to Bear Interest

The rules governing interest on judgments are summarized in *Stockton Theatres, Inc. v Palermo* (1961) 55 C2d 439, 442, 11 CR 580:

> A judgment bears legal interest from the date of its entry in the trial court even though it is still subject to direct attack. [Citation.] When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. [Citations.] On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment.

In other words, a modified judgment earns interest from original date of entry; after reversal, a new award earns interest from the new date of entry.

These rules were applied in *Snapp v State Farm Fire & Cas. Co.* (1964) 60 C2d 816, 36 CR 612. The supreme court in *Snapp* stated that the question of when interest begins "should not depend on mere formalism, but on the substance of the order." 60 C2d at 821. On the first appeal in *Snapp,* the original judgment for $8168.25 for plaintiffs was reversed by the district court of appeal with directions to enter judgment for plaintiffs for $25,000. The supreme court ruled that this "so-called 'reversal' with directions, was, in fact and in law, a 'modification'" because the judgment was severable, no issues remained to be determined, and no further evidence was necessary. 60 C2d at 820. Therefore, the judgment for $25,000 started bearing interest from the date the original judgment for $8168.25 was entered, not from the entry date of the $25,000 judgment. In *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527, the court applied *Snapp* and *Stockton Theatres,* holding that the judgment at issue was never reversed, only modified upward, and thus it began drawing interest on the date of the original judgment.

NOTE: If the plaintiff makes a settlement offer under CCP §998 that the defendant does not accept and the plaintiff obtains a more favorable judgment, the plaintiff is entitled to prejudgment interest on the judgment from the date of the plaintiff's offer. CCP §3291. See *Ray v Goodman* (2006) 142 CA4th 83, 87, 47 CR3d 659 (when there are two successive unaccepted §998 offers tendered by plaintiff who recovers judgment in excess of either offer, prejudgment interest runs from date of first offer). See §17.85.

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§17.65 3. Costs on Appeal

Authorization. Costs on appeal are in the nature of incidental damages allowed to indemnify the successful party. *Harmon v Pacific Tel. & Tel. Co.* (1962) 201 CA2d 453, 20 CR 118. They are governed entirely by statute. CCP §1034; see Cal Rules of Ct 8.278. Code of Civil Procedure §1034 directs the Judicial Council to establish allowable costs on appeal and the procedure to claim those costs. California Rules of Court 8.278(d) sets forth the allowable costs on appeal.

Procedure. The party who may recover costs is usually specified in the appellate opinion. If the appellate decision does not designate the recovering party, the procedure for recovery is set out in Cal Rules of Ct 8.278(c). The method for claiming costs is set out in Cal Rules of Ct 8.278(c). A party seeking costs must file and serve a costs memorandum in the trial court within 40 days after the notice of issuance of the remittitur is mailed. Cal Rules of Ct 8.278(c)(1). For an extensive discussion of costs on appeal and all required procedures, see chap 20.

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§17.66 G. Recovering Appellate Bond After Reversal

An appellant who posts an appeal bond to stay enforcement of the judgment must file the bond with the court. CCP §995.340. Under CCP §995.360, the court may withdraw the bond from the file and return it to the principal when the bond is "no longer in force and effect." The bond is no longer in force and effect once the "purpose for which the bond was given is satisfied." CCP §995.430(b). Thus, whether reversal in a particular case will result in a court order to return the bond hinges on whether reversal of the judgment satisfies the purpose for which the bond was given.

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§17.67 1. Reversal on Issue of Liability

Although no California authority exists on the issue, it seems clear that the appellate court's reversal of the lower court's judgment of liability satisfies the purpose for which the appeal bond was given. An appellant posts a bond to stay execution of the lower court's judgment pending a decision on appeal. The bond requirement serves to ensure that if the appellate court ultimately affirms the lower court's finding of liability, the respondent can recover in full. The bond is meant to "protect … the appellee from the inherent risks, such as subsequent insolvency of the appellant, associated with the delay in enforcement of the [lower court's] judgment while the appeal proceeds." *Neeley v Bankers Trust Co. of Texas* (5th Cir 1988) 848 F2d 658, 660. A reversal on the issue of liability vacates the lower court's judgment. Thus, reversal on liability satisfies the purpose of the appellate bond because the respondent is no longer entitled to recover from the appellant and there is no continued risk against which to protect the respondent.

Moreover, that a reversal does not conclusively determine the rights of the parties does not militate against the conclusion that the court should return the bond on reversal of liability. The courts have found that when an appellant obtains a reversal, the reversal entitles the appellant to recover amounts he has expended to satisfy the judgment against him. Indeed, the appellate court must order restitution in "uncomplicated cases," despite the fact that the plaintiff/respondent may obtain another judgment against the defendant/appellant on remand. *Rogers v Bill & Vince's, Inc.* (1963) 219 CA2d 322, 33 CR 129. Consistent with this reasoning, the court should return a bond to a successful appellant despite the possibility that the plaintiff/respondent might ultimately obtain a judgment against the appellant that will withstand review.

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§17.68 2. Reversal of Damages Portion of Judgment Only

Whether the purpose of the appellate bond is satisfied when the appellate court remands solely on the issue of damages is less clear. On the one hand, the respondent may recover less in damages after remand, meaning that the current appellate bond may prove to be excessive. On the other hand, the respondent may very well recover more on remand, making the danger of the appellant's insolvency all the more acute. No California authority exists to provide guidance in resolving this issue. However, the federal courts hold that the appellant may not recover his bond when the appellate court does not disturb the lower court's finding on liability. See, *e.g., Beatrice Foods Co. v New England Printing and Lithographing Co.* (Fed Cir 1991) 930 F2d 1572; *Water Technols. Corp. v Calco, Ltd.* (ND Ill 1988) 694 F Supp 1328; *Tennessee Valley Auth. v Atlas Mach. & Iron Works, Inc.* (4th Cir 1986) 803 F2d 794, 798.

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IV. PROCEEDINGS AFTER REMAND

§17.69 A. Right to Retrial After Reversal

A judgment or an order that is reversed without qualification restores to the parties essentially the same rights they had before the trial court made its erroneous ruling. *Weightman v Hadley* (1956) 138 CA2d 831, 836, 292 P2d 909; see §17.31. Ordinarily, this means the right to have the entire case, or the issues in the reversed portion of the judgment, tried anew, limited only by the doctrine of "law of the case." See §§17.64-17.66. If, however, there are no disputed factual issues and the appellate court decision makes it clear that the court intended that judgment be entered for one of the parties, an unqualified reversal does not remand the case for trial. *Moore v City of Orange* (1985) 174 CA3d 31, 219 CR 301; see §17.35.

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B. Time Limits for Retrial

§17.70 1. General Rule

When an appellate court reverses the judgment below and remands the case for a new trial, the plaintiff has at least 2 years to bring the action to trial from the date the court clerk files the remittitur. If the plaintiff fails to bring the action within 2 years, then the trial court has discretion to dismiss the action for failure to prosecute. CCP §§583.410(a), 583.420(a)(3)(C). However, the trial court is not *required* to dismiss the plaintiff's action for failure to prosecute unless the plaintiff fails to bring the action to trial within 5 years of filing his or her original complaint against the defendant (CCP §§583.310, 583.320(b)) or 3 years after the court clerk files the remittitur (CCP §583.320(a)(3)), whatever period affords the plaintiff more time.

NOTE: Although the relevant statutes do not define the term, the case law indicates that an action is "brought to trial" when the court swears in the jury, or—in a trial before the judge—calls the first witness. *Hartman v Santamarina* (1982) 30 C3d 762, 765, 180 CR 337.

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§17.71 2. Availability of Extension or Tolling

Under certain circumstances, the 2-, 3-, and 5-year periods under CCP §§583.310, 583.320, and 583.420 may be tolled or extended. Any period during which the statutes were tolled must be added to the date on which the statutory period would otherwise end, extending the time the plaintiff has to bring the action to trial. For example, if the statutes were tolled for 3 months, then the trial court would not have discretion to dismiss the action under CCP §583.320(a)(3) until at least 2 years and 3 months after the court clerk filed the remittitur.

The 2-, 3-, and 5-year statutes are tolled or extended exclusively for those reasons provided in the relevant statutes of the Code of Civil Procedure. See CCP §§583.360(b), 583.420(b). The applicable provisions of the Code of Civil Procedure provide that the following circumstances extend or toll the statutes (CCP §§583.340, 583.140):

- The parties agree to extend the time to bring the action to trial;
- The trial court temporarily losses jurisdiction over the action;
- Prosecution of the action is stayed or enjoined;
- It is impossible, impracticable, or futile for the plaintiff to prosecute the action; and
- The defendant waives—or takes action that otherwise estops him from asserting—his right to enforce the statutes.

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§17.72 a. Agreement Between the Parties

The parties may extend the statutory period by agreement. The courts will give effect to two types of agreements: (1) written agreements and (2) oral agreements made in open court. If the parties agree to an extension by written stipulation, they may file the stipulation with the court. If they do not file the stipulation with the court, then they must bring it to the court's attention if it is relevant to a motion for dismissal. CCP §583.330(a). If the parties come to an oral agreement in open court, the courts will give the agreement effect as long as the court clerk records the agreement in the minutes or the court reporter in a court transcript. CCP §583.330(b).

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§17.73 b. Suspension of Jurisdiction

Under CCP §583.340(a), suspension of the trial court's jurisdiction tolls the 2-, 3-, and 5-year statutes. The statute itself does not define the circumstances under which the trial court's jurisdiction is "suspended." But the case law clarifies the meaning of the statute to some degree. Broadly speaking, the cases hold that when the trial court loses jurisdiction over *all* further proceedings relating to the cause of action, this suspends jurisdiction for the purposes of §583.340(a). *Bergin v Portman* (1983) 141 CA3d 23, 25, 190 CR 81; *Guy F. Atkinson Co. v State* (1971) 17 CA3d 1065, 1068, 95 CR 543 (appeal suspends trial court's jurisdiction and tolls 5-year statute during pendency of appeal); *Estate of Morrison* (1932) 125 CA 504, 14 P2d 102 (jurisdiction of trial court was suspended and 5-year statute tolled from date that will contestant voluntarily dismissed action until trial court set aside dismissal for fraud and reinstated action); *Schwenke v J & P Scott, Inc.* (1988) 205 CA3d 71, 76, 252 CR 91 (jurisdiction of trial court suspended and statute tolled when amount in controversy exceeded statutory limit, because this deprived court of subject matter jurisdiction, which, in turn, required court to "suspend *all* further proceedings") (emphasis in original).

On the other hand, the cases generally hold that depriving the trial court of jurisdiction to try a cause of action on its merits does not "suspend" its jurisdiction for the purposes of CCP §583.340(a), as long as the court retains limited jurisdiction over the case. For example, in *Moore v Powell* (1977) 70 CA3d 583, 138 CR 914, the court held that the 5-year statute was not tolled during the pendency of change of venue proceedings. The court recognized that the filing of the motion to change venue operated to suspend the trial court's power to act on any matter other than the motion itself. However, it refused to apply the tolling provisions of §583.340, concluding that the trial court had not lost jurisdiction in the "fundamental sense" because it retained jurisdiction to hear the motion to transfer. Similarly, in *Gordon's Cabinet Shop v State Compensation Ins. Fund* (1999) 74 CA4th 33, 40, 87 CR2d 541, the court held that a pending coordination application did not operate to suspend the jurisdiction of the trial court for the purposes of §583.340(a). The trial court lacked power to try the action while the application was pending, but it retained jurisdiction over the action for purposes of all pretrial and discovery proceedings. This limited jurisdiction was sufficient to prevent tolling of the 5-year statute.

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§17.74 c. Prosecution Stayed or Enjoined

Under CCP §583.340(b), the 2-, 3-, and 5-year statutes are tolled for any time during which prosecution or trial of the action was stayed or enjoined.

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§17.75 d. Impossibility, Impracticability, or Futility

Code of Civil Procedure §583.340(c) tolls the 2-, 3-, and 5-year statutes for any period during which it was impossible, impracticable, or futile for the plaintiff to bring the action to trial. See *Hattersley v American Nucleonics Corp.* (1992) 3 CA4th 397, 401, 4 CR2d 331 (3-year period tolled due to courtroom unavailability). The courts determine whether it is impossible, impracticable, or futile to proceed to trial in light of the circumstances in each case, including the conduct of the parties and the nature of the proceedings. *Moss v Stockdale, Peckham & Werner* (1996) 47 CA4th 494, 54 CR2d 805.

The cases are split on the issue of whether the courts should consider the plaintiff's reasonable diligence in attempting to prosecute the action when determining if it was impossible, impracticable, or futile to prosecute. See *Brown & Bryant, Inc. v Hartford Acc. & Indem. Co.* (1994) 24 CA4th 247, 29 CR2d 144 (critical factor in determining whether impossibility, impracticability, or futility of bringing case to trial extends statute of limitations is whether plaintiff exercised reasonable diligence in prosecuting case). Compare with *Ocean Servs. Corp. v Ventura Port Dist.* (1993) 15 CA4th 1762, 19 CR2d 750 (statutory tolling of 5-year mandatory dismissal period is automatic and not subject to "reasonable diligence" restriction).

The better view is probably that the statute does not imply a "reasonable diligence" restriction. The courts have expressed the view that the terms impossibility, impracticability, and futility merit liberal construction, consistent with the policy favoring trial on the merits. *Brown & Bryant, Inc. v Hartford Acc. & Indem. Co.* (1994) 24 CA4th 247, 29 CR2d 144. For example, impracticability due to excessive or unreasonable expense falls within the scope of §583.340(c). See *Camille Corp. v Superior Court* (1969) 270 CA2d 625, 75 CR 868.

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§17.76 e. Waiver or Estoppel

General principles of waiver and estoppel may also limit enforcement of the 2-, 3-, and 5-year statutes. CCP §583.140. See, *e.g., Holder v Sheet Metal Worker's Int'l Ass'n* (1981) 121 CA3d 321, 324, 175 CR 313 (defendant who agreed to trial date beyond 3-year period thereby waived right to pursue motion). However, waiver by the defendant of the right to assert the statutes of limitation does not deprive the court of discretion to dismiss the case on its own motion. 121 CA3d at 327 n2.

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§17.77 f. Minimum of 6 Months to Bring Action Once Tolling Period Ends or After Reversal of Dismissal for Delay

Code of Civil Procedure §583.350 bars the trial court from dismissing an action if the plaintiff brings it to trial within 6 months from the date a tolling period ends. In other words, §583.350 guarantees the plaintiff 6 months to bring the action to trial from the end of any period of tolling or extension, regardless of how little time remains under the statute. See *Greene v Howmedica, Inc.* (1993) 13 CA4th 912, 16 CR2d 777.

Likewise, when a motion for preferential trial setting is made within 6 months after the running of the 5-year period under CCP §583.310, and the motion is denied and the case dismissed, parties who are fortunate enough to obtain a reversal of the dismissal on appeal must bring the matter to trial within 6 months after the date on which the remittitur issues. In these circumstances, CCP §583.350 (see §17.57) controls and requires that the case be brought to trial within 6 months "after the end of the period of tolling or extension." That period ends on the date the remittitur is filed. *Greene v Howmedica, Inc*. (1993) 13 CA4th 912, 16 CR2d 777.

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§17.78 3. Availability of Preferential Setting

There is a widespread misconception that cases that are retried after reversal on appeal are entitled to a statutory priority in trial setting, but in fact no formal basis for priority exists. The court clerk places the matter on the trial calendar and the matter is tried as though it had never been tried before. Most superior courts, however, approve applications for preferential setting in these cases on a much lesser showing than that required before the original trial. Trial courts grant such applications because considerable time has already elapsed since the occurrence of facts giving rise to the action.

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C. Assignment or Disqualification of Original Trial Judge

§17.79 1. Past Custom of Not Assigning Trial Judge to Retrial

In the past, the trial judge who presided at the original trial was often considered inappropriate to judge a retrial without the parties' stipulation or other unusual circumstance. So strong was this custom that in smaller counties, in which only one judge would have been available, an out-of-county judge was usually assigned to the second trial. This was based on the law's intent that even the appearance of potential partiality should be avoided. This custom was not followed, of course, when the retrial consisted only of carrying out modifications or further proceedings ordered by the appellate court. Currently, however, it appears that this custom has fallen by the wayside, probably due to the advent of CCP §170.6(a)(2), which provides a party with a peremptory challenge of the assigned judge. For further discussion of this procedure, see §17.80.

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§17.80 2. Peremptory Challenge of Same Trial Judge

Assignment of trial judge from prior proceeding as grounds for peremptory challenge. That a judge presided at the first trial does not afford grounds for automatic disqualification of that judge at retrial. However, if the same judge is assigned to conduct the new trial, and the party prevailing on appeal genuinely believes that the judge cannot be impartial on retrial, it has grounds for a peremptory challenge under CCP §170.6(a)(2).

NOTE: The applicability of CCP §170.6(a)(2) hinges on what constitutes a "new trial." Remand on a single issue can be a new trial unless its function is merely a ministerial act. Similarly, reversal of summary judgment does not result in a new trial unless remanded to have the trial court complete a judicial task. See *First Fed. Bank v Superior Court* (2006) 143 CA4th 310, 49 CR3d 296 (trial judge can be challenged under §170.6(a)(2) when case is remanded for determination of amount of attorney fees to judge who had previously determined that attorney fees were barred as matter of law; it constitutes retrial, as it will be reexamination of issue previously in controversy).

To bring the peremptory challenge, the successful appellant must establish that the judge is prejudiced against a party or attorney appearing in the new trial. CCP §170.6(a)(1). Prejudice may be established by a "written motion supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge before whom the … [new trial] is assigned is prejudiced against [a] party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial … before the judge…." CCP §170.6(a)(2). The statute requires only that the movant possess a good faith belief that the judge is biased. *People v Hall* (1978) 86 CA3d 753, 150 CR 412. The requirement that the movant make the motion under oath sufficiently establishes the movant's good faith. *Solberg v Superior Court* (1977) 19 C3d 182, 137 CR 460. Assuming that the party bringing the challenge satisfies the oath or affidavit requirement of CCP §170.6(a)(2) and duly presents the motion, the judge supervising the master calendar must assign some other judge to preside over the new trial. CCP §170.6(a)(3).

Additional preemptory challenge provided for remand. As a general rule, a party may not make more than one peremptory challenge in any one action or proceeding. CCP §170.6(a)(3). But a successful appellant who utilized a peremptory challenge to disqualify the first judge assigned to the original trial may, on remand, bring a motion to disqualify the judge who actually presided over the original trial.

This exception to the general rule is found in the last paragraph of CCP §170.6(a)(2), which provides that if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter, "the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a [peremptory challenge motion] regardless of whether that party has previously done so." In other words, §170.6(a)(2) provides the successful appellant who used a peremptory challenge before appeal with another peremptory challenge for remand.

Whether prior proceeding before judge or jury irrelevant. The successful appellant may bring a peremptory challenge against reassignment of the same judge—provided that the requirements delineated above are satisfied—even if the first trial was before a jury. *Pandazos v Superior Court* (1997) 60 CA4th 324, 327, 70 CR2d 669.

Time limit for peremptory challenge. The successful appellant must bring its peremptory challenge to reassignment of the same trial judge within 60 days after the party or the party's attorney is notified of the assignment. CCP §170.6(a)(2).

NOTE: The time limit for bringing a peremptory challenge may be shortened to 20 days in a coordination proceeding if there is evidence that judicial efficiency would be compromised by assigning another judge. Cal Rules of Ct 3.516; *Jane Doe 8015 v Superior Court (In re Needles Cases)* (2007) 148 CA4th 489, 55 CR3d 708 (time limit for bringing peremptory challenge in coordinated action is not subject to Rule 3.516's 20-day rule because there is no evidence that judicial efficiency would be compromised).

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§17.81 3. Disqualification of Original Trial Judge in the Interests of Justice

Under CCP §170.1(c), the appellate court has discretion to disqualify the judge whose judgment or order was reviewed by the appellate court from presiding over the new trial. On a motion of a party or on the court's own motion, the appellate court may disqualify the original judge if it determines that it is in the "interests of justice" to have a different judge preside over the remand.

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§17.82 D. Amendment of Pleadings on Retrial

Parties allowed to amend pleadings, subject to appellate court's directions and law of the case. The appellate court may reverse with directions that the trial court allow the parties to amend the pleadings. *Chitwood v County of Los Angeles* (1971) 14 CA3d 522, 92 CR 441; *Coffelt v Coffelt* (1964) 229 CA2d 659, 40 CR 513. That the appellate court directs the trial court to allow specific amendments does not deprive the trial court of discretion to allow other amendments as well. *Ellis v Witmer* (1906) 148 C 528, 531, 83 P 800; *Pillsbury v Superior Court* (1937) 8 C2d 469, 472, 66 P2d 149.

Either party may apply for permission to file amended pleadings in a retrial. The parties' right to request leave to amend the pleadings on retrial is the same as if the previous trial had never occurred. *Bank of America v Superior Court* (1942) 20 C2d 697, 128 P2d 357; *Pillsbury v Superior Court* (1937) 8 C2d 469, 66 P2d 149. Only the directions in order of reversal and the law-of-the-case doctrine (discussed in §§17.64-17.66) limit the trial court's usual discretion to allow amendments. *Bank of America v Superior Court, supra.*

New defenses may be raised, subject to limitations. Although the trial court should exercise caution in permitting amendments on retrial, it may, in its discretion, permit defendant to raise new defenses at the retrial. *Estate of Horman* (1971) 5 C3d 62, 95 CR 433 (statute of limitations defense raised first on retrial). If the proposed amendment asserts a belated and radical change in defense theory, the court may deny the request. *Dressler v Johnston* (1933) 131 CA 690, 21 P2d 969.

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§17.83 E. Right to Conduct Additional Discovery

When an appellate court reverses a lower court's judgment and remands the case, the parties are entitled to conduct additional discovery in preparation for the new trial. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70. Remand resets the discovery deadlines, giving the parties until the 30th day before the date initially set for the *new* trial to complete discovery. 22 C4th at 247; see CCP §§2024.020-2024.030 (discovery deadline is the 30th day before the date "initially set for trial"). But resetting the discovery clock after a reversal does not necessarily mean that discovery starts from scratch. The Discovery Act's limitations continue to apply. For example, a natural person may be deposed only once during the run of the litigation, and the parties are limited to 35 special interrogatories and requests for admission. CCP §§2025.610, 2030.030-2030.050, 2030.070, 2033.010-2033.050. Also, if renewed discovery appears to be abusive in any way, the trial court may always restrict it as cumulative or burdensome. See CCP §2019.030; *Fairmont Ins. Co.,* 22 C4th at 254.

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§17.84 F. Scope of Evidence Permitted on Retrial

The parties are entitled to introduce any evidence on the issues during retrial, including any additional and new evidence, as well as evidence introduced at the prior trial. *Weightman v Hadley* (1956) 138 CA2d 831, 836, 292 P2d 909. The trial court may not make findings based on evidence taken only at the first trial. *Bate v Marsteller* (1965) 232 CA2d 605, 618, 43 CR 149.

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§17.85 G. Settlement Before Retrial

Reversal offers opportunity for settlement before retrial. A good time for settlement discussions seems to be immediately after reversal, before both sides begin preparing the case for a second trial. The loser on appeal is less confident of the case than while appeal was pending, and the winner may feel only temporarily reprieved and certainly worn down. No one likes to try the same case twice. Thus, many settlements occur at this stage, and parties should not be timid about suggesting one.

Successful party on appeal may have good reason to settle. For a good example of why it may be wise for the prevailing party on appeal to settle before a retrial, see the two judgments in *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654, and *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 138 CR 705, overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607. The first judgment was for slightly more than one million dollars. Defendant prevailed on appeal and gained a retrial. The judgment following the second trial was for over $11 million, reduced by the trial court to a little under $10 million.

Settlement offers may be made under CCP §998. Settlement offers may be made as in any pretrial period, and the parties are entitled to the protection of CCP §998 on payment of costs. For a general discussion of §998, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004). If a settlement offer is made and rejected before the first trial and a second offer is made before retrial, the second offer extinguishes the first offer and supersedes it. CCP §998. *Palmer v Schindler Elevator Corp.* (2003) 108 CA4th 154, 157, 133 CR2d 339 (prior settlement offer is extinguished by subsequent settlement offer to same party); *Wilson v Wal-Mart Stores, Inc.* (1997) 72 CA4th 382, 388, 85 CR2d 4; *Distefano v Hall* (1968) 263 CA2d 380, 385, 69 CR 691 (court applied former CCP §997, which is now CCP §998). But see *Ray v Goodman* (2006) 142 CA4th 83, 87, 47 CR3d 659 (in determining date from which prejudgment interest should be computed when there are two successive unaccepted §998 offers tendered by plaintiff who recovered judgment in excess of either offer, language of CC §3291 controlled and interest ran from date of first offer, which was not extinguished).

For a comprehensive discussion of settlement on appeal, see chap 15.

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§17.86 H. Law of the Case

The law of the case doctrine serves to limit the discretion of the trial court on remand as surely as specific instructions from the reviewing court. Specifically, the doctrine defines and delimits the legal principles and rules that the trial court may apply to reach a final judgment on remand.

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1. When Doctrine Applies

§17.87 a. Stated Principle or Rule of Law Necessary to Appellate Court's Decision

Whenever an appellate court opinion expresses a principle or a rule of law necessary to its decision, that principle or rule establishes the "law of the case." *Clemente v State* (1985) 40 C3d 202, 219 CR 445; *People v Shuey* (1975) 13 C3d 835, 120 CR 83; *Estate of Horman* (1971) 5 C3d 62, 73, 95 CR 433; *Gore v Bingaman* (1942) 20 C2d 118, 124 P2d 17. In other words, the trial court on remand will apply that principle or rule as defined by the appellate court, at least insofar as the issues remain substantially the same. See *Weightman v Hadley* (1956) 138 CA2d 831, 841, 292 P2d 909 (law of case applies to subsequent trial only when issues remain substantially the same); §17.66.

On the other hand, the doctrine generally does not apply to statements of law on which the appellate court did not rely in reaching its holding; *dicta* is not law of the case and does not bind the trial court on remand. *Stockton Theatres, Inc. v Palermo* (1956) 47 C2d 469, 304 P2d 7. But rules and principles the appellate court relied on to reach an *alternative holding* are not *dicta*. When the appellate court articulates alternative grounds for its decision, the rules and principles it relied on to reach each respective holding are considered law of the case even though none may be strictly "necessary" to support the court's decision (because each ground may justify the decision in its own right). *Steelduct Co. v Henger-Seltzer Co.* (1945) 26 C2d 634, 643, 160 P2d 804; *Westerfeld v New York Life Ins. Co.* (1910) 157 C 339, 345, 107 P 699.

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§17.88 b. Law of the Case by Necessary Implication

In certain cases, a point of law the appellate court does not explicitly resolve will nonetheless bind the trial court on remand. The law-of-the-case doctrine treats the appellate court as having impliedly decided all those points of law necessary to support its opinion, in a manner consistent with that opinion. Therefore, these implicitly decided matters of law are law of the case even if the issues were never raised by counsel or mentioned by the appellate court. *Lindsey v Meyer* (1981) 125 CA3d 536, 541, 178 CR 1; *Olson v Cory* (1983) 35 C3d 390, 399, 197 CR 843 (although issue was not raised in prior case, it was "implicitly decided" because it was essential to decision).

For example, an appellate court decides by necessary implication that a plaintiff/appellant has standing when the court hears his appeal on the merits. *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 579, 145 CR 665. This implicit determination binds the trial court on remand, so that it may not dismiss the remanded action for lack of standing. This is true even when neither the parties nor the court explicitly raised the issue of standing on the first appeal. 80 CA3d at 579.

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§17.89 2. Effect on Later Proceedings

Effect in all subsequent proceedings in same case. Trial courts will follow the law of the case unless there is an intervening change in the law. See *Ryan v Mike-Ron Corp.* (1968) 259 CA2d 91, 66 CR 224, discussed in §17.92. Generally, a subsequent appellate court will adhere to the law of the case as a matter of sound policy but is not bound to follow it like a trial court. See *England v Hospital of Good Samaritan* (1939) 14 C2d 791, 795, 97 P2d 813, discussed in §17.97.

Effect on original writ proceeding. The doctrine has been extended to cover a prior appellate opinion in an original writ proceeding. *Richer v Superior Court* (1976) 63 CA3d 748, 754, 134 CR 52. However, denial of a writ petition without issuance of an alternative writ and full plenary review of the issues presented may not be given law of the case effect. *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728. *Kowis* expressly overrules *Richer v Superior Court, supra,* to the extent that it implies otherwise.

Effect on proceeding to determine permanent injunction. The doctrine may also be applied in cases concerning injunctions. Thus, when a case presents questions of law only, an appellate court may determine the merits of an action on appeal from an order granting or denying a preliminary injunction. In such a case, the appellate court decision will establish the law of the case for the purpose of granting or denying the permanent injunction. *North Coast Coalition v Woods* (1980) 110 CA3d 800, 805, 168 CR 95.

For further discussion and examples of applications of the doctrine of law of the case, see 9 Witkin, California Procedure, *Appeal* §§459-480 (5th ed 2008).

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3. General Limitations on the Doctrine

§17.90 a. Rule Does Not Apply to Issues Not Determined or Facts Not Presented by Prior Appeal

The law of the case does not extend to facts or to points of law that might have been but were not presented and determined on a prior appeal. *Bovard v American Horse Enters.* (1988) 201 CA3d 832, 247 CR 340; *Weightman v Hadley* (1956) 138 CA2d 831, 841, 292 P2d 909 (doctrine does not apply to new and additional evidence, nor does it apply when explanation of previous evidence appears in later trial).

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§17.91 b. Majority of Court Must Concur

The law of the case applies only to the portions of the prior opinion that reflect the view of the majority of the court. *City of Oakland Water Front Co.* (1912) 162 C 675, 124 P 251.

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§17.92 c. Doctrine May Be Subject to Change in Law

The law of the case is a procedural rule and is not jurisdictional; therefore, when there is an intervening or contemporaneous change in the law or establishment of a new precedent by controlling authority, the doctrine is not controlling. For example, in *Ryan v Mike-Ron Corp.* (1968) 259 CA2d 91, 98, 66 CR 224, a subsequent California Supreme Court decision explicitly disapproved of the first appellate court's resolution of a point of law. Nonetheless, the trial court on remand, feeling itself bound by the law of the case, applied the rule as articulated by the first appellate court. On appeal from remand, the *Ryan* court reversed, stating that a trial court may disregard the law of the case when an intervening supreme court decision has changed the law. See also *England v Hospital of Good Samaritan* (1939) 14 C2d 791, 795, 97 P2d 813; *Standard Oil Co. v Johnson* (1942) 56 CA2d 411, 415, 132 P2d 910; *Chase Brass & Copper Co. v Franchise Tax Bd.* (1977) 70 CA3d 457, 138 CR 901.

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§17.93 d. Decision Must Be on the Merits

A reviewing court's decision that is not on the merits does not establish the law of the case. *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728; *Solorzano v Superior Court* (1992) 10 CA4th 1135, 1138, 13 CR2d 161.

Example: **doctrine does not apply to summary denial of writ.** A summary denial of a writ petition does not establish the law of the case. *Kowis v Howard, supra*. In *Kowis,* the defendant failed to respond in a timely manner to plaintiff's requests for admissions concerning defendant's liability. Plaintiff moved for an order that defendant's liability be deemed admitted. The court granted plaintiff's motion and denied defendant's subsequent motion for relief from that order. Defendant then petitioned the appellate court for a writ of mandate, and the appellate court summarily denied the petition. On defendant's appeal from the final judgment, the appellate court affirmed, determining that its earlier denial of defendant's mandate petition was law of the case, and precluding it from considering the propriety of the trial court's order deeming the requests admitted. The supreme court reversed the judgment of the appellate court and remanded with instructions to consider the issue on its merits. The court held that the appellate court's denial of defendant's mandate petition did not establish law of the case, because the appellate court accompanied the denial with only a brief supporting statement but without oral argument or a full written opinion.

Example: **doctrine does not apply to issuance of alternative writ or order to show cause.** An appellate court makes no determination on the merits when it issues an alternative writ or orders the trial court to show cause why the appellate court should not issue a peremptory writ. *Solorzano v Superior Court* (1992) 10 CA4th 1135, 1138, 13 CR2d 161. Thus, the issuance of this type of writ has no law-of-the-case implications. In *Solorzano,* the trial court interpreted the alternative writ as a ruling on the merits, vacated its order favoring the plaintiffs, and entered a new order favoring the defendant. The plaintiffs then filed a petition for writ of mandate to reinstate the trial court's original order. The appellate court issued an order to show cause and, after argument, ordered the trial court to reinstate its original ruling. As the court stated, "[c]ontrary to popular belief, we sometimes issue … alternative writs and orders to show cause not because we have made up our minds that the petition ought to be granted but because we perceive a genuine dispute and want to hear the other side of the case." 10 CA4th at 1138 n1.

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§17.94 e. Ruling Regarding Sufficiency of Pleadings Does Not Govern Later Ruling Regarding Sufficiency of Evidence

When an appellate court reverses a trial court order dismissing the plaintiff's case for failure to state a cause of action, the reversal establishes only the sufficiency of the allegations contained in the pleadings; it does not speak to the weight of the evidence in support of these allegations. See *Abroms v New York Life Ins. Co.* (1944) 64 CA2d 449, 456, 149 P2d 217 (decision of reviewing court in ruling on demurrer did not bind trial court as law of case in ruling on sufficiency of evidence to support allegations in pleadings). In ruling on a demurrer, the courts must assume the truth of the facts contained in the plaintiff's complaint. 64 CA2d at 449. In contrast, when a court rules on a summary judgment motion, it must examine the parties' respective evidence to determine whether there exists any "triable issue as to any material fact." CCP §437c(c). Thus, a reversal of an order sustaining a demurrer does not establish as law of the case the sufficiency of plaintiff's *evidence* to survive a subsequent motion for summary judgment. See *Hagood v Sonoma County Water Agency* (9th Cir 1996) 81 F3d 1465, 1473 (order denying motion to dismiss did not establish law of case at summary judgment stage).

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§17.95 f. Decision on Insufficiency of Evidence Not Binding When Plaintiff Introduces New Material Facts

If the appellate court determines that the plaintiff below did not introduce sufficient evidence to support a judgment in his favor, and the plaintiff introduces no "substantially different" evidence at the retrial, the appellate court's determination on the sufficiency of the evidence is law of the case and the trial court must enter judgment for the defendant on remand. *Stromer v Browning* (1968) 268 CA2d 513, 521, 74 CR 155. On the other hand, if the plaintiff on retrial introduces additional material facts that substantially change his evidence, then the former decision is not law of the case. See *Foley v Northern Cal. Power Co.* (1913) 165 C 103, 106, 130 P 1183 (additional witness offered new material testimony); *Wicktor v Los Angeles* (1960) 177 CA2d 390, 2 CR 352. In other words, when there is no "substantial identity of facts," the law of the case doctrine does not apply. See *Allen v Bryant* (1909) 155 C 256, 259, 100 P 704; *Rutledge v Rutledge* (1955) 134 CA2d 689, 694, 286 P2d 429.

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§17.96 g. Application of State Court Decision Does Not Apply to Federal Question

Atchison, Topeka & Santa Fe Ry. v Railroad Comm'n (1930) 209 C 460, 288 P 775, has been cited for the rule that, because the law of the case doctrine applies to a "court of last resort" or the "highest court," no state court is a court of last resort or the highest court when a federal question is involved. This holding was explicitly rejected by the court of appeal in *Yu v Signet Bank/Va.* (2002) 103 CA4th 298, 310 n1, 126 CR2d 516, which stated that no court has ever followed this rule and that the rule has been effectively overruled by other cases. In other words, according to *Yu,* state courts may establish law of the case on federal questions.

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§17.97 4. Limitations on "Law of the Case" Doctrine Applicable Exclusively on Subsequent Appeal

As noted above, the trial courts are generally bound by the law of the case regardless of whether the reviewing court's legal reasoning is sound. But an appellate court hearing an appeal from a remanded action is not strictly bound to follow the law of the case as established by the first appellate court. It is true that in the vast majority of cases a subsequent appellate court will adhere to the law of the case as a matter of sound policy. See *England v Hospital of Good Samaritan* (1939) 14 C2d 791, 795, 97 P2d 813. But as discussed below, an appellate court in certain narrow circumstances may exercise its discretion and depart from the law of the case when the trial court presiding over the remand could not.

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§17.98 a. Application Must Not Result in Manifestly Unjust Decision

The appellate courts will deviate from the doctrine and reconsider points of law determined in a prior appeal if application of the doctrine would result in "manifest" or "substantial" injustice. *England v Hospital of Good Samaritan* (1939) 14 C2d 791, 795, 97 P2d 813. This standard requires considerably more than mere disagreement by the subsequent appellate court with the first appellate court's resolution of points of law. Rather, "there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior legal proceeding." *People v Shuey* (1975) 13 C3d 835, 846, 120 CR 83; see also *Clemente v State* (1985) 40 C3d 202, 219 CR 445; *Searle v Allstate Life Ins. Co.* (1985) 38 C3d 425, 212 CR 466; *Gore v Bingaman* (1942) 20 C2d 118, 124 P2d 17; *Vangel v Vangel* (1955) 45 C2d 804, 810, 291 P2d 25 (former decision, construed as limiting apportionment of profits without compensation for postdissolution services, would be unjust and therefore decision should not be followed to that extent).

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§17.99 b. Rule to Be Applied Must Be Internally Consistent

The appellate courts will not apply the doctrine if adherence to the law of the case would perpetuate an evident inconsistency in the court's legal reasoning. *Gage v Downey* (1892) 94 C 241, 244, 29 P 635 (prior appellate decision determined two opposing principles of law, incapable of harmonious construction).

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§17.100 c. No Application to Reversal on Grounds Not Considered in Prior Appeal

The doctrine does not apply when the court hearing the subsequent appeal determines that there should be a reversal on a ground that was not considered on the prior appeal. Because the primary purpose of the doctrine is judicial economy, if a reversal is necessary in any event, adherence to the doctrine is unnecessary. *Searle v Allstate Life Ins. Co.* (1985) 38 C3d 425, 212 CR 466.

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§17.101 d. Prior Denial of Dismissal of Appeal Does Not Bar Later Dismissal

The doctrine will not bar the appellate court from dismissing an appeal when the same court had earlier denied a motion to dismiss the appeal on the basis of the record and arguments then before it. *Chernett v Jacques* (1988) 202 CA3d 69, 248 CR 63.

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§17.102 I. Remedies When Trial Court Fails to Follow Directions or Law of the Case

When the trial court on remand fails to follow either the appellate court's instructions or the law of the case, the aggrieved party may pursue certain remedies to restore its legal rights. The available remedies and the procedures by which the aggrieved party may pursue these remedies are discussed below.

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§17.103 1. Material Variance Required

An immaterial departure from the appellate court's directions or the law of the case is not grounds for issuance of an extraordinary writ or reversal of the trial court's judgment; the deviation must be material to merit these remedies. See *In re Candace P.* (1994) 24 CA4th 1128, 1131, 30 CR2d 1. However, the "material variance" standard is not synonymous with "harmless error" analysis. For example, *In re Candace P.* intimates that if the trial court deviates materially from the appellate court's directions, then on the second appeal the reviewing court should reverse and remand a second time, even if the trial court's failure to follow directions was "harmless" in that it probably did not change the outcome of the trial.

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2. Method of Challenging Trial Court's Ruling

§17.104 a. Extraordinary Writ

Code of Civil Procedure §1085 authorizes the courts to issue a writ of mandate "to compel the performance of an act which the law specially enjoins." A petitioner may make the necessary showing by establishing that the lower court threatens to take an action "in excess of [its] jurisdiction" (CCP §1102), and a trial court acts in excess of its jurisdiction when it refuses to follow the appellate court's directions on remand. In *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1, the court issued a writ of prohibition when the trial judge, after the appellate court reversed with directions to enter judgment denying relief to either party, reset the case for further trial. See also *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 234, 177 CR 239 (quoting *Babb v Superior Court* (1971) 3 C3d 841, 851, 92 CR 179).

It is true that the appellate courts will issue the writ only when "there is not a plain, speedy, and adequate remedy in the ordinary course of the law." CCP §1103. Generally, the courts presume that appeal is an adequate remedy, and a petitioner with the right to appeal the trial court action it challenges must rebut this presumption by demonstrating that the appeal is not an adequate remedy under the circumstances. But when a trial court fails to comply with a reviewing court's directions or the law of the case, requiring the parties to wait until the trial court enters a final judgment before allowing them to challenge that court's actions may impose an undue hardship. *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1. Thus, a party may challenge a material deviation by immediately petitioning the appellate court for writ of prohibition to restrain the trial court from violating the directions, or a writ of mandate to compel the trial court to carry out the reviewing court's instructions. *Protect Our Water v County of Merced* (2003) 110 CA4th 362, 1 CR3d 726 (trial court ordered to issue peremptory writ of mandate directing county to set aside its approval of proposed massive mining project with potentially "significant effect on the environment").

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§17.105 b. Appeal From Final Judgment

Rather than petition for an alternative writ, a party may choose to wait until the trial court enters its final judgment before challenging a material deviation from the reviewing court's directions or the law of the case. *Rice v Schmid* (1944) 25 C2d 259, 153 P2d 313. If the trial court deviates materially from the appellate court's directions or the law of the case, this constitutes grounds for reversal and a second remand. *Frankel v Four Star Int'l* (1980) 104 CA3d 897, 902, 163 CR 902; *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1. The same rule applies when the reviewing court instructs the trial court to conduct "further proceedings consistent with this opinion." When given this general instruction, the trial court has jurisdiction to interpret the appellate court's decision, *i.e.,* to decide what types of proceedings would or would not be "consistent" with the opinion. If the losing party on remand feels the trial court incorrectly interpreted the appellate court's language and conducted proceedings inconsistent with its opinion, it may appeal from the judgment. *Harris v Hensley* (1931) 214 C 420, 6 P2d 253; *Estate of Dargie* (1941) 48 CA2d 101, 119 P2d 438.

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Source: Civil Litigation/California Civil Appellate Practice/18 Remittitur/Chapter Outline

18

Remittitur

William T. Rintala

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- B. Interpretation of Remittitur §18.2
- C. Effect on Jurisdiction §18.3
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I. ISSUANCE OF REMITTITUR

§18.1 A. Definition of Remittitur

What is a remittitur? The remittitur is a document that the clerk of the reviewing court sends to the court from which the appeal was taken to notify the lower court that the judgment of the reviewing court is final. *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192; *Combs v Haddock* (1962) 209 CA2d 627, 26 CR 252; *Noel v Smith* (1905) 2 CA 158, 161, 83 P 167 (court described historical development of remittitur). A remittitur must issue after the final determination of an appeal, the denial of a writ petition without issuance of an alternative writ or order to show good cause, or the denial of habeas corpus petition without issuance of an order to show cause. Cal Rules of Ct 8.272(a)-(b), 8.386, 8.449, 8.540.

Remittitur distinguished from appellate court judgment. The remittitur is not to be confused with the judgment of the reviewing court. The court's judgment is rendered when it is filed with the clerk of the reviewing court (see §17.7), and it becomes final after a prescribed period of time elapses (Cal Rules of Ct 8.264(b), 8.532(b)). After the decision becomes final, the clerk must prepare a form stating the court's decision, certify it, and send it to the trial court together with a certified copy of the court's order or judgment and opinion, if any. CCP §§43, 912. This form is the remittitur.

Form of remittitur. No special form of remittitur is required by rule or statute. The supreme court and the courts of appeal use their own forms.

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§18.2 B. Interpretation of Remittitur

It is important that the remittitur accurately reflect the judgment. The remittitur is to be interpreted in accordance with the court's opinion. Any ambiguity in the remittitur is to be resolved, if possible, by reference to the opinion. *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192; *Whipple v Cowdrey* (1965) 235 CA2d 501, 45 CR 343; *Combs v Haddock* (1962) 209 CA2d 627, 26 CR 252.

JUDICIAL PERSPECTIVE: Interpretation of remittitur is a rare problem. When it does occur, it usually relates to the award of costs or attorney fees. A motion to the appellate court for clarification would be appropriate if the opinion or remittitur is in conflict or so vague that the trial court is unclear on how to proceed.

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§18.3 C. Effect on Jurisdiction

Effect of issuance on jurisdiction of appellate and trial courts. When the remittitur issues, the reviewing court loses jurisdiction over the case. *Riley v Superior Court* (1957) 49 C2d 305, 316 P2d 956; *Isenberg v Sherman* (1932) 214 C 722, 7 P2d 1006. Concurrently, the issuance of the remittitur revests the trial court with jurisdiction. *Hampton v Superior Court* (1952) 38 C2d 652, 242 P2d 1; *Granger v Sheriff* (1903) 140 C 190, 195, 73 P 816. *Except* for a motion to recall the remittitur (see §§18.14-18.18), all further proceedings must occur in the trial court.

Effect of remittitur's terms on trial court jurisdiction. The trial court's jurisdiction may be defined and limited by the terms of the remittitur. *Hampton v Superior Court, supra; Van Diest v Van Diest* (1968) 266 CA2d 541, 545, 72 CR 304. If the trial court exceeds the specific directions of the reviewing court as stated in the remittitur, its judgment is void and a writ of prohibition may be sought to restrain the trial court from violating the terms of the reviewing court's final judgment. *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1. For further discussion of the writ of prohibition, see California Civil Writ Practice §§15.14-15.26 (4th ed Cal CEB 2008).

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§18.4 D. Procedure for Issuance

When remittitur is issued by supreme court. The clerk of the appellate court must issue the remittitur when a decision of that court is final. Cal Rules of Ct 8.540(b)(1). After review by the supreme court of a court of appeal decision, the clerk of the court of appeal must issue the remittitur immediately on receiving the supreme court remittitur if there will be no further proceedings in the court of appeal. Cal Rules of Ct 8.272(b)(2)(A).

When remittitur is issued by court of appeal. Absent review by the supreme court, the clerk of the court of appeal must issue the remittitur immediately after the supreme court denies review, or the period for granting review expires, or the court dismisses review under Cal Rules of Ct 8.528(b). Cal Rules of Ct 8.272(b)(1)(A). For discussion of when appellate court decisions become final, see §17.6.

Exception to general rule. The reviewing court may, however, order immediate issuance of the remittitur (Cal Rules of Ct 8.272(c), 8.540(c); see §18.6) or stay issuance of the remittitur (Cal Rules of Ct 8.272(c), 8.540(c); see §18.10).

Clerk's duties in issuing remittitur. The remittitur is "deemed issued when the clerk enters it in the record." Cal Rules of Ct 8.272(d)(1), 8.540(b)(1). Immediately after issuance of the remittitur, the reviewing court clerk must transmit the remittitur and a file-stamped copy of the court's order or opinion to the lower court (CCP §912; Cal Rules of Ct 8.272(b), 8.540(b)) and must send notice to the parties that the remittitur has been issued (Cal Rules of Ct 8.272(d)(1), 8.540(b)).

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§18.5 E. Award of Costs in Remittitur

If the reviewing court directs the manner in which costs are to be awarded or denied, the court clerk must include that direction in the remittitur. Cal Rules of Ct 8.278(b)(1). Without such directions, the clerk must enter on the record and insert in the remittitur a judgment for costs under Cal Rules of Ct 8.278(b)(2). See §20.5. If the clerk fails to enter the proper judgment for costs, only the reviewing court has jurisdiction to recall the remittitur for correction. The court may recall the remittitur on its own motion or on motion of a party made no later than 30 days after issuance of the remittitur. Cal Rules of Ct 8.278(b)(2); *Sacramento & San Joaquin Drainage Dist. ex rel State Reclamation Bd. v Reed* (1963) 217 CA2d 611, 31 CR 754 (clerk's error in awarding costs to appellants); *Lavine v Jessup* (1959) 175 CA2d 136, 345 P2d 505. See also §18.15.

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II. IMMEDIATE ISSUANCE

§18.6 A. When Remittitur May Be Issued Immediately

Although the remittitur is usually issued by the clerk as a routine matter (see §18.4), the supreme court may direct immediate issuance of the remittitur either on motion for good cause shown or on stipulation of the parties. Cal Rules of Ct 8.540(c)(1). Good cause may be shown when, *e.g.,* it is of great importance to the parties or the public that the court's decision become effective without delay. See, *e.g., Legislature v Reinecke* (1972) 7 C3d 92, 101 CR 552. Appellate courts may direct immediate issuance only on the parties' stipulation or on dismissal of appeal under Cal Rules of Ct 8.244(c). Cal Rules of Ct 8.272(c); see 9 Witkin, California Procedure, *Appeal* §845 (5th ed 2008).

JUDICIAL PERSPECTIVE: Parties will frequently stipulate to immediate issuance when neither seeks review in the supreme court.

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Source: Civil Litigation/California Civil Appellate Practice/18 Remittitur/§18.7 B. Form: Motion for Immediate Issuance of Remittitur

§18.7 B. Form: Motion for Immediate Issuance of Remittitur

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18.7-1 Motion for immediate issuance of remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR IMMEDIATE ISSUANCE OF REMITTITUR; SUPPORTING MEMORANDUM; DECLARATION OF _ _[*NAME*]_ _

_ _[*Appellant/Respondent*]_ _ **moves this court for an order directing immediate issuance of the remittitur in this case.**

This motion is made under California Rules of Court 8.540(c)(1) on the following ground(s): _ _[*State in detail grounds showing good cause*]_ _**.**

This motion is based on the attached declaration of _ _[*name of declarant*]_ _ **and supporting memorandum, and on the record on appeal filed in this proceeding.**

Date: _ _ _ _ _ _

__[*Signature*]__|
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: Original and eight copies to file in supreme court (Cal Rules of Ct 8.44(a)(5)) together with supporting documents; copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: Proof of service on all parties should be attached to the original motion. Cal Rules of Ct 8.54(a)(1). If the motion is based on matters outside the record, it must be accompanied by an affidavit or a declaration. Cal Rules of Ct 8.54(a)(2). On motion procedure generally, see Cal Rules of Ct 8.54; chap 11.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

This form is for use only in the supreme court. Courts of appeal can shorten the time of issuance only on stipulation of the parties or on dismissal of appeal. Cal Rules of Ct 8.272(c). See §18.6.

The supreme court will draft its own order on a motion for immediate issuance of the remittitur, or on any other remittitur motion. On caption and cover requirements, see §11.6. For a form of declaration, see §18.20.

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§18.8 C. Form: Stipulation for Immediate Issuance of Remittitur

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18.8-1 Stipulation for immediate issuance of remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR IMMEDIATE ISSUANCE OF REMITTITUR

The parties, through their respective counsel, stipulate that the remittitur in this case may be issued immediately under _ _[*specify either California Rules of Court 8.272(c) (court of appeal) or California Rules of Court 8.540(c)(1) (supreme court)*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: Original and one copy in both supreme court (Cal Rules of Ct 8.44(a)(6)) and court of appeal (Cal Rules of Ct 8.44(b)(6)); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On caption and cover requirements, see §11.6.

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§18.9 D. Form: Order Directing Immediate Issuance of Remittitur on Stipulation

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18.9-1 Order directing immediate issuance of remittitur on stipulation

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

ORDER DIRECTING IMMEDIATE ISSUANCE OF REMITTITUR ON STIPULATION

On the reading and filing of the stipulation of the parties,

IT IS ORDERED that the remittitur in this case issue immediately.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Chief/Presiding*]_ _ **Justice**

Copies: See §18.8.

Comment: The order should be attached to the stipulation as a separate document, but it need not have a separate caption.

This form is for use only in the court of appeal. The supreme court will draft its own order on a stipulation for immediate issuance of the remittitur, or on any other remittitur motion or stipulation.

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III. STAY OF ISSUANCE

§18.10 A. When Issuance May Be Stayed

Stay may issue for reasonable period on good cause. For good cause, both the supreme court and the courts of appeal may stay the issuance of a remittitur for a reasonable period on its own or a party's motion. Cal Rules of Ct 8.272(c), 8.540(c)(2). The court of appeal may also stay issuance of remittitur on stipulation. Cal Rules of Ct 8.272(c). See generally *Reynolds v E. Clemens Horst Co.* (1918) 36 CA 529, 172 P 623 (reviewing courts have inherent power to temporarily stay execution of their judgments when necessary to achieve justice).

Examples of good cause. A court may stay issuance of a remittitur to allow a party time to petition the United States Supreme Court for a writ of certiorari. See, *e.g., Severns Drilling Co. v Superior Court* (1936) 16 CA2d 435, 60 P2d 530; *Reynolds v E. Clemens Horst Co., supra*. The court may order a stay for other reasons, such as in connection with an order to show cause why the court's judgment should not be vacated owing to the parties' mutual mistake or the court's incomplete knowledge of the facts (*e.g., Krug v Meehan* (1951) 108 CA2d 416, 239 P2d 46), but it will not do so unless an extraordinary reason for the stay is shown (*Reynolds v E. Clemens Horst Co.* (1918) 36 CA 529, 530, 172 P 623).

Stay should not result in prejudice to another party. In addition to showing good cause, the party seeking the stay should show that a delay in issuance of the remittitur will not prejudice another party. See *Severns Drilling Co. v Superior Court, supra* (undertaking filed to guarantee respondent against loss caused by stay of issuance of remittitur); *Reynolds v E. Clemens Horst Co., supra* (issuance stayed because "it does not appear that respondent will suffer any injury by a short delay in the execution of the judgment, whereas appellant might suffer irreparable damage if the judgment should be carried into execution").

JUDICIAL PERSPECTIVE: Stay of remittitur is decided on a case-by-case basis. It is so infrequent that there is very little law in the area.

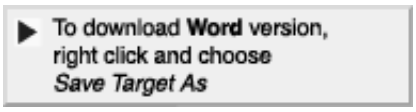
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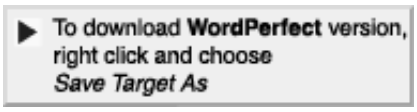
§18.11 B. Service for Written Motion to Obtain Stay

Before the court may stay issuance of a remittitur, a motion (or a stipulation in the court of appeal) is necessary. Cal Rules of Ct 8.272(c), 8.540(c)(2). This is a change from the previous practice. See *Goble v Appellate Dep't of the Superior Court* (1933) 130 CA 737, 20 P2d 345 (order staying issuance of remittitur made without notice; any possible defect cured by later hearing on motion to vacate order).

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§18.12 C. Form: Motion for Stay of Issuance of Remittitur





18.12-1 Motion for stay of issuance of remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

MOTION FOR STAY OF ISSUANCE OF REMITTITUR; SUPPORTING MEMORANDUM; DECLARATION OF _ _[*NAME*]_ _

_ _[*Appellant/Respondent*]_ _ **moves this court for an order staying issuance of the remittitur in this case until** _ _[*date*]_ _**.**

This motion is made under California Rules of Court 8.272(c) [or Cal Rules of Ct 8.540(c)(2)] on the following ground(s): _ _[*State in detail ground(s) showing good cause*]_ _**.**

[*Add if appropriate*]

Stay of issuance of the remittitur in this case will not injure the other parties in this case because: _ _[*State facts showing lack of prejudice*]_ _**.**

[*Continue*]

This motion is based on the attached declaration of _ _[*name of declarant*]_ _ **and supporting memorandum, and on the record on appeal filed in this proceeding.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*party*]_ _

Copies: See §18.8.

Comment: If the motion is based on matters outside the record, it must be accompanied by an affidavit or declaration. Cal Rules of Ct 8.54(a)(2). On motion procedure generally, see Cal Rules of Ct 8.54; chap 11.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

The moving party need not submit a proposed order for a remittitur motion in any appellate court except the second appellate district. The other courts, including the supreme court, draft their own orders.

On caption and cover requirements, see §11.6. On form of declaration, see §18.20.

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§18.13 D. Form: Stipulation for Stay of Issuance of Remittitur

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18.13-1 Stipulation for stay of issuance of remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR STAY OF ISSUANCE OF REMITTITUR

The parties, through their respective counsel, stipulate that the issuance of the remittitur in this case may be stayed until _ _[*date*]_ _**. The parties further stipulate that the requested stay is for a reasonable period.**

This stipulation is made for the following reasons: _ _[*State reasons showing good cause*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: See §18.8.

Comment: The stipulation should state in detail the reasons for the requested stay because the court of appeal is authorized to stay issuance of the remittitur only for good cause. Cal Rules of Ct 8.272(c). See §18.10. The supreme court will not stay issuance of remittitur on stipulation. A motion is required.

The form in §18.9 may be adapted for use as an Order Staying Issuance of the Remittitur on Stipulation.

On caption and cover requirements, see Comment in §11.6.

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IV. RECALL OF REMITTITUR

§18.14 A. When Available

Appellate court's jurisdiction to recall is limited. As a general rule, a court of appeal has no appellate jurisdiction over its own judgment and cannot review or modify it after the case has passed from its control by the issuance of the remittitur. *Isenberg v Sherman* (1932) 214 C 722, 725, 7 P2d 1006. However, an appellate judgment and remittitur secured by fraud or imposition, or by misleading the court so that it decides the case under a misapprehension of the facts, is a nullity that does not divest the appellate court of jurisdiction. *Isenberg v Sherman, supra*. In other words, although jurisdiction is reinvested in the trial court once the remittitur has issued, the reviewing court still retains "some vestige of jurisdiction" to recall the remittitur when inadvertence, mistake of fact, or the court's incomplete knowledge of all circumstances of the case, whether induced by fraud or otherwise, resulted in an unjust decision. *In re Martin* (1962) 58 C2d 133, 138, 23 CR 167. Also see Cal Rules of Ct 8.272(c)(2) ("[o]n a party's or its own motion or on stipulation and for good cause, the court [of appeal] may … order … recall" of remittitur), 8.540(c)(2) ("[o]n a party's or its own motion and for good cause, the [supreme] court may … order … recall" of remittitur; note that stipulation is not available in the supreme court).

Recall is extraordinary remedy. A motion to recall a remittitur is an extraordinary remedy to be exercised only in the limited situations described above. *Haydel v Morton* (1938) 28 CA2d 383, 82 P2d 623. As a practical matter, recall of a remittitur is extremely rare, and counsel should be sure that there is a solid basis for recall before seeking it.

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§18.15 B. Examples of Grounds for Recall

Reviewing courts have recalled remittiturs for the following reasons:

- To correct the clerk's failure to enter the proper judgment for costs (Cal Rules of Ct 8.278(b)(2)); *Sacramento & San Joaquin Drainage Dist. ex rel State Reclamation Bd. v Reed* (1963) 217 CA2d 611, 31 CR 754) or to correct other clerical errors (*Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 165, 188 CR 104).
- When there has been a mistake in the facts of the case (*In re Rothrock* (1939) 14 C2d 34, 37, 92 P2d 634; see also *In re McGee* (1951) 37 C2d 6, 9, 229 P2d 780) or if a judgment was improvidently rendered without due consideration of the facts of the case (*Municipal Bond Co. v City of Riverside* (1934) 138 CA 267, 288, 32 P2d 661; see also *In re McGee, supra*).
- When there has been fraud or "imposition on the court." *McClearen v Superior Court* (1955) 45 C2d 852, 856, 291 P2d 449 (remittitur recalled on ground that court was misled by parties into acting under mistaken belief that lower court had not heard any issue of fact in denying motion for lien when in fact issues of fact had been presented by stipulation); *Trumpler v Trumpler* (1899) 123 C 248, 252, 55 P 1008 (confession of error obtained by deceit, injuring real party in interest and resulting in issuance of remittitur).
- To clarify and make certain matters that are implicit in the court's opinion and judgment. *Ruth v Lytton Sav. & Loan Ass'n* (1969) 272 CA2d 24, 76 CR 926.

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§18.16 C. Grounds for Denial of Recall

Recall not available to correct judgment on merits. A court will not recall a remittitur to correct judicial error or to reconsider or modify its judgment on the merits. *Southwestern Inv. Corp. v City of Los Angeles* (1952) 38 C2d 623, 626, 241 P2d 985; *Davis v Basalt Rock Co.* (1952) 114 CA2d 300, 301, 250 P2d 254. Judicial errors can be corrected only on a rehearing or modification before the remittitur issues, or on review by the supreme court. 114 CA2d at 310. A motion to recall the remittitur is not a proper vehicle for correcting the judgment on its merits, and the motion will be denied if it is in fact an attempt to secure a second rehearing on the merits of an issue already fully considered by the court on a petition for rehearing. *Southwestern Inv. Corp. v City of Los Angeles* (1952) 38 C2d 623, 630, 241 P2d 985; *Isenberg v Sherman* (1932) 214 C 722, 725, 7 P2d 1006.

Exception in certain criminal cases. An exception may be made, however, at least in a criminal case, when the error is so significant that it would entitle defendant to a writ of habeas corpus, in which event the recall of the remittitur is an "adjunct to the writ." *People v Mutch* (1971) 4 C3d 389, 396, 93 CR 721; *Southwestern Inv. Corp. v City of Los Angeles* (1952) 38 C2d 623, 241 P2d 985.

Recall can be denied because of undue delay. Courts have also denied motions to recall on the ground of laches, *i.e.,* unexplained long delay. *Ellenberger v City of Oakland* (1946) 76 CA2d 828, 836, 174 P2d 461; *Talbot v Fire & Police Pension Bd.* (1942) 51 CA2d 193, 124 P2d 352.

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§18.17 D. How Recall Is Obtained

The court of appeal may recall a remittitur on its own motion, on motion of the parties supported by affidavits or declarations, or on stipulation of the parties, setting forth facts that would justify granting a motion to recall. Cal Rules of Ct 8.272(c). Recall may be obtained only by motion in the supreme court. Cal Rules of Ct 8.540(c)(2).

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§18.18 E. When Motion to Recall Must Be Made

If a party moves to recall the remittitur because the clerk failed to enter the proper judgment for costs (see §18.5), the motion must be made within 30 days after the remittitur is issued. Cal Rules of Ct 8.278(b)(2). There is no time limit for filing motions based on other grounds, although motions have been denied on the ground of undue delay (see §18.16).

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§18.19 F. Form: Motion to Recall Remittitur

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18.19-1 Motion to recall remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

**MOTION TO RECALL REMITTITUR;
SUPPORTING MEMORANDUM;
DECLARATION(S) OF** _ _[*NAME*]_ _

_ _[*Appellant/Respondent*]_ _, _ _[*name*]_ _, **moves this court to recall the remittitur issued in this case on** _ _[*date*]_ _.

This motion is made under California Rules of Court 8.272(c) [or Cal Rules of Ct 8.540(c)(2)] on the following ground(s): _ _[*State grounds in detail, e.g., the judgment was inadvertently made in that* _ _[*name of party*]_ _ *induced the court by fraudulently misstating the facts to enter judgment and issue the remittitur in these proceedings/the clerk inadvertently failed to enter the proper judgment for costs*]_ _.

This motion is based on the attached _ _[*declaration of* _ _[*name of declarant*]_ _ *and*]_ _ **supporting memorandum, and on the record on appeal.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*e.g., plaintiff and appellant*]_ _

Copies: See §18.8.

Comment: The motion to recall must comply with Cal Rules of Ct 8.54. The court may grant a hearing on request of a party or on the court's own motion; otherwise the court may rule on a motion anytime after an opposition or other response is filed or the time to do so has expired. Cal Rules of Ct 8.54(b). If the motion is based on matters outside the record, it must be accompanied by an affidavit or declaration. Cal Rules of Ct 8.54(a)(2). On motion procedure generally, see Cal Rules of Ct 8.54; chap 11.

NOTE: Under the reorganized and renumbered Rules of Court, a "memorandum of points and authorities" is now referred to simply as a "memorandum." See Cal Rules of Ct 8.54.

On caption and cover requirements, see Comment in §11.6.

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§18.20 G. Form: Declaration in Support of Motion to Recall Remittitur

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18.20-1 Declaration in support of motion to recall remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

DECLARATION OF _ _[*NAME*]_ _ **IN SUPPORT OF MOTION TO RECALL REMITTITUR**

_ _[*Name*]_ _ **declares:**

1. I am the _ _[*attorney for* _ _[*appellant/respondent*]_ _]_ _**. I am making this declaration in support of the motion for an order recalling the remittitur issued in this case. If called as a witness, I could testify competently to the matters set forth below.**

2. _ _[*State basis for relief; see §17.13*]_ _**.**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _
Declarant

Copies: See §18.8.

Comment: The supporting memorandum required by Cal Rules of Ct 8.54(a)(2) may be filed with the motion under the same cover (see §18.19), in which case a separate caption is not required.

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Source: Civil Litigation/California Civil Appellate Practice/18 Remittitur/§18.21 H. Form: Stipulation for Recall of Remittitur

§18.21 H. Form: Stipulation for Recall of Remittitur

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18.21-1 Stipulation for recall of remittitur

_ _[*Name, State Bar number, address, telephone*]_ _
Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION FOR RECALL OF REMITTITUR

The parties, through their respective counsel, stipulate that the remittitur issued in this case on _ _[*date*]_ _**, may be recalled.**

This stipulation is made for the following reasons: _ _[*State facts that would justify granting a motion to recall the remittitur, see discussion in §18.15 and form in §18.19*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

Copies: See §18.8.

Comment: The stipulation must state facts that would justify granting a motion to recall the remittitur. Cal Rules of Ct 8.272(c).

Form 18.9-1 may be adapted for use as an Order to Recall Remittitur. See Comment in §18.9.

On caption and cover requirements, see Comment in §11.6.

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19

Rehearing in Court of Appeal

Joseph P. Mascovich

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I. NATURE AND PURPOSE

§19.1 A. Right to Rehearing

There is a right to petition for a rehearing in the court of appeal after a court of appeal decision that is "not final in that court on filing." Cal Rules of Ct 8.268(a)(1). See Cal Rules of Ct 8.264 on when a decision becomes final. When the court of appeal decides a case on an issue that neither party raised or briefed, a rehearing is required if requested. Govt C §68081.

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§19.2 B. Potential Benefits of Rehearing

Although successful petitions for rehearing are in fact rare (see §19.3), there are often sound reasons for filing such a petition, the primary one being that it is sometimes an essential preliminary step to seeking review in the supreme court (see §19.4). Further, despite the rarity with which rehearings occur, the benefit for the client is obvious when the court of appeal grants a rehearing and then changes the disposition of the case. See, *e.g., Kaplan v Coldwell Banker Residential Affiliates, Inc.* (1997) 59 CA4th 741, 69 CR2d 640 (vacating previous opinion at 57 CA4th 958, 69 CR2d 59); *Milo Equip. Corp. v Elsinore Valley Mun. Water Dist.* (1988) 205 CA3d 1282, 1285, 253 CR 126; *Freedom Newspapers, Inc. v Superior Court* (1986) 186 CA3d 1102, 1106, 231 CR 189; *Oneto v City of Fresno* (1982) 136 CA3d 460, 466, 186 CR 299. Even when rehearing does not change the disposition, a well-crafted petition may convince the court to limit or modify the scope of its holding in a way that will benefit petitioners in other cases.

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II. DECIDING WHETHER TO FILE PETITION FOR REHEARING

A. Practical and Tactical Considerations

§19.3 1. Grant of Petition Is Rare and Does Not Necessarily Change Result

Petitions rarely granted. Petitions for rehearing are rarely granted. Even when the court of appeal does grant a rehearing, it seldom changes the result and issues a new opinion. See, *e.g., Wolski v Fremont Inv. & Loan* (2005) 127 CA4th 347, 25 CR3d 500. Most often, the court modifies parts of the opinion without changing the result. Sometimes the opinion is reissued verbatim.

NOTE: California Rules of Court 8.268(b)(2) expressly states that a petition for rehearing normally will not be granted unless the court has requested an answer. See §19.21.

Why rehearings are rare. The rarity of rehearings is due to several factors, which the losing party should keep in mind when considering filing a petition. First, the vast majority of appeals were already correctly decided, because the court of appeal applies settled law to the relevant facts as determined by the applicable standard of review. Even when reasonable people may differ on the correct outcome, because the court of appeal has stated its position on the merits of the case, it is naturally difficult to persuade that court that its opinion is incorrect and contains serious flaws. Finally, given the court of appeal's caseload and the production demands that load imposes on each justice, the court of appeal cannot take the time to grant rehearing or modify its opinion in response to every petition for rehearing that raises potentially valid points.

JUDICIAL PERSPECTIVE: Generally, the authoring justice refers a petition for rehearing to the staff attorney who worked on the case. Unless the reason for the purported erroneous disposition is based on a new case or a factual conclusion that is indisputably in error, it is unlikely that a recommendation will be made to grant. As a practical matter, the concurring justices give significant deference to the position of the authoring justice.

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§19.4 2. Petition for Rehearing Is Sometimes Essential Preliminary Step to Filing Petition for Review in Supreme Court

Petition as preliminary step to supreme court review. The California Supreme Court will usually not consider an issue if it was omitted from or misstated in the court of appeal's opinion, unless the error was called to that court's attention through a petition for rehearing. This is the main reason for filing a petition for rehearing. Cal Rules of Ct 8.500(c)(2).

Hazards of failing to file petition. Without a petition for rehearing in the court of appeal, the supreme court will not usually consider a claim that the opinion omitted or misstated an issue or material fact. See generally *Soule v General Motors Corp*. (1994) 8 C4th 548, 557 n1, 34 CR2d 607 (noting that petitioner had not challenged court of appeal's summary of relevant parts of trial evidence); Cal Rules of Ct 8.500(c)(1). Therefore, when a claimed court of appeal error implicates an omitted or misstated issue or material fact, counsel should file a petition for rehearing. Moreover, because the supreme court does not issue opinions when it denies review, it is impossible to know when it has denied an otherwise meritorious petition only because a petition for rehearing was never filed. Prudence thus dictates that, in all but the most unusual cases, a petition for rehearing should be filed if the court of appeal's opinion misstates or omits one or more issues or material facts.

When petition for rehearing unnecessary. When the asserted appellate error does not turn on an omitted or misstated issue or material fact, and was not based on an issue raised or briefed by one of the parties, no petition for rehearing is necessary. When it is claimed, for example, that the court of appeal made an error of law, or erred by failing to apply the law correctly to the facts, or reached a decision in violation of public policy, a petition for rehearing is not a prerequisite to a petition for review.

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§19.5 3. Balancing Potential Benefits Against Expense and Risk

Benefits. The potential benefits of a petition for rehearing are usually straightforward. The petition provides an opportunity to undo an adverse opinion, or at least to modify the opinion in a helpful way. In fact, because it is so difficult to obtain supreme court review (see §§22.3-22.13), a petition for rehearing is often the losing party's only real chance to alter the outcome of the appeal.

Expense. In most cases, the cost of preparing a petition for rehearing is not a controlling factor in deciding whether to file a petition. The loser has already incurred the expenses of transcripts, briefs, and counsel's time. The additional expenses of proceeding further are usually insignificant compared with those that have already been incurred. Nevertheless, because preparation of an effective petition for rehearing may cost several thousand dollars, the expense involved may tip the balance against seeking rehearing when the grounds are marginal and a petition for supreme court review will not be filed.

Risks. The potential risks of seeking rehearing are often more subtle and difficult to assess than the potential benefits. In some cases, when a petition criticizes the reasoning of an opinion, its author is not only prepared to stand by the opinion, but may realize on reflection that a valid point was not stated as clearly or as vigorously as it could have been. In this situation, the author might modify the opinion to clarify an ambiguity or to strengthen the reasoning, thus removing or weakening the only point that would have persuaded the supreme court to grant review. See *Coca-Cola Bottling Co. v Superior Court* (1991) 233 CA3d 1273, 1286, 286 CR 855.

Impact of whether opinion was published. Whether the opinion is published or unpublished raises a distinct set of issues that must be analyzed, particularly for the risks they present. If the opinion is unpublished and a petition for review in the supreme court will be filed, it may be worthwhile to consider combining a petition for rehearing with a request that the opinion be published in the Official Reports. The chances of obtaining review usually increase if the opinion is published, and a petition for rehearing may help convince the court of appeal that the opinion should be published because it resolves an important issue and will provide guidance in other cases. For standards of publication of court of appeal opinions, see Cal Rules of Ct 8.1105(c). For procedures for requesting publication of an unpublished opinion, see Cal Rules of Ct 8.1120.

NOTE: Unless the party has already filed a petition for rehearing, a court of appeal order certifying the opinion for full or partial publication restarts the period for filing a petition. Cal Rules of Ct 8.268(b)(1)(B).

Risks of petition when opinion unpublished. If an opinion is unpublished and it is in the client's best interests that it remain so, a petition for rehearing involves some risk. A petition that criticizes the court's reasoning may have the unwanted effect of suggesting that the opinion addresses recurring issues or is important to the development of the law, thereby inducing the court to consider publishing the opinion or the prevailing party to request publication.

Risks when published opinion addresses issues that arise frequently for client. When an opinion is published, proceeding further may involve risks if the losing party is frequently involved in litigation that raises the same or similar issues. For example, an insurance company may face many cases involving standard policy language, or a manufacturer may be involved in many product liability lawsuits. If so, counsel should evaluate whether to seek a rehearing with these other cases in mind. Although the court of appeal's opinion may be harmful, it may leave room for a different result in other cases involving different facts. In this situation, a petition for rehearing may prompt the court of appeal to modify its opinion in a way that precludes a different result in other cases.

Discuss prospect of rehearing with client. Litigants in an appeal will have spent considerable time, energy, and money on both the litigation and the appeal and will be disappointed if they lose. Even when the chance of success is small, some litigants want to pursue every available remedy that may alter the outcome, including a petition for rehearing. Conversely, other litigants may be so disheartened that they are ready to concede defeat and do nothing to attempt to change the result, even though there may be grounds for rehearing, or the issues may be worthy of supreme court review. In all cases, then, the practitioner should review with the client the reasons that the court of appeal may be induced to grant rehearing, discuss the risks that may be associated with filing the petition, and explain how

rehearing may be a critical step toward supreme court review. See §§19.6-19.10. The decision of whether to petition for rehearing should be based on these factors. Although the client has the right to decide whether a petition for rehearing should be filed, if there are no legal grounds for the court to grant a rehearing, counsel should explain to the client why no petition should be filed.

Risk of sanctions. Although there is no available record of a court of appeal imposing sanctions for filing a frivolous petition for rehearing, counsel who succumb to their client's demands to file a petition without merit risk damaging their credibility with the court. See Cal Rules of Ct 8.276(a).

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B. Factors That May Persuade Court of Appeal to Grant Rehearing or Modify Its Opinion

§19.6 1. Grounds Not Limited by Statute

Although Cal Rules of Ct 8.268 authorizes a petition for rehearing, it does not set out the grounds on which a rehearing may be sought or granted. Some of the situations in which a petition for rehearing may be required, in preparation for a petition for review in the supreme court, are discussed in §19.14. See also 9 Witkin, California Procedure, *Appeal* §905 (5th ed 2008). In addition, a petition for rehearing is appropriate if there was some defect in the constitution of the court (*Kelliher v Kelliher* (1950) 101 CA2d 226, 225 P2d 554), but such instances obviously are rare. Finally, the court of appeal is required to order a rehearing on request when its decision rests on an issue that was neither proposed nor briefed by a party. Govt C §68081; see §19.9.

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§19.7 2. Material Misstatements or Omissions of Fact

Rarely basis for rehearing. The court may grant a rehearing if its decision contains misstatements or omissions of material fact. Such an error may occur when the record is lengthy or the issues are highly technical. As an oft-cited case observed, if the court believes its decision "has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether [the case was] correctly decided," the court may grant a rehearing. *In re Jessup* (1889) 81 C 408, 471, 22 P 742. Yet, there are almost no cases in which courts have found misstatements of material fact sufficient to justify granting a petition for rehearing.

Minor mistakes or omissions insufficient. Omissions that, if corrected, would leave the court's judgment intact are an insufficient basis to grant a rehearing. See *Bence v Teddy's Taxi* (1929) 101 CA 748, 753, 282 P 392. Further, minor mistakes of fact brought to the court's attention in a petition for rehearing may be corrected by the court in an opinion rendered on denial of the petition. *Jewish Publications v Gordon* (1949) 91 CA2d 376, 206 P2d 61.

Applicable standard of review. Counsel's evaluation of the merits of seeking rehearing on the ground of a misstatement or omission of material fact must also be made with the standard of review in mind. Appellants often make the mistake of responding to the appellate court's failure to discuss all the facts and evidence that they considered crucial by arguing the facts that would have supported a judgment in their favor. On appeal, many factual issues are governed by the substantial evidence standard of review, under which all conflicts in the evidence are resolved in the prevailing party's favor and all reasonable inferences from the facts are used to support the judgment. See §5.20. When this standard applies, no basis for rehearing exists merely because the court of appeal omitted from its decision any reference to conflicting evidence that, although it would have supported a different result at trial, cannot support reversal of the judgment on appeal. *Toole v Richardson-Merrell Inc.* (1967) 251 CA2d 689, 719, 60 CR 398 (pointedly observing that summary of evidence stated in manner consistent with substantial evidence standard of review "rarely makes pleasant reading for the losing party").

Consider petition when court has overlooked important facts. Despite the slight chance of success on a petition for rehearing, counsel should petition for rehearing if the court of appeal has overlooked important facts. The petition should not reargue the facts but should carefully highlight any instance in which the court of appeal omitted a reference to undisputed or uncontradicted evidence that is material to and in conflict with the decision.

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§19.8 3. Material Misstatements or Omissions of Law

A court of appeal opinion may incorrectly analyze or overlook a relevant rule of law or one of the party's arguments. For example, the court may resolve an issue tendered to it, but its resolution of that issue may implicate other legal issues that either were not adequately briefed or that became relevant only in light of the opinion. See, *e.g., Milo Equip. Corp. v Elsinore Valley Mun. Water Dist.* (1988) 205 CA3d 1282, 1285, 253 CR 126. Much less often, the court may overlook an argument that, if accepted, could affect the outcome. See, *e.g., Freedom Newspapers, Inc. v Superior Court* (1986) 186 CA3d 1102, 1106, 231 CR 189. In such cases, the petition should point out the problem and demonstrate why the result should be different. For the reasons discussed in §19.3, however, the most likely response is denial of the petition with a minor modification of the opinion.

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§19.9 4. Petition for Rehearing Based on New Issue

Express statutory ground for rehearing. When the court of appeal decides an appeal based on an issue that was not raised in the briefs, there is an express statutory ground for rehearing; Govt C §68081 provides:

> Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

Rehearing mandatory. The supreme court has provided some guidance to appellate courts and lawyers on the application of Govt C §68081 in *People v Alice* (2007) 41 C4th 668, 677, 61 CR3d 648. The court made it clear that §68081 does not require that a party actually have briefed an issue, just that it had the opportunity to do so in a written brief. 41 C4th at 677, 679. The court also made it clear that the opportunity to brief includes any issues that are "fairly included" within the issues actually raised. *People v Alice, supra.*

The protection of §68081 extends only to new issues raised by an appellate court; the parties do not have the right to submit supplemental briefs or be granted a rehearing when the appellate court relies on authority or uses a mode of analysis that was not briefed by the parties. 41 C4th at 679.

The advantage §68081 provides is that, when applicable, it makes rehearing mandatory. See *Adoption of Alexander S.* (1988) 44 C3d 857, 864, 245 CR 1. In fact, the court of appeal's refusal to grant a rehearing will likely result in the supreme court granting review and retransferring the case to the court of appeal with directions to reconsider its opinion after permitting supplemental briefing. See, *e.g.*, *Alice,* 41 C4th at 679 (supreme court noted that it could reverse and remand for rehearing after supplemental briefing but decided case instead because parties had already briefed issue); *Dieckmeyer v Redevelopment Agency of Huntington Beach* (2005) 127 CA4th 248, 250 n1, 24 CR3d 895 (supreme court granted review and transferred case to court of appeal after finding that court of appeal had not complied with Govt C §68081).

Different result not guaranteed. Of course, although Govt C §68081 may make rehearing mandatory, it does not guarantee that the court of appeal will change its mind on rehearing. Thus, counsel still must demonstrate that the court of appeal incorrectly analyzed the law or misapplied the law to the facts of the case.

Practical effect of Govt C §68081. With respect to rehearing, the impact of Govt C §68081 has been greater in theory than in practice because the court of appeal usually follows §68081 by requesting supplemental briefing on a new issue before rendering an opinion. See, *e.g., Falahati v Kondo* (2005) 127 CA4th 823, 831 n18, 26 CR3d 104; *San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus* (1994) 27 CA4th 713, 741 n12, 32 CR2d 704. Be aware that the court of appeal will not grant rehearing based on a conclusory statement that the case was decided on an unbriefed issue. See, *e.g., Garcia v Hejmadi* (1997) 58 CA4th 674, 692, 68 CR2d 228. The petition should carefully demonstrate why the issue is in fact new to the case and was not fairly encompassed by the issues that the parties actually briefed and argued. See *Westly v California Pub. Employees' Retirement Sys. Bd. of Admin.* (2003) 105 CA4th 1095, 1113 n14, 130 CR2d 149.

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§19.10 5. Petition for Rehearing to Obtain Guidance on Remand or to Clarify Ambiguity in Directions

An appeal may result in reversal with directions to the trial court that are either ambiguous or impracticable. In this situation, even the prevailing party may wish to petition for rehearing, or for modification, to obtain clearer or more practical directions. See, *e.g., Jeffer, Mangels & Butler v Glickman* (1991) 234 CA3d 1432, 1444, 286 CR 243 (in response to petition for rehearing, court provided guidance on allowable scope of expert testimony).

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/§19.11 6. Caveat: New Points Raised for First Time Usually Not Considered

§19.11 6. Caveat: New Points Raised for First Time Usually Not Considered

New points generally not considered. Many court of appeal decisions have stated that rehearing will not be granted to consider points that the petitioner has raised for the first time in a petition for rehearing. *Garcia v Hejmadi* (1997) 58 CA4th 674, 692, 68 CR2d 228; *Lacher v Superior Court* (1991) 230 CA3d 1038, 1050, 281 CR 640. This situation should be distinguished from one in which the court's opinion turns on an issue that the parties did not brief and argue (see §19.9).

Exceptions. The following are the main exceptions to the rule that points raised for the first time in a petition for rehearing will not be considered:

- **Jurisdictional issues.** If petitioner raises a jurisdictional question for the first time in a petition for rehearing, the court will consider it because issues of jurisdiction can be raised at any time. *Sime v Malouf* (1950) 95 CA2d 82, 116, 213 P2d 788 (court considered new point of failure to join indispensable party, considered jurisdictional, but refused rehearing because person not joined was not indispensable party).
- **Procedural problems.** A petition for rehearing is a proper way to raise a procedural problem with the way in which a case was decided. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557 (participation in decision by justice who did not participate in oral argument denied petitioner effective right to oral argument; error required retransfer for reargument and decision).
- **Unanticipated points.** The decision may reveal points that the parties did not anticipate and thus were not covered in the briefs. In that event, the court of appeal may be receptive to a petition for rehearing that seeks a modification rather than a change in the outcome. *Kenneth Mebane Ranches v Superior Court* (1992) 10 CA4th 276, 292, 12 CR2d 562 (court held that demurrer should have been sustained, but in response to petition for rehearing changed disposition to allow leave to amend). See also discussion in §19.9 (rehearing required when parties neither raised nor briefed issue).
- **Other exceptions.** Even when the narrow circumstances described above do not exist, a court of appeal may be willing to consider a new point if, given the posture of the case on appeal, petitioner's failure to raise it sooner is reasonable. *Mounts v Uyeda* (1991) 227 CA3d 111, 120, 277 CR 730 (argument in petition that statute was unconstitutional considered when based on recent federal decision). Sometimes, without explanation, a court has relaxed the rule, granted a petition for rehearing, and considered new points. *Traders & Gen. Ins. Co. v Pacific Employers Ins. Co.* (1955) 130 CA2d 158, 278 P2d 493 (rehearing granted to consider new point of applicability of a section of the Insurance Code; court stressed general rule but gave no reason for departing from it).

Explain failure to raise points earlier. If new points will be raised in the petition for rehearing, it is vital to explain the failure to raise them earlier. If petitioner can show, for example, that a statute has been changed or a new decision rendered after the original briefs were filed, and that the change should apply to the case at hand, the court may be more inclined to grant a rehearing than in other situations. See, *e.g.*, *People v Overby* (2004) 124 CA4th 1237, 22 CR3d 233 (court granted rehearing to assess impact of important U.S. Supreme Court decision). In some cases, the court may modify its opinion to offer guidance on what should occur on remand when the directions were not included in the original opinion. *Britz, Inc. v Alfa-Laval Food & Dairy Co.* (1995) 34 CA4th 1085, 1108 n12, 40 CR2d 700 (petition for rehearing prompted court to state that losing party could raise waiver).

Comments on newly raised points while denying rehearing. Despite the exceptions, it is safe to assume that the court of appeal will not grant rehearing to consider points raised for the first time in the petition. This is not to say that the court will refrain from commenting on the new points. Courts frequently address and reject new points in opinions rendered on denial of the petition for rehearing. See, *e.g., Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 495, 144 CR 474 (rehearing denied but court considered new issues of propriety of attorney fee award and waiver of objection to checks delivered to corporation). Indeed, in some cases, the resulting modification of the opinion has been significant even though it did not change the result. See, *e.g., Christiansen v Roddy* (1986) 186 CA3d 780, 791,

231 CR 72 (rehearing denied but court addressed important cases cited for first time in petition for rehearing and its discussion of them significantly limited holding of main opinion).

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III. PREPARING PETITION

A. Procedure

§19.12 1. Time for Filing

The filing deadline for rehearing petitions is measured from the date the court of appeal files its decision. This filing date is stamped on the first page of the slip opinion that the court of appeal mails to the parties and also can be obtained from the court of appeal's website. Within 15 calendar days after that date, the petitioner *must* file and serve the petition for rehearing. Cal Rules of Ct 8.268(b). For the definition of "date of filing," see §19.13. When this deadline falls on a weekend or a court holiday, it is automatically extended to the next day that is not a holiday. CCP §12a. However, because the court of appeal has limited time in which to act on the petition, counsel should try to file before the due date. Note that the presiding justice may relieve a party from failure to timely file a petition for review on the party's motion and for good cause shown before the decision is final. Cal Rules of Ct 8.268(b)(4).

NOTE: Under Govt C §68106(b)(1), effective July 28, 2009, and operative through June 30, 2010, if a court is closed as the result of a budget reduction measure in response to the state fiscal crisis, the day is considered a holiday and not a court day.

Certain events, such as a court of appeal order certifying the opinion for full or partial publication, may restart this 15-day period. Cal Rules of Ct 8.268(b)(1)(B)-(D). See also Cal Rules of Ct 8.264(b)(3) (certification for publication), 8.264(c)(2) (modification changing appellate judgment), 8.264(d) (filing of consent to increase or decrease judgment).

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§19.13 2. Date of Filing

The "date of filing" of a petition for rehearing and answers to it is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1), (3). This rule also provides, however, that a petition for rehearing is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3).

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§19.14 3. Time for Court to Act

Court must act before decision is final. The court of appeal must act on the petition for rehearing, if it is going to do so, before the decision becomes final as to that court, which occurs 30 calendar days after the decision was filed. Cal Rules of Ct 8.264(b), 8.268(a). If the court of appeal has not acted by that date, a "pocket veto" occurs, with the petition for rehearing deemed denied by operation of law. Cal Rules of Ct 8.268(c).

Available time when opinion or judgment is modified. If the court of appeal modifies its opinion during the time allowed for rehearing without a change in the judgment, the judgment will become final 30 calendar days after the initial filing of the decision. The modification does not postpone the time that the decision becomes final. But if the judgment itself is modified, the time in which the decision will become final begins to run anew, as of the date the modification is filed. Cal Rules of Ct 8.264(c)(2). The order modifying the opinion must state whether the modification results in a change in the judgment. Cal Rules of Ct 8.264(c)(2).

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§19.15 4. Format

A petition for rehearing (defined as a "brief" in Cal Rules of Ct 8.25(b)(3)) should conform as far as practicable to Cal Rules of Ct 8.204, which states the requirements for the form of briefs. Cal Rules of Ct 8.268(b)(3). See generally §§12.19-12.24. Among other things, Cal Rules of Ct 8.204(a)(1)(A)-(B) requires that all briefs be preceded by a table of contents and a table of authorities and that each point appear separately under an appropriate heading. See §§12.25, 12.34-12.40. The cover of a petition for rehearing should be orange. Cal Rules of Ct 8.40(b)(1). However, unless an attorney or party has repeatedly violated the rule on cover color, the court must accept a nonconforming color. Cal Rules of Ct 8.40(b)(3).

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§19.16 5. Copies

The original and four copies of a petition for rehearing should be filed with the court of appeal. Cal Rules of Ct 8.44(b)(3). Unless the court or a local rule requires otherwise, only one set of any separately bound supporting documents accompanying a petition for rehearing need be filed. Cal Rules of Ct 8.44(b)(5).

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§19.17 6. Service

The petitioner must also provide proof of service of one copy of the petition and any separately bound documents on counsel for each party represented by separate counsel and on each party not represented by counsel. Cal Rules of Ct 8.25(a). Although not required by the rules of court, it is good practice to serve a copy of the petition on the superior court clerk for delivery to the trial judge (see Cal Rules of Ct 8.212(c)(1)).

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B. Problems of Persuasion

§19.18 1. When Petition Filed Primarily to Preserve Right to Review

The challenge of preparing a petition for rehearing varies with the circumstances of each case and the ultimate objective involved. In some cases, counsel has no realistic expectation that the court of appeal will grant a rehearing, and the petition is primarily filed to preserve the losing party's ability to seek review on any issue involving an omitted or misstated issue or material fact. In that event, a succinct treatment of the issues is all that is required.

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§19.19 2. When Modification or Clarification Sought

Counsel sometimes will only be interested in seeking a modification or clarification of the opinion that will affect what occurs on remand. If so, the petition should make it clear from the outset that it is being filed for that limited purpose and, accordingly, does not involve the court's reasoning or a decision whether to reverse or affirm. This prefatory statement should then be followed by a concise statement of the problem and the favored solution. When appropriate, counsel should propose language that the court of appeal may use if it agrees to modification.

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§19.20 3. When Rehearing Sought

Most challenging for petitioner. The petition for rehearing presents the most formidable obstacle for the advocate because the petition must attack the opinion's reasoning and result and attempt to show the court of appeal why it needs to decide the case anew. Although the merits of petitioner's case remain the same, the burden of persuasion is immeasurably greater because the court of appeal has already taken a position on the issues.

Petition should be compelling and concise. When rehearing is sought, counsel's first step in convincing the court of appeal to change its decision is to get the court's attention. Therefore, the petition must be compelling and concise and should not reargue the issues that were briefed. Counsel should carefully select the points to be raised and present only those that directly involve the court's reasoning process on the issues that are at the heart of the case. If the opinion will significantly affect other cases in ways which the court of appeal may not have foreseen, these concerns should be highlighted. Likewise, if the opinion reaches a result inconsistent with other authority that the court may have overlooked, this point should be developed as well. As with any brief, however, weak arguments will detract from a good point. If the grounds for rehearing cannot be stated in a direct and forceful manner, or if they amount to a recapitulation of the briefs on file, then they are undoubtedly insufficient to obtain a rehearing.

Tone must be respectful to court. Although a petition for rehearing must be forceful to be persuasive, it must also be respectful toward the court. Although a valid argument should not be omitted for fear of offending the court, it must be made in respectful terms. Because of the importance of maintaining this delicate balance in the petition, counsel should ask a colleague to review a draft to ensure that it does not have an intemperate tone that conveys, subtly or otherwise, anger or frustration with the court. In this regard, the Alabama Supreme Court's admonition in *Prudential Ballard Realty Co. v Weatherly* (Ala 2000) 2000 Ala Lexis 530 has universal application: By filing a petition for rehearing that appears to be "a written temper tantrum," an attorney may "detract from the merits of the argument and do his or her client irreparable harm by failing to maintain the required level of professionalism."

JUDICIAL PERSPECTIVE: Counsel should not assume that reviewing courts will not employ contempt in an appropriate case. Appellate courts have set orders to show cause and found attorneys in contempt because of intemperance in their petitions.

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/ IV. ANSWER/ A. Whether to File/§19.21 1. No Right to File Answer

IV. ANSWER

A. Whether to File

§19.21 1. No Right to File Answer

An answer to a petition for rehearing may not be filed unless the court requests an answer. Cal Rules of Ct 8.268(b)(2). The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another "expeditious method." Any answer must be served and filed within 8 days after the order is filed unless the court orders otherwise.

PRACTICE TIP: The rule that a party may not file an answer to a petition for rehearing unless the court requests one (Cal Rules of Ct 8.268(b)(2)) is a marked change from former practice. Because the appellate courts deny all but a very small percentage of petitions for rehearing, this rule change signifies that the courts seldom need the assistance of an answer to decide whether a petition has merit or warrants closer scrutiny.

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/§19.22 2. Deciding Whether to File [Deleted]

§19.22 2. Deciding Whether to File [Deleted]

This section has been deleted. See §19.23.

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§19.23 3. When Answer Requested by Court

When the court requests that an answer be filed under Cal Rules of Ct 8.268(b)(2), counsel should, of course, comply. Some courts may direct that the answer address specific issues. More often, the order will simply request the party to file an answer, and the court clerk will be unable to advise counsel whether the court is interested in a particular issue. Either way, counsel should view the request as a signal that the court has some concern about the arguments raised in the petition for rehearing. Consequently, the answer should be more than a terse dismissal of the petition's arguments. Absent a court order specifying the issues the answer should address, counsel should carefully analyze the petition to determine what arguments likely captured the court's attention. The answer should address these arguments first, but it should respond to the petition's other points as well.

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§19.24 B. Problems of Persuasion

Although the request for an answer to the petition (Cal Rules of Ct 8.268(b)(2)) means that the appellate court has some concerns, counsel should not rebrief the case. When preparing an answer, counsel's fundamental objective still is to persuade the court to deny the petition outright or to deny the petition in conjunction with an order that responds to the petition's arguments but preserves the original disposition. See §19.32. Thus, the answer's focus will depend on the types of arguments presented in the petition.

For example, if the petition asserted that Govt C §68081 requires a rehearing, the answer should, if appropriate, contest that assertion but also respond to the merits. If the petition argued that the opinion overlooked or misunderstood parts of the record, the answer should explain how the record, when viewed in light of the applicable standard of review, supports the result the court reached. If the petition challenged points of law, the answer should demonstrate that the opinion either has applied settled legal principles to the facts of the case or has extended or limited a legal principle in a reasoned and justifiable manner. If the petition identified a true flaw in the opinion, the answer should show the court that the challenged part of the opinion is not essential to the result or could be modified without changing the outcome. Finally, in the rare case when a change in the outcome appears likely, the answer should try to shape the new outcome by suggesting what the holding might be or what should occur on remand.

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C. Procedure

§19.25 1. Timing

The filing deadlines for answers as well as for petitions for rehearing are measured from the date the petition is filed. An answer must be served and filed within 8 days after the petition is filed unless the court orders otherwise. Cal Rules of Ct 8.268(b)(2). If the decision has not yet become final, the appellate court may extend the time for filing the answer. Cal Rules of Ct 8.268(b)(4), 8.60(b). Such extensions are rarely granted and should rarely be sought unless the petition for rehearing presents important new issues. A petition to extend the time for filing an answer may serve only to indicate to the court that the petition has merit. On "date of filing," see §19.13. On policies and standards for granting extensions of time generally, see Cal Rules of Ct 8.63.

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/§19.26 2. Format, Filing, and Service

§19.26 2. Format, Filing, and Service

The rules for format, filing, and service of the answer to a petition for rehearing are the same as those for the petition itself, and are discussed in §§19.15-19.17. The only difference is that the cover for the answer should be blue, whereas the cover for the petition should be orange.

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V. REPLY TO ANSWER

A. May Be Filed in Appropriate Case Even Though Not Mentioned in Rules of Court

§19.27 1. Replies Rarely Filed

Replies in support of a petition for rehearing are hardly ever filed. The reason is two-fold: (1) The California Rules of Court make no mention of a reply, which may lead some practitioners to conclude that they are not permitted, and (2) the short time limits on rehearings often make it difficult to file an effective reply.

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§19.28 2. File Reply to Correct Misstatements in Answer

Because a reply is appropriate only in the unusual case, state in the opening paragraph that the reply is being filed only because the answer contains misstatements that, if not corrected, could lead the court astray. Of course, if clear, material misstatements cannot be shown, do not file a reply.

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B. Procedure

§19.29 1. Timing

Because a reply to an answer is not mentioned in the California Rules of Court, there is no applicable deadline other than the need to file the reply in time to have the court of appeal consider it before it rules on the petition or loses jurisdiction to do so. See §19.14. As a practical matter, therefore, the reply should be filed without delay (*i.e.,* within a day or two after receipt of the answer), and counsel should telephone the court to advise it that a reply will be filed by a specific day and time. Otherwise, the court of appeal will probably rule on the petition soon after the answer is filed.

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/§19.30 2. Format, Filing, and Service

§19.30 2. Format, Filing, and Service

The reply should be in the same format as the petition. The rules of court do not specify a color for the cover of a reply, but the best practice is to use an orange cover to identify the reply as associated with the original petition, which must have an orange cover. Cal Rules of Ct 8.40(b)(1). Counsel should file and serve the reply in the same manner as the petition. See §§19.16-19.17.

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VI. POSSIBLE DISPOSITIONS OF PETITION

§19.31 A. Summary Denial

The vast majority of petitions for rehearing are summarily denied in a one-sentence order. If the court of appeal does not issue a formal order denying the petition, it is deemed denied by law 30 calendar days after the court of appeal filed its decision. Cal Rules of Ct 8.268(c).

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§19.32 B. Modification on Denial

It is quite common for the court of appeal to modify its opinion while denying the petition for rehearing. See, *e.g., Holey v J & S Sweeping Co.* (1983) 143 CA3d 588, 192 CR 74. This occurs when the court wants to address certain additional points or criticisms of its opinion raised in the petition for rehearing, but does not want to change the result. See, *e.g., R-Ranch Markets #2, Inc. v Old Stone Bank* (1993) 16 CA4th 1323, 1329 n2, 21 CR2d 21; *McCauley v BFC Direct Mktg.* (1993) 16 CA4th 1262, 1269 n7, 20 CR2d 498. Usually, however, the modification is not significant.

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§19.32A 1. Notation in Published Opinion

When modifications are incorporated into the opinion as published in the bound volumes of the Official Reports, the specific changes are often difficult to ascertain because there is merely a statement at the end of the text that a petition for rehearing was denied and the opinion modified to read as printed. See, *e.g., Allstate Ins. Co. v Orlando* (1968) 262 CA2d 858, 868, 69 CR 702; *Foley v U.S. Paving Co.* (1968) 262 CA2d 499, 509, 68 CR 780. In other cases, modifications on denial of rehearing are set out separately following the text of the original opinion. See, *e.g., Christiansen v Roddy* (1986) 186 CA3d 780, 791, 231 CR 72; *Toole v Richardson-Merrell Inc.* (1967) 251 CA2d 689, 718, 60 CR 398.

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Source: Civil Litigation/California Civil Appellate Practice/19 Rehearing in Court of Appeal/§19.33 2. When Decision Becomes Final

§19.33 2. When Decision Becomes Final

When an opinion is modified without changing the judgment during the time allowed for rehearing, the decision still becomes final 30 calendar days after it was filed. Cal Rules of Ct 8.264(c). A modified opinion that changes the judgment, however, is considered a new opinion, and the decision becomes final 30 calendar days after the date the modification is filed. Thus, another petition for rehearing becomes permissible within 15 calendar days after the new decision is filed. A modification that changes the judgment also postpones the deadline for filing a petition for review in the supreme court.

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C. Grant of Petition

§19.34 1. Oral Argument Not Required

When the court of appeal grants a petition for rehearing, the prior opinion is vacated. It is not necessary, however, for the court of appeal to recalendar the case for oral argument. *Metropolitan Water Dist. v Adams* (1942) 19 C2d 463, 468, 122 P2d 257. See also *People v Brigham* (1979) 25 C3d 283, 288, 157 CR 905 (discussing rehearing in supreme court). The court of appeal may grant a petition and issue a new opinion without any further briefing or oral argument. Practices and procedures vary from district to district and depend on the reason that a rehearing was granted in the particular case.

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§19.35 2. Opinion on Rehearing

When a rehearing is granted, the court of appeal may issue a new opinion or, in rare cases, it may reissue its original opinion verbatim. See, *e.g., Waite v Godfrey* (1980) 106 CA3d 760, 163 CR 881 (rehearing granted solely because counsel stated that he had not received notice of oral argument; after hearing argument on rehearing, court reissued opinion). If the court changes its decision, the party who was originally successful must decide whether to petition for rehearing. Most often, however, the court of appeal's opinion is still adverse to petitioner. In either case, the likelihood of convincing the court of appeal to grant another rehearing is highly remote. In this situation, a petition for rehearing might be filed if required by Cal Rules of Ct 8.500(c)(2) (see discussion in §19.4) in anticipation of supreme court review.

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20

Costs, Attorney Fees, and Sanctions

Gail Y. Norton
Lucille Y. Baca

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I. COSTS

§20.1 A. Statutory Basis

A party's right to recover costs incurred in an appeal depends entirely on statutes and court rules. Code of Civil Procedure §1034(b) specifies that court rules established by the Judicial Council govern both allowable costs on appeal and the procedure for claiming them. Allowable costs and the procedure for claiming them in an appeal from superior court are governed by Cal Rules of Ct 8.278. On procedure and items recoverable as costs on appeal from an appeal to the appellate division of the superior court in a limited civil case, see Cal Rules of Ct 8.764. This chapter exclusively addresses appeals from superior court judgments and orders. On appeals from limited civil cases court decisions, see chap 10.

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B. Who May Recover Costs

§20.2 1. Prevailing Parties

Prevailing party may recover costs. The "prevailing party" is generally entitled to recover costs on appeal. Cal Rules of Ct 8.278(a)(1). But see discussion of exceptions in §20.3.

Who is the prevailing party? Respondent is considered the prevailing party if the court of appeal affirms the judgment without modification, or dismisses the appeal. Appellant is considered the prevailing party in a reversal of the judgment in its entirety. Cal Rules of Ct 8.278(a)(2). If the court reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs. Cal Rules of Ct 8.278(a)(3).

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§20.3 2. Other Parties in Interests of Justice

Court may award or deny costs. Despite the definition of "prevailing party" in Cal Rules of Ct 8.278(a)(1), the appellate court has the power to grant, withhold, or apportion costs as it deems proper in any case in which the "interests of justice" require it. Cal Rules of Ct 8.278(a)(5). There may also be a statutory basis for granting costs on appeal to the nonprevailing party. See, *e.g.,* CCP §1268.720 (defendant in eminent domain proceeding is ordinarily entitled to costs on appeal as against plaintiff condemning agency, whether or not defendant is prevailing party).

Examples. In the following examples, the appellate court awarded costs in the interests of justice and contrary to the definition of prevailing party under former Rule 26(a) (now Rule 8.278):

- **Judgment reversed with costs to respondent.** See, *e.g., Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866 (judgment on pleadings for plaintiff/respondent reversed, but defendant/appellant's conduct in trial court warranted award of costs to respondent); *Graddon v Knight* (1956) 138 CA2d 577, 292 P2d 632 (judgments in plaintiffs' favor affirmed on issue of liability but reversed on amount of damages; plaintiffs awarded costs); *Campbell v Veith* (1953) 121 CA2d 729, 264 P2d 141 (judgment for defendants after sustaining demurrer without leave to amend reversed in part, but plaintiff/appellant's negligence in pleading complaint warranted award of costs to respondent).
- **Judgment affirmed as modified with costs to respondent.** See, *e.g., Bank of America v Oil Well Supply Co.* (1936) 12 CA2d 265, 55 P2d 885 (appellant could have easily obtained modification in trial court without appeal).
- **Judgment affirmed with costs to appellant.** See, *e.g., Stuckey v Stuckey* (1964) 231 CA2d 382, 387, 41 CR 792 (alimony award affirmed on wife's appeal, but in "interests of justice" costs of appeal and reasonable fee to wife's attorney for services on appeal to be borne by respondent/husband).
- **Appeal dismissed with costs to appellant.** See, *e.g., Bell v Board of Supervisors* (1976) 55 CA3d 629, 127 CR 757 (when intervening legislation precipitated by plaintiff/appellant's appeal rendered action moot, resulting in dismissal, it was inequitable to require plaintiff to pay costs of appeal).
- **Apportionment of costs.** See, *e.g., Schwartz v Schwartz* (1969) 268 CA2d 685, 74 CR 192 (multiple party apportionment); *Parker v Parker* (1955) 135 CA2d 782, 288 P2d 29 (even though appellant was in effect the successful party, respondent's stipulation that order appealed from be set aside resulted in saving of litigation expense and court time and caused court to order costs to be paid two-thirds by respondent and one-third by appellant).
- **No award of costs.** See, *e.g., Estate of Auslender* (1960) 53 C2d 615, 632, 2 CR 769 (accounting orders reversed in part and affirmed in part with interests of justice dictating that each party bear his own costs).

JUDICIAL PERSPECTIVE: Generally, appellate courts automatically award costs to the party who prevails on appeal. When the reviewing judges, however, are persuaded that the prevailing party has created most of the problems that resulted in the appeal, there is a tendency not to be inclined to reward that party. In those circumstances, costs are sometimes not awarded.

Make request for discretionary cost award before issuance of remittitur. Because only "the reviewing court" has jurisdiction to make a discretionary or an apportioned cost award, a party should request it to do so in a brief, motion, application, or petition for rehearing filed before remittitur issues. See, *e.g., Ramirez v St. Paul Fire & Marine Ins. Co.* (1995) 35 CA4th 473, 478, 41 CR2d 416; *Lavine v Jessup* (1959) 175 CA2d 136, 138, 345 P2d 505.

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C. Procedure to Obtain Award

§20.4 1. Decision of Appellate Court

When court of appeal must specify cost award in opinion. If there is more than one notice of appeal in a case or if the judgment is either modified or wholly or partially reversed, the court of appeal must specify any cost award or denial in its opinion. Cal Rules of Ct 8.278(a)(3). If it fails to do so, interested counsel may wish to make a request by formal motion before remittitur issues.

Award of costs against state, its subdivisions, and public officers. Costs on appeal against the state, its political subdivisions, and public officers are awarded on the same basis as against any other party. CCP §§1028-1029.

Probate cases. In probate cases, if the reviewing court does not expressly award costs, the superior court must decide whether the prevailing party is to be paid its costs from the estate or by a party. Prob C §1002; Cal Rules of Ct 8.278(a)(4).

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§20.5 2. Remittitur

Cost award inserted in remittitur. When the appellate court itself directs the manner in which costs are to be awarded, the court clerk inserts a judgment in accordance with those directions in the remittitur. Cal Rules of Ct 8.278(b)(1). If the appellate court makes no express award of costs, the clerk inserts in the remittitur a judgment for costs to the prevailing party as defined in the rules. Cal Rules of Ct 8.278(b)(1). In making the entry in the absence of an express award, the clerk should state who the prevailing party is, rather than simply inserting the notation "Prevailing party to recover costs." *People ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501 (partial reversals to multiple appellants); *Schwartz v Schwartz* (1969) 268 CA2d 685, 688, 74 CR 192. For further discussion of remittitur, see chap 18.

Correction of remittitur. If the clerk either fails to enter judgment for costs or erroneously awards them, the appellate court may, on motion made no later than 30 days after issuance of the remittitur, or on its own motion, recall the remittitur for correction. Cal Rules of Ct 8.272(c), 8.278(b)(2) (stipulation also acceptable). See *In re McGee* (1951) 37 C2d 6, 10, 229 P2d 780; *Estate of Brisacher* (1959) 175 CA2d 370, 346 P2d 225.

Always check remittitur. Because the likelihood that the appellate court will recall the remittitur itself is remote, counsel should always carefully review the remittitur and should calendar any recall motion required. See, *e.g., Ramirez v St. Paul Fire & Marine Ins. Co.* (1995) 35 CA4th 473, 478, 41 CR2d 416.

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§20.6 3. Memorandum of Costs on Appeal

Party awarded costs must file memorandum of costs; time. Within 40 days after the appellate court clerk mails notice of the issuance of remittitur, a party awarded costs by the court must serve and file a verified memorandum of costs in the trial court. Cal Rules of Ct 8.278(c)(1). That period is not extended by virtue of mailing under CCP §1013. For the approved form of the memorandum, see §20.8.

Extension of time in which to file. The 40-day period may be extended for any length of time by agreement confirmed in a writing filed with the trial court clerk, or arguably for up to 30 days by court order. Cal Rules of Ct 8.278(c), 3.1700(b)(3). There is no direct authority, however, supporting the latter interpretation. See also Cal Rules of Ct 8.60(b) on extensions of time generally.

Failure to comply with timely filing and service requirements. Unexcused failure to comply with either the 40-day filing requirement (*Moulin Elec. Corp. v Roach* (1981) 120 CA3d 1067, 1070, 175 CR 111 (30 days at time of this decision)) or the service requirement (see *Holmes v Anderson* (1928) 90 CA 276, 289, 265 P 1010) usually results in a loss of the right to costs.

But while mandatory, these requirements are not jurisdictional. The trial court generally has the discretionary power under CCP §473 to grant relief due to mistake, surprise, inadvertence, or excusable neglect. See *Spellens v Spellens* (1957) 49 C2d 210, 227, 317 P2d 613; *Moulin Elec. Corp. v Roach, supra.* For a more thorough discussion, see generally California Trial Practice: Civil Procedure During Trial §§27.88-27.102 (3d ed Cal CEB 1995).

Counsel who finds that an extension is necessary but who cannot obtain an agreement should consider a motion alternatively seeking both a court-ordered 30-day extension and CCP §473 relief when appropriate.

When appeal has been voluntarily abandoned. A voluntarily abandoned appeal normally operates as a dismissal. Cal Rules of Ct 8.244(b)(1). If the appeal is abandoned after the record has already been filed in the reviewing court, prevailing respondent should file the cost memorandum within the usual 40-day period after the appellate court clerk mails notice that the remittitur has issued. Cal Rules of Ct 8.244(c), 8.278(c)(1). If the appeal is abandoned before the record is filed in the reviewing court, no remittitur will issue. In this event, the cost memorandum should be filed "within a reasonable time" after the trial court clerk notifies the parties of the abandonment. *Wilson v Harley Davidson Motor Co.* (1977) 67 CA3d 678, 136 CR 793 (20 days reasonable).

Memorandum must be verified. The verification must be on oath of the party or the party's attorney or agent, and it must state that to the best of the verifier's knowledge the disbursements are correct and were necessarily incurred in the action or proceeding. Cal Rules of Ct 8.278(c)(1), 3.1700(a)(1). An unverified or improperly verified cost memorandum can be stricken on motion. Cal Rules of Ct 8.278(c)(2). See, *e.g., Snodgrass v Snodgrass* (1930) 103 CA 412, 414, 284 P 696.

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§20.7 a. Items Recoverable

Except for attorney fees, which are discussed in §§20.13-20.18, the only recoverable costs on appeal are the following items when they are actually and reasonably incurred (Cal Rules of Ct 8.278(d)(1); *Wilson v Board of Retirement* (1959) 176 CA2d 320, 1 CR 373):

- **Cost of preparing record on appeal.** Any prevailing party may recover the cost paid for any portion of the record, whether an original or copy of both. However, the cost to copy parts of a prior record under Cal Rules of Ct 8.147(b)(2) is not recoverable unless the court of appeal ordered the copying. These recoverable costs are always subject to reduction under Cal Rules of Ct 8.278(a) on order of the reviewing court, which in its discretion may apportion costs, impose or withhold costs, or impose penalties on a prevailing party for that party's insertion of irrelevant or unnecessary material in the transcript. Cal Rules of Ct 8.276(a)(2); *Gudel v Ellis* (1962) 200 CA2d 849, 850, 19 CR 751.
- **Reasonable cost of printing or reproduction of briefs by other duplication process.** The term "briefs" in this context includes any petitions and answers on rehearing or review. It does not include briefs filed in the United States Supreme Court. *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 224, 226 CR 265. That a brief could have been printed by a different printer, or produced by some other method, at lesser cost is not controlling. Under Cal Rules of Ct 8.278(d)(1) the cost incurred need only be "reasonable," and what is reasonable is a question of fact. *Johnson v WCAB* (1984) 37 C3d 235, 243, 207 CR 857 (printing cost); *Lubetzky v Friedman* (1988) 199 CA3d 1350, 1355, 245 CR 589 (typewriting and photocopying costs); *Bank of Idaho v Pine Ave. Assocs.* (1982) 137 CA3d 5, 19, 186 CR 695 (printing cost).
- **Cost of producing additional evidence.** This refers to the cost of producing additional evidence in the court of appeal under CCP §909 and Cal Rules of Ct 8.252. For further discussion of these procedures, see §§11.81-11.85.
- **Filing fees, notary fees, and expenses of service, transmittal, and filing of the record, briefs, and other papers.** The trial court may still deny costs for any of these items incurred solely for the prevailing party's convenience, rather than as a necessary expense. *Muller v Reagh* (1959) 170 CA2d 151, 153, 338 P2d 601. See also *Lubetzky v Friedman, supra* (that less expensive means of filing could have been chosen does not itself defeat award).
- **Cost of obtaining surety bond, including premium, by party recovering costs, unless trial court finds that bond was unnecessary.** In determining necessity, the trial court may consider not only whether an alternative method of staying enforcement was available when the appeal was taken, but also whether that method would have caused appellant undue delay, expense, risk, or business disruption. *Jewell v Bank of America* (1990) 220 CA3d 934, 269 CR 671. See also *Stockton Theatres, Inc. v Palermo* (1958) 51 C2d 346, 333 P2d 10; *Combs v Haddock* (1962) 209 CA2d 627, 633, 26 CR 252.
- **Other.** Other expenses reasonably necessary to procure the surety bond, such as the expense of acquiring a letter of credit required as collateral for the bond.

For further discussion of these items, see 9 Witkin, California Procedure, *Appeal* §§968-973 (5th ed 2008). See also Cal Rules of Ct 8.764(c) for a comparable list of recoverable items in appeals from limited civil cases.

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Source: Civil Litigation/California Civil Appellate Practice/20 Costs, Attorney Fees, and Sanctions/§20.8 b. Form: Memorandum of Costs on Appeal (Mandatory Judicial Council Form MC-013)

§20.8 b. Form: Memorandum of Costs on Appeal (Mandatory Judicial Council Form MC-013)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
MEMORANDUM OF COSTS ON APPEAL	CASE NUMBER:

Prevailing party *(name)*:
claims from *(name)*:
the following costs on appeal:

		TOTALS
1. Filing fees	1. $	
2. Preparation of clerk's transcript	2. $	
3. Preparation of reporter's transcript	3. $	
4. Printing of briefs	4. $	
5. Production of additional evidence	5. $	
6. Notary fees	6. $	
7. Expenses of service	7. $	
8. Transmission and filing of record, briefs, and other papers	8. $	
9. Premium on any surety bond on appeal	9. $	
10. Other expenses reasonably necessary to secure surety bond	10. $	
11. Other: *(specify authority)*:	11. $	
TOTAL COSTS	$	

I am ☐ the party ☐ counsel for the party ☐ agent for the party who claims the costs listed above. To the best of my knowledge, the items of cost are correct and were necessarily incurred in this case on appeal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
MC-013 [Rev. January 1, 2007]

Code of Civil Procedure, § 1034(b);
Cal. Rules of Court, rule 8.272
www.courtinfo.ca.gov

Print

MC–013

SHORT TITLE:	CASE NUMBER:

PROOF OF SERVICE

☐ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My residence or business address is *(specify):*

3. I mailed or personally delivered a copy of the *Memorandum of Costs on Appeal* as follows *(complete either a or b):*
   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope **and**
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service, with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state):*

   b. ☐ **Personal delivery.** I personally delivered a copy as follows:
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶

(SIGNATURE OF DECLARANT)

Comment: This form may be obtained at the Judicial Council's website (http://www.courtinfo.ca.gov/forms), in the

California Judicial Council Forms Manual (Cal CEB 1981) (print), or on SmartLaser (Cal CEB Software).

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Source: Civil Litigation/California Civil Appellate Practice/20 Costs, Attorney Fees, and Sanctions/§20.9 c. Form: Memorandum of Costs on Appeal (Attorney-Drafted) [Deleted]

§20.9 c. Form: Memorandum of Costs on Appeal (Attorney-Drafted) [Deleted]

The Judicial Council form printed in §20.8 is mandatory. The attorney-drafted form previously in §20.9 has been deleted.

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4. Motion to Strike Cost Bill or Tax Costs

§20.10 a. Procedure

Rules governing objections to costs. A party who objects to the memorandum of costs in its entirety or to specific items may contest the costs, as provided in Cal Rules of Ct 3.1700(b), which governs contesting costs generally. Cal Rules of Ct 8.278(c)(2).

Motion to tax costs. If specific items in the cost bill are objectionable, a motion to tax costs should be made. The motion must refer to each objectionable item by the same number and in the same order as the corresponding item in the memorandum of costs, and expressly state why each is improper. Cal Rules of Ct 8.278(c), 3.1700(b)(2).

Motion to strike entire cost bill. If the entire cost memorandum is invalid because it is either untimely or unverified, a motion to strike the entire cost bill is appropriate. There is no need to specify in the motion why individual cost items are objectionable. See generally *Fennessy v DeLeuw-Cather Corp.* (1990) 218 CA3d 1192, 1194, 267 CR 772; *Rappenecker v Sea-Land Servs.* (1979) 93 CA3d 256, 261, 155 CR 516.

Time for filing. Within 15 days after the memorandum of costs is served, the adverse party may file a motion in the trial court to have the cost bill stricken or certain claimed costs taxed. If the memorandum is served by mail, the 15-day period is extended, as provided in CCP §1013. Cal Rules of Ct 8.278(c)(2), 3.1700(b)(1).

Extension of time. The filing period can be extended for any length of time by agreement confirmed in a writing filed with the trial court clerk, or arguably for up to 30 days by court order. Cal Rules of Ct 8.278(c)(2), 3.1700(b)(3).

Relief from default for untimely filing. A party may seek CCP §473 relief when a motion to tax or strike was not timely filed due to mistake, inadvertence, surprise, or excusable neglect. *Lane v Pacific Greyhound Lines* (1947) 30 C2d 914, 915, 187 P2d 9.

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§20.11 b. Burden of Proof

Verified memorandum of costs is prima facie evidence of itemized costs' validity. The party claiming costs on appeal has the burden of proving them. *Muller v Reagh* (1959) 170 CA2d 151, 338 P2d 601. A verified memorandum of costs, however, is prima facie evidence that the itemized costs were necessarily incurred. *Goodstein v Bank of San Pedro* (1994) 27 CA4th 899, 910, 32 CR2d 740; *Bach v County of Butte* (1989) 215 CA3d 294, 308, 263 CR 565.

Opposing party has burden of overcoming evidence that costs necessarily incurred. The opposing party has the burden of overcoming the prima facie evidence of a verified memorandum of costs. A party can overcome this evidence by establishing that a charge was excessive or not actually incurred. *Johnson v Ford Motor Co.* (1970) 9 CA3d 304, 309, 88 CR 221; *Pratt v Robert S. Odell & Co.* (1944) 63 CA2d 78, 146 P2d 504. See also *Fennessy v DeLeuw-Cather Corp.* (1990) 218 CA3d 1192, 267 CR 772; *Rappenecker v Sea-Land Servs.* (1979) 93 CA3d 256, 155 CR 516.

Evidence or argument of contesting party shifts burden to claimant. When the adverse party does present evidence or argument in opposition to the verified cost bill, the claimant in turn bears the burden of substantiating the claim with detailed declarations or affidavits if necessary. See generally *Fennessy v DeLeuw-Cather Corp., supra; Rappenecker v Sea-Land Servs., supra*.

Order on motion is usually appealable. Generally, the order entered on a motion to strike or tax costs is a directly appealable postjudgment order. CCP §904.1(a)(2); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 222, 226 CR 265. But see *Barnes v Litton Sys.* (1994) 28 CA4th 681, 33 CR2d 562 (order is appealable unless it is preliminary to further proceedings).

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§20.12 5. Judgment for Costs

The award of costs on appeal is an independent judgment, enforceable by execution. Cal Rules of Ct 8.278(c)(3); *Stockton Theatres, Inc. v Palermo* (1961) 55 C2d 439, 443, 11 CR 580. It bears interest from the time the order is entered on a motion to tax costs or on the lapse of time for filing a motion to tax. *Dalzell v Kelly* (1952) 115 CA2d 60, 251 P2d 343.

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II. ATTORNEY FEES

§20.13 A. Authorization

General rule. Attorney fee awards authorized by statute, contract, or law (CCP §1033.5(a)(10), (c)(5)) ordinarily include services rendered on appeal as well as at trial. *Morcos v Board of Retirement* (1990) 51 C3d 924, 927, 275 CR 187 (statute); *Serrano v Unruh* (1982) 32 C3d 621, 637, 186 CR 754 (same); *Rosenaur v Scherer* (2001) 88 CA4th 260, 287, 105 CR2d 674 (statute); *Rider v County of San Diego* (1992) 11 CA4th 1410, 1422, 14 CR2d 885 (common fund doctrine); *Security Pac. Nat'l Bank v Adamo* (1983) 142 CA3d 492, 498, 191 CR 134 (contract). See also CCP §1235.140 ("litigation expenses" in eminent domain cases include attorney fees on appeal); CCP §1036 (plaintiffs in inverse condemnation actions may recover attorney fees "in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding"). See generally California Attorney Fee Awards, chap 12 (3d ed Cal CEB 2010); California Trial Practice: Civil Procedure During Trial §26.2 (3d ed Cal CEB 1995).

Exceptions. This general rule does not apply when the authorizing statute expressly directs otherwise. *Imperial Bank v Pim Elec.* (1995) 33 CA4th 540, 557, 39 CR2d 432 (CCP §685.040; enforcement). But see *Grade-Way Constr. Co. v Golden Eagle Ins. Co*. (1993) 13 CA4th 826, 837, 16 CR2d 649 (CCP §996.480(a)(2); surety beneficiary's fees granted).

Appellate fees incurred in pressing the fee claim itself may not be recoverable in common fund doctrine or substantial benefit theory cases, partly because of counsels' potential conflicts of interest. See *Serrano v Unruh* (1982) 32 C3d 621, 628, 186 CR 754 (dictum). See also *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646 (special circumstances require denial of fees for "fee work" on appeal); *Estate of Cirone* (1987) 189 CA3d 1280, 1293, 234 CR 749 (parties obtaining statutory fee awards under CCP §1021.5 were not entitled to further fees under CCP §1021.5 for their efforts to collect final fee award; result may have differed however, "if their efforts to compel payment had independently resulted in the 'enforcement of an important right affecting the public interest").

Fees for interim appeals. When attorney fees are authorized only on the basis of a final disposition on the merits, fee awards on successful interim appeals are generally deferred to the end of the case. *Bank of Idaho v Pine Ave. Assocs.* (1982) 137 CA3d 5, 15, 186 CR 695 (CC §1717 "prevailing party"); *Serrano v Unruh* (1982) 32 C3d 621, 639 n28, 186 CR 754 (CCP §1021.5; "successful party"). But the courts are divided as to whether one party's interim fees should offset a final fee award ultimately made at trial to the other. Compare *Bank of Idaho v Pine Ave. Assocs., supra* (offset approved), with *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 962, 196 CR 1 (offset disapproved).

Fees for appeals when fees are award under indemnity clause. The authorities are also split on whether appellate fees are recoverable under an indemnity clause that does not specifically provide for them. See, *e.g., Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 869, 257 CR 535; *Otis Elevator Co. v Toda Constr.* (1994) 27 CA4th 559, 565, 32 CR2d 404; *Jones-Hamilton Co. v Beazer Materials & Servs.* (9th Cir 1992) 959 F2d 126, 132.

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§20.14 B. Attorney Fees May Be Awarded by Appellate Court or Trial Court

Attorney fees incurred on appeal can be awarded by either the reviewing court while the appeal is pending, or by the trial court after remittitur issues. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426.

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§20.15 1. Reviewing Court

Appellate court has discretion to award attorney fees relating to appeal. The reviewing court has the discretion to determine entitlement in the first instance, and may prefer to do so when its own opinion is the basis for the fee award. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426 (CCP §1021.5); *Rider v County of San Diego* (1992) 11 CA4th 1410, 1422, 14 CR2d 885 (common fund doctrine). There are also circumstances in which it will itself determine the amount of the award (see, *e.g., Young v Rosenthal* (1989) 212 CA3d 96, 134, 260 CR 369 (fee award as sanction); *Planned Parenthood Affiliates v Swoap* (1985) 173 CA3d 1187, 1202, 219 CR 664 (original writ proceeding)) or appoint a referee to do so (*Mack v Younger* (1980) 27 C3d 687, 165 CR 876 (original writ proceeding)).

For a detailed discussion of cases in which the reviewing court has itself determined entitlement and amount issues, see California Attorney Fee Awards, chap 12 (3d ed Cal CEB 2010).

Appellate court may abate or preclude trial court fee determination. The appellate court can also abate a fee determination pending the outcome of a related appeal determinative of the fee issue (*Marriage of Colvin* (1992) 2 CA4th 1570, 1582, 4 CR2d 323; *Planned Parenthood Affiliates v Swoap, supra*) or order the trial court to award no fee at all (*Encinitas Plaza Real v Knight* (1989) 209 CA3d 996, 1003, 257 CR 646).

Appellate court determination is law of the case. When the reviewing court expressly determines entitlement, its decision is binding on the trial court as the law of the case. *Benson v Greitzer* (1990) 220 CA3d 11, 14, 269 CR 201.

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§20.16 2. Trial Court

Generally, issues of entitlement and determination are remanded to trial court. The "better practice" and more "customary" procedure is for the appellate court to remand either or both attorney fee issues (*i.e.*, entitlement and determination) to the trial court. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426; *Akins v Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 CA4th 1127, 1134, 94 CR2d 448; *Milman v Shukhat* (1994) 22 CA4th 538, 546, 27 CR2d 526; *Security Pac. Nat'l Bank v Adamo* (1983) 142 CA3d 492, 498, 191 CR 134.

The trial court is generally considered better suited to decide the factual issues inherent in fixing the fee amount. *Milman v Shukhat, supra; People ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 388, 211 CR 501 (trial courts are better equipped to resolve factual issues affecting fee awards). See also *Harman v City & County of San Francisco* (2006) 136 CA4th 1279, 39 CR3d 589 (on remand, trial court must recalculate lodestar figures and adjust fee to reflect plaintiff's limited success); *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 39 CR3d 550 (on remand, trial court must determine amount of fees to award for hours spent on both trial level and on appeal).

On remand the trial court may also be asked to determine a substantive issue on which entitlement depends, such as vindication of a public interest for purposes of CCP §1021.5. *Bjornestad v Hulse* (1991) 229 CA3d 1568, 1598, 281 CR 548.

Trial court jurisdiction absent remand on issue of attorney fees. Even when there is no express fee direction in the opinion or remittitur, the trial court still has jurisdiction to award attorney fees on appeal authorized by statute, contract, or law. CCP §1033.5(a)(10), (c)(5); *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 264, 55 CR2d 640 (trial court had jurisdiction to make attorney fee award authorized by contract despite absence of specific direction in appellate court's remittitur). The same rule applies to fees for successful interlocutory writs. *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 272 CR 227 (denied without prejudice pending prevailing party determination); *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1081, 241 CR 239 (despite costs denied by reviewing court).

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C. Procedure to Obtain Award

§20.17 1. In Reviewing Court

State request for attorney fees in appellate brief. To avoid a risk of implied waiver or claim of surprise, a party should point out in its brief that it seeks appellate attorney fees if appropriate, and cite the statute, contract, or law authorizing that award. See generally *Dameshghi v Texaco Ref. & Mktg.* (1992) 3 CA4th 1262, 1291 n18, 6 CR2d 515 (overruled on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241); *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 306, 251 CR 72. Compare these cases with *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226, 226 CR 265.

If inclined to do so, the reviewing court can address entitlement in its opinion on the merits, leaving only the amount to be fixed by stipulation, on affidavits, or on remand. See generally *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 166, 188 CR 104 ("appropriateness of an award of attorney fees to the prevailing party on an appeal should normally be disposed of in conjunction with a decision on the merits of the appeal"); *Sierra Club v California Coastal Comm'n* (1993) 12 CA4th 602, 620, 15 CR2d 779.

Motion for attorney fees in appellate court also available. Although generally not required to do so (Cal Rules of Ct 3.1702(c)), counsel can alternatively notice a formal motion for attorney fees in the reviewing court, conforming to the motion requirements of Cal Rules of Ct 8.54(a)(1)-(2) (*Mack v Younger* (1980) 27 C3d 687, 689, 165 CR 876), preferably before the opinion becomes final in that court (generally 30 days after opinion filed; Cal Rules of Ct 8.264(b)).

Motion necessary when attorney fees sought as sanctions. When attorney fees are specifically sought as sanctions, counsel must notice a formal motion in the reviewing court under Cal Rules of Ct 8.54(a) within 10 days after appellant's reply brief is "due," or at the same time a motion to dismiss is filed. CCP §907; Cal Rules of Ct 8.276(a). For further discussion, see §20.28.

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§20.18 2. In Trial Court

Include attorney fees as cost item. Whether authorized by statute, contract, or law, attorney fees on appeal should be included as a separate cost item in the memorandum of costs on appeal filed in the trial court. CCP §1033.5(a)(10), (c)(5); Cal Rules of Ct 3.1702(c), (e). They must be claimed in the cost memorandum when either a contract or a statute fixes them by formula "without the necessity of a court determination." Cal Rules of Ct 3.1702(e).

Generally, a separate motion must be filed in trial court. In virtually all instances, however, counsel must also serve and file a noticed motion for appellate attorney fees "within the time for serving and filing the memorandum of costs under [Cal Rules of Ct] 8.278(c)(1)." Cal Rules of Ct 3.1702(c)(1). For example, it is now settled that a noticed motion is required in order to obtain any fee award under a contract, including awards authorized by CC §1717. Cal Rules of Ct 3.1702(e). See, *e.g., Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 1725, 24 CR2d 274 (strict compliance by timely noticed motion mandatory, criticizing *Gunlock Corp. v Walk on Water, Inc.* (1993) 15 CA4th 1301, 1304, 19 CR2d 197 ("spirit of the law" compliance doctrine)).

Arguably, a party seeking appellate fees authorized only by statute may do so merely on an "application supported by an affidavit made concurrently with a claim for other costs" (see CCP §1033.5(a)(10), (c)(5)), despite the motion procedure. California Rules of Court 3.1702(a) makes its provisions applicable "[e]xcept as otherwise provided by statute." This is by no means clear, however, and several statutes authorizing attorney fee awards themselves require a noticed motion. See, *e.g.,* CCP §1021.5. It is probably wiser to follow the noticed motion procedure in each instance.

Time for filing. The motion must be filed concurrently with the memorandum of costs on appeal under Cal Rules of Ct 8.278(c), within 40 days after the appellate court clerk mails notice of the issuance of remittitur. Cal Rules of Ct 3.1702(c). That period is not extended by virtue of mailing under CCP §1013, nor does the trial court have discretion to disregard noncompliance with Cal Rules of Ct 3.1702.

Extension is available. The time under Cal Rules of Ct 3.1702(c) may be extended either by stipulation or on court order. See Cal Rules of Ct 3.1702(c)(2) (parties may by stipulation extend time for filing motion up to additional 60 days); 3.1702(d) (court may extend time for filing motion for attorney fees in absence of parties' stipulation or for longer period than allowed by stipulation). Relief from an untimely filing based on CCP §473 mistake, inadvertence, surprise, or excusable neglect is also available. *Russell v Trans Pac. Group, supra.*

For further discussion of the motion procedure in trial court and for a form of the motion (including accompanying documents), see California Attorney Fee Awards, chap 12 (3d ed Cal CEB 2010).

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III. SANCTIONS

§20.19 A. Authorization

Authority for award of sanctions. A reviewing court is authorized to impose various types of sanctions when a party or its attorney either "unreasonabl[y]" violates the California Rules of Court on appeal, prosecutes an appeal that is either "frivolous" or taken "solely to cause delay," or includes in the record "any matter not reasonably material to the appeal's determination." CCP §907; Cal Rules of Ct 8.276(a).

The reviewing court's general sanction power extends to writ petitions as well as to appeals. *Manzetti v Superior Court* (1993) 21 CA4th 373, 380, 25 CR2d 857 ($1500 sanction for redundant meritless petition); *Jones v Superior Court* (1994) 26 CA4th 92, 95, 31 CR2d 264 (sanctions permitted in emergency criminal writ proceeding but declined).

Sanctions for violation of court rule. Sanctions for rule violations may take several forms, "including the award or denial or costs." Cal Rules of Ct 8.276(a). See, *e.g., Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 35 CR3d 745 (monetary sanctions for unreasonable violations of former Cal Rules of Ct 14(a)(1)(B)-(C), 14(a)(2)(C) (now Cal Rules of Ct 8.204), including numerous violations of rules pertaining to appellate briefs); *Pierotti v Torian* (2000) 81 CA4th 17, 31, 96 CR2d 553 (appellant did not support all statements of fact in briefs with citations to record (former Cal Rules of Ct 15(a); now see Cal Rules of Ct 8.204(a)(1)(C)) and did not confine statement to matters in record on appeal (former Cal Rules of Ct 13; now see Cal Rules of Ct 8.204(a)(2)(C))); *Alicia T. v County of Los Angeles* (1990) 222 CA3d 869, 884, 271 CR 513 (monetary sanction for defective briefs and improper use of authority).

An appellate court imposed attorney fees on the attorney as a sanction under former Cal Rules of Ct 26(a)(2) (now Cal Rules of Ct 8.276(a)) based on the attorney's misrepresentation of "specific facts" alleged to establish good cause for a requested extension of time, in violation of former Cal Rules of Ct 45.5(b) (now Cal Rules of Ct 8.60(c)). *Bryan v Bank of America* (2001) 86 CA4th 185, 194, 103 CR2d 148. However, inclusion of over 1000 pages of materials in a judgment creditor's joint appendix that were not part of the trial court record did not warrant sanctions. *Haskett v Villas at Desert Falls* (2001) 90 CA4th 864, 885, 108 CR2d 888.

Sanctions for frivolous or dilatory appeal. In a frivolous or dilatory appeal, the reviewing court has the power to impose penalties, such as withholding or imposing costs. Cal Rules of Ct 8.276(a)(1); CCP §907; *Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 167, 35 CR3d 745 (court imposed monetary sanctions, including attorney fees, for filing patently frivolous appeal).

Although it rarely does so, the appellate court can also dismiss a frivolous or dilatory appeal before briefing on the merits, with or without further monetary sanctions. See, *e.g., TMS, Inc. v Aihara* (1999) 71 CA4th 377, 379, 83 CR2d 834 (defendants' willful disobedience of trial court's order to answer postjudgment interrogatories justified dismissal of appeal); *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 706 n8, 238 CR 780; *Coleman v Gulf Ins. Group* (1986) 41 C3d 782, 790 n5, 226 CR 90; *Zimmerman v Drexel Burnham Lambert, Inc.* (1988) 205 CA3d 153, 161, 252 CR 115 (dismissal and monetary sanctions). See, *e.g., Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 (costs plus monetary sanctions to respondent and to court for plaintiff's frivolous appeal).

Sanctions for frivolous motion on appeal. One court of appeal has held that it has the inherent authority to impose sanctions for the filing of a frivolous *motion* on appeal, and that it will exercise its discretion to do so upon an appropriate showing. *Dana Commercial Credit Corp. v Ferns & Ferns* (2001) 90 CA4th 142, 147, 108 CR2d 278 (second motion to recall remittitur after appeal dismissed).

Other remedies. Generally, statutory sanctions are the only viable monetary remedy available to a party injured by an appeal pursued in bad faith. *Coleman v Gulf Ins. Group* (1986) 41 C3d 782, 789, 226 CR 90 (no tort cause of action for abuse of appellate process or malicious prosecution of appeal). Compare *Coleman* with *Hand v Farmers Ins. Exch.* (1994) 23 CA4th 1847, 1855, 29 CR2d 258 (Ins C §11580 judgment creditor following final judgment). Nonetheless, anyone contemplating a later abuse of process, malicious prosecution, or "insurance bad faith" suit should evaluate whether adverse findings on a sanctions request could potentially have collateral estoppel effect. One court has stated

that it did not believe the legislature intended CCP §128.7 (sanctions for actions violating specified conditions) to apply to appellate filings or to in any way limit the inherent authority of appellate courts. *Bryan v Bank of America* (2001) 86 CA4th 185, 197, 103 CR2d 148.

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§20.20 B. Standards Governing Award

Standard of *Marriage of Flaherty*. The general substantive standards by which an appeal is adjudged "frivolous" or "taken solely for delay" under CCP §907 and Cal Rules of Ct 8.276(a)(1) originated in the supreme court's decision in *Marriage of Flaherty* (1982) 31 C3d 637, 183 CR 508, and remain viable today. The court stated that an appeal that is "simply without merit" is not necessarily frivolous. 31 C3d at 650. On the contrary, because the law often evolves only through appeals, sanctions should be imposed only for the most "egregious" conduct. 31 C3d at 650.

Either improper motive or absence of merit supports award of sanctions on appeal. Specifically, an appeal is sanctionable as frivolous only when it is either prosecuted for an "improper motive" on the one hand—such as to harass or delay the effect of an adverse judgment, or when it "indisputably has no merit" on the other—such that "any reasonable attorney would agree the appeal is totally and completely without merit." 31 C3d at 650. The first standard is evaluated subjectively by reference to appellant's or its attorney's bad faith motive, while the second is evaluated objectively by reference to a reasonable attorney's perspective. 31 C3d at 649.

Either standard supports sanctions award. These standards are disjunctive. In other words, either one will independently support an award. CCP §907; Cal Rules of Ct 8.276(a)(1). For further discussion, see §§20.21-20.22.

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§20.21 1. Improperly Motivated Appeal

Improper motivation alone supports sanctions. An appeal need not be found objectively meritless if it is found to have been improperly motivated. *Hersch v Citizens Sav. & Loan Ass'n* (1983) 146 CA3d 1002, 1012, 194 CR 628 (dilatory appeal). See generally *In re Aquela P.* (1995) 37 CA4th 439, 455, 43 CR2d 757 (retaliatory appeal); *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 437, 286 CR 556 (bad faith, vexatious dilatory appeal); *San Bernardino Community Hosp. v Meeks* (1986) 187 CA3d 457, 470, 231 CR 673 (dilatory appeal); *Marriage of Stich* (1985) 169 CA3d 64, 77, 214 CR 919 (same).

Total lack of merit is evidence of improper motive. At the same time, "the total lack of merit of an appeal is viewed as evidence that appellant must have intended it solely for delay." *Marriage of Flaherty* (1982) 31 C3d 637, 649, 183 CR 508; *Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122; *Simonian v Patterson* (1994) 27 CA4th 773, 784, 32 CR2d 722; *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1073, 275 CR 594; *Town of Woodside v Gava* (1989) 213 CA3d 488, 494, 261 CR 730 (objective lack of merit supports inference of bad faith purpose).

Dilatory motive. At least one court has held that a dilatory motive must be proved under a clear and convincing standard. As a matter of informal policy in the fourth appellate district, this standard is not fulfilled unless a panel unanimously believes the award to be appropriate. *San Bernardino Community Hosp. v Meeks* (1986) 187 CA3d 457, 470 n7, 231 CR 673.

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§20.22 2. Objectively Meritless Appeal

Doubt about merit resolved in favor of promoting access to courts. In keeping with the concern expressed in *Marriage of Flaherty* (1982) 31 C3d 637, 183 CR 508, that the threat of sanctions not deter vigorous, creative appellate advocacy, any doubt about whether an appeal is objectively devoid of merit will generally be resolved in favor of promoting access to the court. See, *e.g., Baize v Eastridge Cos.* (2006) 142 CA4th 293, 304, 47 CR3d 763 (appeal did not "indisputably" lack merit because issue is ripe for reconsideration in light of recent appellate authority); *Tomaselli v Transamerica Ins. Co.* (1994) 25 CA4th 1766, 1774, 31 CR2d 224 (first impression issue); *Marriage of Green* (1992) 6 CA4th 584, 593, 7 CR2d 872 (in light of statutory interpretation, "impossible to say" that appeal totally lacked merit); *Rice v Dean Witter Reynolds, Inc.* (1991) 235 CA3d 1016, 1031, 1 CR2d 265, disapproved in part on other grounds in *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 407, 58 CR2d 875 (some points "very weak" while others warrant "careful consideration"); *Clean Air Transp. Sys. v San Mateo County Transit Dist*. (1988) 198 CA3d 576, 243 CR 799 (sanctions denied when meritless contention not contrary to settled authority); *Tullai v Homan* (1987) 195 CA3d 1184, 1187, 241 CR 255 (appellant urged that adverse precedent be overruled).

Patently frivolous appeals. The courts are nevertheless increasingly willing to impose sanctions for "patently frivolous" appeals. *Pierotti v Torian* (2000) 81 CA4th 17, 31, 96 CR2d 553 (appeal from judgment confirming arbitration award that awarded attorney fees when arbitrator clearly had authority to determine prevailing party); *Kurokawa v Blum* (1988) 199 CA3d 976, 996 245 CR 463 ($15,000 sanction for statute of limitations appeal with little legal or evidentiary underpinning and briefs that "state the record loosely, cite strained authorities, and discuss legal principles in a vacuum"); *Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 ($14,000 sanction plus counsel to pay $3000 to clerk of court for appeal; "[t]his appeal is patently frivolous.... [It's] largely a duplicate of *Pollock I.*").

Among the many other examples are *Westphal v Wal-Mart Stores, Inc.* (1998) 68 CA4th 1071, 1082, 81 CR2d 46 ("this kind of unsubstantiated potshot indicates defendant does not have a substantive basis for attacking the verdict"); *Banks v Dominican College* (1995) 35 CA4th 1545, 1558, 42 CR2d 110 ("no reasonable attorney after proper investigation could have concluded there was any merit in appellant's claims" (in pro per)); *Henry v Clifford* (1995) 32 CA4th 315, 324, 38 CR2d 116; *Simonian v Patterson* (1994) 27 CA4th 773, 784, 32 CR2d 722 ("not a close call by any stretch of the imagination"); *Say & Say v Castellano* (1994) 22 CA4th 88, 94, 27 CR2d 270 ("[n]o attorney of reasonable competence could have thought this massive mountain of paper had any arguable merit whatsoever" (frivolous opposition to dismissal motion)); *Papadakis v Zelis* (1992) 8 CA4th 1146, 1149, 11 CR2d 411 ("[n]o competent attorney could conceivably believe in good faith that this interlocutory order was final and appealable"); *City of Bell Gardens v County of Los Angeles* (1991) 231 CA3d 1563, 1571, 283 CR 91 ("any reasonable attorney would agree that the county's appeal is totally without merit").

Appeal may become meritless after filing. An appeal that is viable when filed can nevertheless later become frivolous in view of substantive or procedural developments while it is pending. See, *e.g., Cohen v General Motors Corp.* (1992) 2 CA4th 893, 896, 3 CR2d 619 (any reasonable attorney would dismiss appeal later mooted by related adverse appellate opinion); *Hale v Laden* (1986) 178 CA3d 668, 224 CR 182 (second of two appeals became frivolous when second was totally dependent on first, which was dismissed); *Wax v Infante* (1983) 145 CA3d 1029, 1031, 194 CR 14 (similar holding); *Cosenza v Kramer* (1984) 152 CA3d 1100, 1103, 200 CR 18.

Be cautious when appealing sanctions award for frivolous motion in trial court. Appealing a trial court CCP §128.5 frivolous-motion sanctions award may itself be deemed frivolous. *M.E. Gray Co. v Gray* (1985) 163 CA3d 1025, 210 CR 285; *Monex Int'l, Ltd. v Peinado* (1990) 224 CA3d 1619, 1627, 274 CR 667. Therefore, before appealing trial court sanctions, carefully review the case and consider consulting appellate counsel to avoid additional sanctions.

Note, however, that the standards under CCP §§128.5 and 907 and Cal Rules of Ct 8.276(a) are not identical. Each is evaluated independently of the other. See, *e.g., Dolan v Buena Eng'rs* (1994) 24 CA4th 1500, 1507, 29 CR2d 903 (trial court sanction denial affirmed, appellate sanctions denied); *Tenderloin Hous. Clinic v Sparks* (1992) 8 CA4th 299, 308, 10 CR2d 371 (trial court sanctions award affirmed; appellate sanctions denied).

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§20.23 3. Partially Frivolous Appeal

Despite other arguably meritorious issues, sanctions may still be assessed for a partially frivolous appeal when discrete frivolous claims are a "*significant* and *material*" part of the appeal. *Maple Props. v Harris* (1984) 158 CA3d 997, 1010, 205 CR 532. See, *e.g., People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 1080, 17 CR2d 19 (sanctions proper despite one valid issue); *Rice v Dean Witter Reynolds, Inc.* (1991) 235 CA3d 1016, 1031, 1 CR2d 265, disapproved in part on other grounds in *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 407, 58 CR2d 875 (sanctions denied when some issues "very weak" but others warranted "careful consideration"); *M.E. Gray Co. v Gray* (1985) 163 CA3d 1025, 1040 n15, 210 CR 285 (sanctions proper when "scintilla of merit" present, but "thrust" of appeal is frivolous); *Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 ("[o]ther than the contentions concerning the first cause of action, this appeal is patently frivolous"; sanctions ordered).

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§20.24 4. Family Law Appeal

In family law actions, appellate costs and attorney fees may be awarded on the alternative ground that the appealing party "frustrates" policies designed to promote settlement and reduce litigation costs. Fam C §271(a). See, *e.g., Marriage of Freeman* (2005) 132 CA4th 1, 6, 33 CR3d 237 (trial court may assess costs incurred on appeal against spouse whose conduct falls within description in Fam C §271(a); costs not awarded because husband's application to receive them was untimely); *Addam v Superior Court* (2004) 116 CA4th 368, 10 CR3d 39 (appellate court remanded to trial court to determine whether award under Fam C §271 is appropriate, and if so, amount of such award); *In re Marriage of Edlund & Hales* (1998) 66 CA4th 1454, 1476, 78 CR2d 671 (appellee mother not entitled to attorney fees in challenge to custody order because stakes in appeal were high and both parties engaged in behavior worthy of sanctions).

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5. Appeals in Pro Per

§20.25 a. Attorney Appellant

Pro per attorney is especially vulnerable. Facing no conflict between duties to a client to urge a position on the one hand and to the judicial system to refrain from making a frivolous claim on the other, counsel prosecuting his or her own appeal may be particularly vulnerable to sanctions for a frivolous appeal. *Bach v County of Butte* (1989) 215 CA3d 294, 263 CR 565 ($17,500 sanction for meritless appeal prosecuted to delay order to pay $50,000 in costs and attorney fees).

Examples. Sanctions have been imposed against a number of pro per attorney appellants. See, *e.g., National Secretarial Serv. v Froehlich* (1989) 210 CA3d 510, 258 CR 506 ($3500 sanction for appeal prosecuted to delay order to pay $6448 for secretarial services); *Bank of Cal. v Varakin* (1990) 216 CA3d 1630, 1638, 265 CR 666 (sanction for prosecuting several unsuccessful appeals in the case and "consistently abus[ing] every legal process available to him to delay fulfillment of his obligations," including trial court-ordered sanctions); *Papadakis v Zelis* (1991) 230 CA3d 1385, 282 CR 18 (sanction for frivolous appeal from judgment to which attorney had stipulated as part of settlement).

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§20.26 b. Nonattorney Appellant

A nonattorney pro per appellant may enjoy more lenient scrutiny, at least when solely objective frivolousness is at issue. *Kabbe v Miller* (1990) 226 CA3d 93, 275 CR 893 (pro per appellant not held to reasonable attorney standard "unless and until" he becomes a persistent litigant). Compare *Kabbe* with *Leslie v Board of Med. Quality Assur.* (1991) 234 CA3d 117, 121, 285 CR 501 (frivolous appeal).

On the other hand, an experienced or legally sophisticated nonattorney appellant can prosecute a dilatory or harassing appeal just as effectively as can an attorney and may merit sanctions on much the same basis. See, *e.g., Banks v Dominican College* (1995) 35 CA4th 1545, 1558, 42 CR2d 110, and cases cited ($17,000 sanction for frivolous harassing appeal); *Marriage of Stich* (1985) 169 CA3d 64, 77, 214 CR 919 ($10,000 sanction for retaliatory dilatory appeal); *Sui v Landi* (1985) 163 CA3d 383, 386, 209 CR 449 ($5000 sanction for deliberately truncating record).

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Source: Civil Litigation/California Civil Appellate Practice/20 Costs, Attorney Fees, and Sanctions/§20.27 C. Procedure to Obtain Award

§20.27 C. Procedure to Obtain Award

California Rules of Court 8.276(a) mandates the procedure by which CCP §907 and Cal Rules of Ct 8.276(a) monetary sanctions for frivolous, dilatory, or rule-violative writs and appeals are to be sought and awarded. For discussion, see §§20.28-20.32.

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§20.28 1. Requesting Monetary Sanctions

The aggrieved party must now file and serve a formal Cal Rules of Ct 8.54 motion at the same time it files a motion to dismiss the appeal but no later than 10 days after appellant's reply brief is "due." The motion must be accompanied by a declaration establishing the amount of sanctions sought by the movant. Cal Rules of Ct 8.276(b)(1).

A party who files a motion to dismiss an appeal before filing its brief may in turn make or renew its sanctions motion at any time up to 10 days after appellant's reply brief is due. Cal Rules of Ct 8.276(b)(2).

On motion procedure in the court of appeal, see chap 11.

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§20.29 2. Court Notice to Opposing Party or Counsel

The reviewing court "must give notice in writing" to either the adverse party or its attorney when it is "considering" imposing sanctions, whether in response to the motion or sua sponte. Cal Rules of Ct 8.276(c).

Rule 8.276(a) does not specify the form for the notice. See generally *Henry v Clifford* (1995) 32 CA4th 315, 324 n3, 38 CR2d 116. Orders to show cause, however, were common under prior case law. See, *e.g., Say & Say v Castellano* (1994) 22 CA4th 88, 91, 27 CR2d 270; *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 16, 244 CR 581; *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1074, 275 CR 594. A clerk's notice at the court's direction has also been used. *Simonian v Patterson* (1994) 27 CA4th 773, 785, 32 CR2d 722.

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§20.30 3. Opposition

The optional opposition to a sanctions request must be filed and served within 10 days after notice is received from the reviewing court, although "failure to do so shall not be deemed consent." Opposition to the sanctions request may not be filed unless the court notice is received. Cal Rules of Ct 8.276(d).

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§20.31 4. Oral Argument

Unless the court orders a different procedure, both the propriety and amount of sanctions are addressed at the same time the appeal is orally argued on its merits. Cal Rules of Ct 8.276(e).

The reviewing court's written opinion in turn constitutes the statement of reasons for the imposition of sanctions. *Banks v Dominican College* (1995) 35 CA4th 1545, 1558, 42 CR2d 110.

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§20.32 5. State Bar Notification

If judicial sanctions exceeding $1000 are ultimately imposed, the attorney considered responsible is required to report that fact to the state bar. Bus & P C §6068(o)(3). The reviewing court does the same, usually by forwarding a copy of its opinion to the bar. Bus & P C §6086.7. See, *e.g., Huschke v Slater* (2008) 168 CA4th 1153, 1164, 86 CR3d 187; *In re Aquela P.* (1995) 37 CA4th 439, 457, 43 CR2d 757.

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§20.33 D. Amount of Award

No settled standards governing award amount. Other than those discernible from case law, there are no specific guidelines on the appropriate amount of damages to be awarded for a frivolous writ or appeal.

In many cases in which penalties were assessed, the courts did not discuss the factors they considered to reach the amount assessed. See, *e.g., Corona v Lundigan* (1984) 158 CA3d 764, 769, 204 CR 846; *Moses v DeVersecy* (1984) 157 CA3d 1071, 203 CR 906; *Menasco v Snyder* (1984) 157 CA3d 729, 203 CR 748. But see *Maple Props. v Harris* (1984) 158 CA3d 997, 1011, 205 CR 532, which listed several factors considered to merit $20,000 in sanctions for a partially frivolous appeal: nature of frivolous claims, protracted delay, chilling effect of conduct, respondent's costs and fees on appeal, undue burden on court time, and need for deterrence.

Undoubtedly, the amount should bear "some rational relationship to the circumstances of the parties and to the purpose" of CCP §907. *Hersch v Citizens Sav. & Loan Ass'n* (1983) 146 CA3d 1002, 1013, 194 CR 628.

Deterrent function of sanctions as factor in determining amount. Among the many factors cited meriting a higher award under the sanctions' deterrent function are serial frivolous writs or appeals prosecuted despite prior sanctions. See, *e.g., Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 ($17,000 in sanctions ordered; $1000 prior sanction in trial court); *Say & Say v Castellano* (1994) 22 CA4th 88, 95, 27 CR2d 270 ($25,000); *Papadakis v Zelis* (1992) 8 CA4th 1146, 1150, 11 CR2d 411 ($20,000). A dilatory appellant's gross revenue derived pending appeal has also been considered material to that end (*People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 1082, 17 CR2d 19 ($165,565 as set by referee)), as has been relative net worth (*Marriage of Stich* (1985) 169 CA3d 64, 75, 214 CR 919 ($10,000)).

See generally *Simonian v Patterson* (1994) 27 CA4th 773, 787, 32 CR2d 722 ($50,000 deterrent sanction); *M.E. Gray Co. v Gray* (1985) 163 CA3d 1025, 1041, 210 CR 285 ($2950 trebled deterrent sanction); *Collisson & Kaplan v Hartunian* (1994) 21 CA4th 1611, 1621, 26 CR2d 786 ($10,000 deterrent sanction).

Lost interest pending appeal. The interest a party has lost pending appeal may also provide a useful sanctions indicator. See *Hersch v Citizens Sav. & Loan Ass'n* (1983) 146 CA3d 1002, 1013, 194 CR 628 ($125,000 5-year loss-of-interest sanction as damages for dilatory appeal from $1,000,000 judgment); *McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1985) 176 CA3d 480, 222 CR 228 (actual 1-year loss-of-interest sanction for dilatory appeal in $10,000,000 stipulated settlement fund).

Attorney fees spent defending frivolous appeal. The amount of attorney fees a respondent has incurred defending a frivolous appeal has also been cited as a guidepost. See *Zimmerman v Drexel Burnham Lambert, Inc*. (1988) 205 CA3d 153, 164, 252 CR 115. See also *Marriage of Mason* (1996) 46 CA4th 1025, 54 CR2d 263 (request for sanctions for frivolous appeal treated as request for attorney fees on appeal).

Cost to taxpayers of processing appeal. Increasingly, courts have awarded attorney fees actually and reasonably incurred in defending a frivolous appeal in conjunction with sanctions payable to the court to compensate it for the additional expense of processing the appeal. *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 244 CR 581 ($2324 sanction for cost of processing average civil appeal payable to court clerk, $14,000 actual attorney fees payable to respondent).

See also *Huschke v Slater* (2008) 168 CA4th 1153, 1160, 86 CR3d 187 ($6000 "to compensate the court for costs it incurred as a result of [appellant's] failure to comply with rule 8.244 of the California Rules of Court"); *In re Aquela P.* (1995) 37 CA4th 439, 457, 43 CR2d 757 ($3000 to court (writ of mandate)); *Banks v Dominican College* (1995) 35 CA4th 1545, 1558, 42 CR2d 110 ($15,000 to respondents, $2000 to court clerk); *Collisson & Kaplan v Hartunian* (1994) 21 CA4th 1611, 1621, 26 CR2d 786 ("[s]urely the cost to process an average appeal has risen since 1987"; $10,000 sanctions assessed payable to court clerk); *People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 1082, 17 CR2d 19 ($1607 for respondent's costs and fees, $5908 to clerk, $165,565 payment to state); *Cohen v General Motors Corp.* (1992) 2 CA4th 893, 896, 3 CR2d 619 ($5908 "latest cost figures" to process average appeal); *City of Bell Gardens v County of Los Angeles* (1991) 231 CA3d 1563, 1574, 283 CR 91 ($135,000 for respondent's costs and fees, $25,000 to court); *Papadakis v Zelis* (1991) 230 CA3d 1385, 1390, 282 CR 18 ($5498 for respondent's

fees, $4000 to court for cost to taxpayers); *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1080, 275 CR 594 ($7916 for respondent's fees, $2324 per *Finnie*'s calculation of cost to court of average appeal); *Marriage of Economou* (1990) 223 CA3d 97, 108, 272 CR 673 ($15,000 for respondent's fees and costs, $15,000 for "total cost to the state"); *Bank of Cal. v Varakin* (1990) 216 CA3d 1630, 1639, 265 CR 666 ($12,067 for respondent's fees, $25,000 to "reimburse the taxpayers victimized by this unremittingly frivolous litigation"); *Young v Rosenthal* (1989) 212 CA3d 96, 136 n40, 260 CR 369 ($3995 cost to process average appeal).

References. For further discussion of sanction amounts imposed for frivolous appeals, see California Attorney Fee Awards, chap 6 (3d ed Cal CEB 2010); 9 Witkin, California Procedure, *Appeal* §§996-1000 (5th ed 2008).

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§20.34 E. Against Whom Award May Be Made

Party alone, attorney alone, or both. A reviewing court may levy frivolous appeal sanctions against a party alone, an attorney alone, or both as the circumstances of the case warrant. See CCP §907; Cal Rules of Ct 8.276(a).

Examples. *Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 (attorney and client jointly and severally, plus separate sanction against attorney); *In re Aquela P.* (1995) 37 CA4th 439, 455, 43 CR2d 757 (attorneys and client); *Marriage of Schnabel* (1994) 30 CA4th 747, 755, 36 CR2d 682 (attorney and client); *Simonian v Patterson* (1994) 27 CA4th 773, 786, 32 CR2d 722 (attorney and client jointly and severally); *Say & Say v Castellano* (1994) 22 CA4th 88, 94, 27 CR2d 270 (attorney and clients); *Collisson & Kaplan v Hartunian* (1994) 21 CA4th 1611, 1621, 26 CR2d 786 (attorneys and client jointly and severally); *Manzetti v Superior Court* (1993) 21 CA4th 373, 381, 25 CR2d 857 (attorney alone, at counsel's request); *Papadakis v Zelis* (1992) 8 CA4th 1146, 1151, 11 CR2d 411 (pro per attorney appellants); *Cohen v General Motors Corp.* (1992) 2 CA4th 893, 896, 3 CR2d 619 (attorney alone, at counsel's request and absent evidence client personally urged continuing appeal); *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 439, 286 CR 556 (attorney alone as to belated waiver of oral argument, and attorney and client jointly and severally as to deterrent sanction); *City of Bell Gardens v County of Los Angeles* (1991) 231 CA3d 1563, 1572, 283 CR 91 (municipal client alone); *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1080, 275 CR 594 (attorney alone, for inadequate legal research and absent evidence client personally urged initiating appeal); *Marriage of Economou* (1990) 223 CA3d 97, 108, 272 CR 673 (attorney and client jointly and severally as to deterrent sanction, client alone as to fee sanction).

Standards; trend is toward shared responsibility. The decision against whom to actually assess a sanctions award is inherently fact-dependent, and remains largely case-specific. Over a period of 10 years the decisions do, however, reflect a distinct trend. What may have originated as an either-or, attorney-or-client, factual approach to the issue (compare, *e.g., Luke v Baldwin-United Corp.* (1985) 167 CA3d 664, 670, 213 CR 654 (CCP §128.5), with *Hale v Laden* (1986) 178 CA3d 668, 675, 224 CR 182, and *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1080, 275 CR 594) appears to have been abandoned in favor of shared responsibility.

For the attorney, this shift reflects judicial sympathy with the view that "an attorney in a civil case is not a hired gun required to carry out every direction given by the client." *Cosenza v Kramer* (1984) 152 CA3d 1100, 1103, 200 CR 18. In fact, several decisions have expressly cited Bus & P C §6068(c) (attorney's duty to maintain such actions "only as appear to him or her legal or just") and the Rules of Professional Conduct, such as Cal Rules of Prof Cond 3-200 (attorney shall not accept or continue employment for vexatious purpose or unless warranted under existing law as extended, modified, or reversed), in support of sanctions against the attorney. See, *e.g., Marriage of Schnabel, supra; Simonian v Patterson, supra; Marriage of Economou, supra*. The attorney is typically assessed at least the amount of the sanction to be paid the court as the "average cost of processing the appeal." See *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 244 CR 581.

For the appellant, the cases as a group are less instructive. Nonetheless, to the extent that the record on appeal reflects either a subjectively vexatious motive, or objective facts from which the reviewing court can conclude that appellant directly benefited financially from taking the frivolous appeal, sanctions will likely be imposed. See, *e.g., People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 17 CR2d 19 (financial benefit); *City of Bell Gardens v County of Los Angeles, supra* (retaliatory motive).

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21

Publication and Citing of Opinions

Blair Hoffman

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§21.1 I. SCOPE OF CHAPTER

This chapter covers the publication and citation of opinions issued by California state courts. The topic involves three basic issues:

- Whether under California law an opinion must be written;
- Whether all or part of an opinion, once written, should be published; and
- Whether, and for what purposes, an opinion may be cited.

For discussion of citing unpublished federal cases in California state courts, see §21.20.

This chapter does not discuss style rules for published opinions. See Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers (4th ed 2000).

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II. WRITTEN OPINIONS

§21.2 A. When Opinions Must Be in Writing

Supreme court and court of appeal decisions that determine causes must be in writing. Decisions of the California Supreme Court and courts of appeal that "determine causes" must be in writing with the court's reasons stated. Cal Const art VI, §14. Opinions of the superior court appellate departments, which are not mentioned in Cal Const art VI, §14, need not be written. However, they may be written if the judges deem it advisable or in the public interest. See Cal Rules of Ct 8.887(a).

When does a decision determine a cause? The phrase "determine causes" has been interpreted to mean decide the case on the merits. 9 Witkin, California Procedure, *Appeal* §779 (5th ed 2008). See also *People v Kelly* (2006) 40 C4th 106, 51 CR3d 98 (in criminal cases, when court of appeal affirms judgment in *Wende* appeal, it disposes of "cause" within meaning of Cal Const art VI, §14). As a practical matter, it is easier to state what does *not* require a written opinion.

When is a written opinion not required? The most common appellate decisions deemed not on the merits, and thus not requiring a written opinion, are:

- An appellate court's summary denial of a petition for writ of mandate or prohibition or for a writ of habeas corpus. *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728; *People v Medina* (1972) 6 C3d 484, 490, 99 CR 630. However, when the appellate court issues an order to show cause, an alternative writ, or a peremptory writ of mandate in the first instance, the matter becomes a "cause" that must be decided in writing with reasons stated. *People v Romero* (1994) 8 C4th 728, 737, 740, 35 CR2d 270 (habeas corpus); *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178 n6, 203 CR 626 (writs). For further discussion, see California Civil Writ Practice (4th ed Cal CEB 2008).
- An order dismissing an appeal or an original proceeding, or ruling on motions (see chap 11 for discussion of motions). 9 Witkin, Procedure, *Appeal* §780. See *People v Brown* (1957) 149 CA2d 175, 176, 307 P2d 949.
- A supreme court order denying review or rehearing. *Metropolitan Water Dist. v Adams* (1942) 19 C2d 463, 468, 122 P2d 257; 9 Witkin, Procedure, *Appeal* §780.

What is remedy for court's failure to issue written opinion? This question has no settled answer, probably owing to the rarity of its occurrence. For discussion of possible remedies when an appellate court improperly omits an issue from an opinion, see §21.4.

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§21.3 B. Statement of Court's Reasons

Reasons must be stated in opinions. Courts are required to state reasons to support their written decisions. Cal Const art VI, §14. In *Amwest Sur. Ins. Co. v Wilson* (1995) 11 C4th 1243, 1265, 48 CR2d 12, the supreme court held that the court of appeal's decision in the case violated Cal Const art VI, §14 when one justice authored the "majority opinion," a second justice "concurred in the result" but without a separate concurring opinion, and a third justice dissented. Even though the supreme court's review of the court of appeal's decision rendered moot the issue of the adequacy of the court of appeal's opinion, the supreme court considered the matter an important, recurring problem and cited six recent cases in which it occurred. See also *People v Kelly* (2006) 40 C4th 106, 120, 51 CR3d 98 (in affirming judgment in *Wende* appeal, court of appeal must provide brief description of facts, procedural history, crimes of which defendant was convicted, punishment imposed, contentions raised by defendant, and reasons contentions fail); *People v Pruitt* (Ct App, Nov. 12, 1981, 3 Crim 11036) (court of appeal opinion stating only that court had "carefully considered the record and [found] that it belies [appellant's] contention" violated Cal Const art VI, §14).

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§21.4 C. Issues That Opinion Must Address

No requirement that every issue be addressed. The courts have generally refused to infer a requirement from Cal Const art VI, §14 that all issues raised by the appellant be addressed in the opinion. In *Lewis v Superior Court* (1999) 19 C4th 1232, 1262, 82 CR2d 85, the California Supreme Court held that a three-paragraph explanation of decision was adequate to set forth reasons on which the decision was based. See, *e.g.*, *People v Garcia* (2002) 97 CA4th 847, 118 CR2d 662 (memorandum opinions do not automatically violate Cal Const art VI, §14; discussion with citing references). But see *People v Kelly* (2006) 40 C4th 106, 51 CR3d 98 (in affirming judgment in *Wende* appeal, court of appeal must describe contentions personally raised by defendant and reasons those contention fail). In *People v Rojas* (1981) 118 CA3d 278, 289, 173 CR 64, the court held that an appellate court need only dispose of the trial court judgment or order and not of "every corollary legal issue that may somehow be involved." In other words, the court must decide the case on the merits but need not explicitly discuss and rule on every nonessential issue raised by a party.

Some opinions have discussed fewer than all the issues and have summarily dismissed the others. 9 Witkin, California Procedure, *Appeal* §§792-793 (5th ed 2008). See, *e.g., Linhart v Nelson* (1976) 18 C3d 641, 645, 134 CR 813 (judgment affirmed; "[h]aving examined defendants' other contentions, we find them of insufficient merit to warrant discussion"); *Forde v County of Los Angeles* (1976) 64 CA3d 477, 479 n1, 134 CR 549 (judgment affirmed; appellant's other issues "more than adequately refuted in defendants' brief and do not justify detailed discussion").

A logical corollary of the above is that, if the appellate court reverses a decision, it need discuss only the issue on which it based its reversal. See, for example, *People v Garcia* (1993) 17 CA4th 1169, 1186, 22 CR2d 545 ("[b]ecause our foregoing conclusion is dispositive of the issues before us, we need not consider Garcia's other claims raised in his petition and appeal"); *Pacific Nat'l Ins. Co. v Webster* (1985) 174 CA3d 779, 782, 220 CR 274 ("[a]lthough appellants raise several issues in their request for reversal, only one merits discussion as it is dispositive").

Omission of certain issues may violate due process. It could be argued that an appellant's rights under the due process clauses of the state (Cal Const art I, §15) and federal (US Const amends V, XIV) constitutions are violated if the appellate court arbitrarily ignores a significant legal issue that a litigant seeks to have reviewed as a matter of right, and that might entitle that party to relief. When the opinion falls below the minimal level to satisfy the letter and spirit of Cal Const art VI, §14, or the due process clause, the losing party may wish to request relief when petitioning for rehearing and, if appropriate, supreme court review. An appellant who is contemplating a petition for review should first petition for rehearing because as "a matter of policy," the supreme court seldom considers any issue omitted from the opinion of the court of appeal unless the omission is brought to the court's attention in a petition for rehearing. Cal Rules of Ct 8.516(c)(2).

Note also that if the court of appeal renders a decision based on an issue that was *not* proposed or briefed, Govt C §68081 requires the court to provide the parties with an opportunity to file supplemental briefs.

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III. PUBLICATION OF OPINIONS

§21.5 A. Rules on Publication

Publication is now governed by rules of supreme court. Between 1909 and 1963, publication of all supreme court and appellate court opinions was required by statute. See Strauss, *Written Opinions*, 39 Cal SBJ 127 (1964) (reviewing California law on the publication of appellate opinions between 1849 and 1964). However, owing to proposals for selective publication advanced by various commentators and supported by the state bar, the legislature amended former Govt C §68895 (now Govt C §68902) in 1963 to provide that publication of appellate court opinions be governed by rules of the supreme court. See Note, *Selective Publication of Case Law*, 39 S Cal L Rev 608 (1966); Strauss, *Written Opinions*, 39 Cal SBJ 127 (1964).

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§21.6 B. Publication of California Supreme Court Opinions

All supreme court opinions must be published. Under Cal Rules of Ct 8.1105(a), all supreme court opinions "are published in the Official Reports." Although supreme court orders are not published in the bound volumes of the Official Reports, they are published as minutes in each unbound advance sheet of the Official Reports.

Adoption by supreme court of court of appeal opinion. Occasionally, the supreme court concludes after independent consideration that the court of appeal opinion correctly stated the law. In that circumstance, the supreme court may adopt the prior opinion, which it publishes as its own, sometimes with modifications. See, *e.g., Arriaga v County of Alameda* (1995) 9 C4th 1055, 1059, 40 CR2d 116; *Municipal Court v Superior Court* (Gonzalez) (1993) 5 C4th 1126, 1129 n1, 22 CR2d 504 (both describing in footnotes court's method for designating its modifications of lower court's opinion).

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§21.7 C. Standards for Publishing Lower Court Opinions

Former rule limited publication. Before April 1, 2007, Cal Rules of Ct 8.1105(c) contained a presumption *against* publication unless the opinion met criteria specified in the rule, *e.g.,* the opinion established a new rule of law or applied an existing rule to a set of facts significantly different from those in other published opinions.

Current rule encourages publication. Under the current Cal Rules of Ct 8.1105(c), an opinion "should" be published if it meets at least one of the following criteria:

- It establishes a new rule of law;
- It applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- It modifies, explains, or criticizes with reasons given an existing rule of law;
- It advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- It addresses or creates an apparent conflict in the law;
- It involves a legal issue of continuing public interest;
- It makes a significant contribution by reviewing the development of a common-law rule, constitutional provision, statute, or other written law;
- It invokes a previously overlooked rule of law or reaffirms a principle of law not applied in a recently reported decision; or
- It is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

NOTE: The workload of the court or the potential embarrassment of a litigant, lawyer, judge, or other person should *not* affect the decision whether to publish an opinion. Cal Rules of Ct 8.1105(d). In addition, the rule applies whether the opinion affirms or reverses a lower court opinion. Cal Rules of Ct 8.1105(c).

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§21.8 D. How Decision to Publish Is Made

The court of appeal or superior court appellate division that decides a case determines initially, by majority vote, whether the decision will be published. Cal Rules of Ct 8.1105(b). There are few written guidelines on the mechanics of making that decision. The Third District Court of Appeal guidelines state that the panel of justices makes a final decision on publication of an opinion at the same time as they indicate their final concurrence or dissent. 3d App Dist IOPP §X. A common procedure is for the author of the opinion to indicate a preference to the other members of the court; if the author desires publication and at least one of the other justices on the panel concurs, the decision will be published. See Kanner & Uelmen, *Random Assignment, Random Justice,* 6 LA Law 10, 13 (1984).

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Source: Civil Litigation/California Civil Appellate Practice/21 Publication and Citing of Opinions/§21.9 E. Certifying Opinion for Publication

§21.9 E. Certifying Opinion for Publication

The filed opinion will indicate whether it is to be published by appropriate marking such as "Certified for Publication" or "Not to be Published in the Official Reports." The court of appeal must certify the opinion for publication before the decision is final as to that court or it will lose jurisdiction to order publication. Cal Rules of Ct 8.1105(b). See Cal Rules of Ct 8.264 on when a decision becomes final.

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Source: Civil Litigation/California Civil Appellate Practice/21 Publication and Citing of Opinions/§21.10 F. Partial Publication

§21.10 F. Partial Publication

Authority for partial publication. The majority of an appellate court may certify only part of an opinion for publication. Cal Rules of Ct 8.1110(a).

Guidelines for partial publication. Appellate courts may certify for partial publication only the parts of an opinion that meet the criteria of Cal Rules of Ct 8.1105(c). Cal Rules of Ct 8.1110(a).

Required statement of partial publication. When only part of an opinion is published, the published part must state that there is an unpublished portion, and it must include all material that aids in applying or interpreting the published part. Cal Rules of Ct 8.1110(b). For purposes of Cal Rules of Ct 8.1105-8.1120, the unpublished part of the opinion is treated the same as opinions that are wholly unpublished. Cal Rules of Ct 8.1110(c). See §21.19.

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§21.11 G. Publication of Opinion Originally Not Published

Initial determination of nonpublication is not necessarily final. The court of appeal or superior court appellate division that decides a case determines initially whether the opinion will be published. Cal Rules of Ct 8.1105(b). An initial determination of nonpublication, however, is not necessarily final. Both the deciding court, before the decision is final in that court, and the supreme court may order on its own motion that an opinion originally not published be certified for publication. Cal Rules of Ct 8.1105(e)(2). Also, any person, not just a party, may request publication. See §§21.12-21.14.

Criteria for publication of opinion not originally published. The criteria for deciding whether to order publication of an originally unpublished opinion are the same as for deciding whether to publish the opinion in the first place. See Cal Rules of Ct 8.1105(c). In effect, the authoring court, and ultimately the supreme court, must decide whether to reverse the original determination that the opinion did not qualify for publication. The authoring court is often willing to do so on request because it may not realize the significance of an opinion until someone points it out. Although it may do so, the supreme court has rarely, if ever, ordered an opinion published if the authoring court did not recommend it.

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§21.12 H. Requesting Publication

Anyone may request publication. If an opinion is not designated for publication, anyone (not only a party to the litigation) may request that the opinion be published. Cal Rules of Ct 8.1120(a)(1). For the attorney, this raises two questions:

- What practical considerations are involved in deciding whether to request publication? and
- What is the proper procedure for making the request?

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§21.13 1. Practical Considerations

Attorney must consider effect on client. An attorney, representing either a party to the litigation or a third party, who is tempted to request publication of an opinion should carefully consider the advantages and disadvantages of such a request to the client.

Does publication help the client? If an attorney wins an appeal in a highly favorable unpublished opinion, the initial reaction might be to quickly request publication. But the interests of the attorney and the broader group that the attorney generally represents might be different from, and in conflict with, those of the specific client, especially when the client is a private, noninstitutional litigant. The favorable opinion has the same legal effect on the specific case when it is unpublished as when it is published. Publication might benefit the broader group and help in other cases, but it may not aid the client in the specific case.

Does publication harm the client? In fact, a publication request may have the potential to harm the client. By its very nature, a publication request, especially if it is granted, tends to highlight the importance of the opinion and give it greater visibility. It may increase the chance the supreme court will grant review, and ultimately rule against the client. These dangers are often remote, but they should be considered. The attorney should be careful not to sacrifice the specific client for some larger cause. The interests and wishes of the individual client must ultimately be pursued.

What effect does publication have on the client's privacy? The attorney should also consider the client's privacy. A published opinion might cause wide dissemination of information the client would prefer remain private. The client might not desire the history of the litigation or personal information in the opinion to be printed in hard copy for all time. (A few clients, however, might prefer the publicity.) In some situations, it might be possible to request that if the opinion is published, personal information not necessary to the analysis be deleted, or initials used, or other steps taken to protect the client's privacy. See, *e.g., In re M.S.* (1995) 10 C4th 698, 42 CR2d 355; Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers §§5.9-5.13 (4th ed 2000).

Attorney should inform and advise the client. An attorney who decides to request publication should fully advise the client of the advantages and disadvantages and obtain the client's informed consent. The attorney should consider memorializing this advice and consent in writing to have an adequate record in case the publication request is later questioned.

Publication's effect on nonlitigant or institutional party. When the attorney represents an institutional litigant or a nonparty, these concerns are greatly reduced and may be nonexistent. But even then counsel should consider the possibility that if a favorable opinion is published, especially one that is not particularly well reasoned, the supreme court might grant review and issue an unfavorable opinion. On the other hand, nonparties can often benefit from having an opinion that contain a favorable opinion published. In that situation, publication should be requested if a credible argument can be made that the opinion meets the standards for publication.

Publication's effect on chances of supreme court review. The losing party is unlikely to want the opinion published, but some attorneys request publication because they believe that publication increases the chance of obtaining supreme court review. This viewpoint is debatable. Although the supreme court certainly grants review of published opinions at a greater rate than unpublished, it is far from clear whether the mere fact of publication makes review more likely or whether an opinion deciding an issue that is worthy of review is inherently more likely to be published. An attorney who requests publication and then argues that, because the opinion is published, the supreme court should grant review may be less than convincing.

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§21.14 2. Publication Procedure

Letter is form of request. Once the decision is made to request publication, the procedure is simple: Anyone may make the request in the form of a letter to the court that rendered the opinion. Cal Rules of Ct 8.1120(a).

Requirements of letter. The letter request must (Cal Rules of Ct 8.1120(a)):

- Be delivered to the rendering court within 20 days after the opinion is filed;
- State "concisely" the person's interest and why the opinion meets the publication standards of Cal Rules of Ct 8.1105(c) (for discussion of those standards, see §21.7);
- Be accompanied by a proof of service on each party to the action or proceeding in the court of appeal; and
- Be filed with the court that rendered the opinion (not the supreme court).

Contents of letter. The letter should cite the precise standards of Rule 8.1105(c) that are being invoked. The rule does not set length limits beyond the requirement of "concise[ness]," but the attorney should take seriously the value of brevity. The opinion itself should be the strongest argument for publication. If it needs a lengthy explanation of its importance, it is not likely to be deemed worthy of publication.

JUDICIAL PERSPECTIVE: In considering a request for publication or depublication, I try to pay close attention to the publication/depublication question in the first place. The party who asks my panel to publish an opinion I did not vote to publish, or to favor depublication of an opinion I did vote to publish, should be as persuasive as possible. The party should keep in mind that even if this court has lost jurisdiction to make a new order for publication or depublication, the court will be required by the rules to make a recommendation to the supreme court, so my vote will count. See Cal Rules of Ct 8.1120(b)(1), discussed below. What impresses me most is a clear and concise statement of why the opinion does (or, for depublication, does not) meet one or more of the criteria of Cal Rules of Ct 8.1105(c). It is also fair to say that I tend to construe Rule 8.1105(c)'s phrases "continuing public interest" and "significant contribution to legal literature" fairly narrowly, so, for example, an application for publication on either of these grounds would need to be particularly persuasive in my case.

Decision by court. When the rendering court either denies the request or has lost jurisdiction to act because the decision has become final as to that court (see Cal Rules of Ct 8.264, 8.1105(b)(1)), it must send the request and a copy of the opinion to the supreme court with its recommendation and a brief statement of its reasons, and send a copy of the recommendation and reasons to each party and anyone who requested publication. Cal Rules of Ct 8.1120(b). The supreme court must either order the opinion published or deny the request and then send notice of its action to the lower court, each party, and the person who requested publication. Cal Rules of Ct 8.1120(c).

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§21.15 I. Requesting or Opposing Depublication

Supreme court may order depublication. When the court of appeal certifies an opinion for publication, the supreme court may order that it not be published, either on request of any person (not just a party) or on its own motion. Cal Rules of Ct 8.1105(e)(2), 8.1125(a), (c). (The term "depublication" and its variants is now preferred to the term "decertification.")

Supreme court's authority to partially depublish is open question. It is unclear whether the supreme court has the authority to order an opinion *partially* depublished. Nothing in the rules of court either provides for, or expressly prohibits, partial depublication. On a practical level, to date the supreme court has never ordered an opinion partially depublished.

Frequency of depublication. In 2004-2005, the supreme court depublished only 16 court of appeal opinions, the lowest number of depublication orders in more than 20 years. Judicial Council of California, Court Statistics Report, *Supreme Court* Table 8 (2006). The number of depublication orders has been steadily declining, although in past years the supreme court ordered the depublication of about 100 cases a year. See Kelso, *A Report on the California Appellate System*, 45 Hastings L Rev 433, 496 (1994); Gerstein, *Law by Elimination: Depublication in the California Supreme Court*, 67 Judicature 292, 294 n1 (1984). This practice has been both criticized (*e.g.,* in Kelso, above; Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loyola LA L Rev 1033 (1993); Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S Cal L Rev 1181 (1977); Biggs, *Censoring the Law in California: Decertification Revisited*, 30 Hastings LJ 1577 (1979)) and defended (Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984); Richland, *Depublication*, 13 LA Law 48 (Aug./Sept. 1990)).

Attorney's role in effecting or preventing depublication. Whatever the merit of the criticisms of depublication, it is clearly here to stay, at least for the foreseeable future. It is also clear that, by requesting or opposing depublication, attorneys play a significant role in the depublication process. This situation raises two questions for the attorney:

- What practical considerations are involved in deciding whether to request depublication or to oppose such a request? and
- What is the proper procedure for making or opposing the request?

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§21.16 1. Practical Considerations

What is in client's best interest? An attorney who loses a case in a published opinion might consider requesting that it be depublished. But be aware that, although a depublished opinion may not be cited as precedent in other cases (see §21.19), it continues to govern the specific case just as if it had remained published. See Cal Rules of Ct 8.1115(b)(1). Therefore, depublication might aid some broader cause but it does not help the specific case. The interests of the specific client should prevail. An attorney who seeks supreme court review should consider whether requesting depublication in the alternative might suggest that depublication would be an adequate remedy, and thus reduce the chance the court will actually grant review. If so, it might be in the client's best interest not to request depublication. (The supreme court may always order the opinion depublished on its own motion. Cal Rules of Ct 8.1125(d)(2).)

Best interest of institutional litigant or nonparty. If the client is an institutional litigant or a nonparty, an actual grant of review might be less important, and depublication adequate to serve the client's needs. A client that is adversely affected by the decision as precedent can have a considerable stake in seeking depublication. Especially when the client is a nonparty, there may be much to gain, and nothing to lose, by requesting that an adverse decision be depublished.

When client has interest in continued publication. Conversely, a client who benefits from a published opinion might have an interest in its continued publication. If depublication is requested, counsel might consider opposing the request and presenting reasons to the supreme court why it should deny the depublication request.

When client has interest in partial publication. An attorney representing a client who does not want the opinion entirely depublished, but for privacy reasons desires deletion of certain information not necessary to the published opinion, might consider requesting the court that rendered the opinion to either delete those details or order the opinion only partially published. See §21.10. Because the supreme court has never ordered an opinion partially depublished (see §21.15), such a request, as a practical matter, should be made to the rendering court (although there is always a possibility the supreme court may do it for the first time). Because the rendering court loses jurisdiction to act when the opinion becomes final as to that court (Cal Rules of Ct 8.264, 8.1105(b)), the request should be made promptly to maximize the chance the court will act favorably on it. It may, in fact, be necessary to petition the court of appeal for rehearing for the purpose of modification, because the court of appeal has no jurisdiction to depublish an opinion it has published. See Cal Rules of Ct 8.1120-8.1125.

JUDICIAL PERSPECTIVE: I have tried to respect the privacy of individuals when their exact identities or identifying information are relevant neither to the analysis nor to the clarity of the opinion. Accordingly, I would give careful consideration to any reasonable request that an opinion be modified in order to reduce the likelihood of identification of individuals. Of course, this request would need to be made while the court of appeal retained jurisdiction.

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§21.17 2. Depublication Procedure

Letter is form of request. Once the decision is made to request depublication, the procedure is simple. Any person may make the request in the form of a letter to the supreme court. Cal Rules of Ct 8.1125(a).

Requirements of requesting letter. Under Cal Rules of Ct 8.1125(a), the letter request must:

- Be sent to the supreme court within 30 days after the decision becomes final in the court of appeal (see Cal Rules of Ct 8.264 on when a decision becomes final);
- State "concisely" reasons why the opinion should not remain published;
- Be accompanied by a proof of mailing to the court of appeal and proof of service on each party to the action or proceeding; and
- Not exceed ten pages.

Requirements of letter in response to request. Any person or the court of appeal may submit a letter in response to a letter requesting depublication. Cal Rules of Ct 8.1125(b). The responding letter must:

- Be sent to the supreme court within 10 days after receipt by the supreme court of a request for depublication;
- Either support or oppose the request;
- State the interest in the publication status of the opinion if the response letter is submitted by anyone other than the court of appeal;
- Be accompanied by a proof of mailing to the court of appeal and proof of service on each party to the action or proceeding and the person requesting depublication; and
- Not exceed ten pages.

Criteria for depublication. The supreme court may order an opinion not published for many different reasons. The rules do not specifically state what criteria the court applies. The letter requesting depublication should make whatever arguments are available, such as (1) the opinion does not meet the publication criteria of Cal Rules of Ct 8.1105(c); (2) the opinion, even if correct in result, contains misleading or incorrect language that might cause confusion; or (3) the opinion is incorrect or unnecessarily creates a conflict (but is, perhaps, not so important as to be worthy of review). For the significance of a depublication order, see §21.18.

Action of supreme court. When a request for depublication is received, the supreme court must either order depublication of the opinion or deny the request. Cal Rules of Ct 8.1125(c)(1). Often, a depublication request accompanies a petition for review in the same case. When that occurs, the supreme court usually rules on both at the same time. If the court grants review, the opinion is automatically not published unless the court orders otherwise. See §21.21. If it denies review, it will rule on any depublication request. It may also order depublication on its own motion (Cal Rules of Ct 8.1125(c)(2)), in which case it must notify the court of appeal of its decision.

NOTE: A depublication request may be filed concurrently with a petition for review but may *not* be filed as part of a petition for review. Cal Rules of Ct 8.1125(a)(2).

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§21.18 J. Effect of Supreme Court Order

Order to publish does not indicate supreme court's views. A California Supreme Court order that a decision be published is not an expression of that court's views on the correctness of the opinion. Cal Rules of Ct 8.1120(d). See, *e.g.*, *White v Davis* (2003) 30 C4th 528, 563 n14, 133 CR2d 648 (court of appeal opinion constitutes citable authority "*not of this court but of the Court of Appeal"* (emphasis in original)); *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 709 n12, 238 CR 780 ("[w]e deem the lower court's opinion here to be beneficial and worthy of publication in that regard, but our order for publication does not necessarily imply agreement with the Court of Appeal's analysis on issues not addressed in our opinion"); *Wilson v Blue Cross* (1990) 222 CA3d 660, 664, 271 CR 876. See also §21.19.

Significance of depublication orders (post-1990). In 1990, former Cal Rules of Ct 979(e) (now Cal Rules of Ct 8.1125(d)) was adopted to provide that an order of depublication, like an order of publication, is not an expression of the supreme court's views on the correctness of the opinion. In *People v Saunders, supra,* the supreme court overruled a series of court of appeal decisions it had left published after denying review and adopted a contrary position that had been endorsed in several appellate decisions it had depublished. 5 C4th at 597 n9. The majority disagreed with the dissent's view (5 C4th at 607) that its prior actions had implicitly "endorsed" the rule of the decisions that had been left published. Citing former Rule 979(e), the majority stated that neither denials of review nor depublication orders express the court's opinion on the merits of a case. 5 C4th at 592 n8. See also *People v Turner* (1990) 50 C3d 668, 705 n18, 268 CR 706 (explaining that depublication actions "have no precedential value and may not be construed as a signal of our ultimate intentions").

NOTE: Until 1990, the effect of a supreme court order that an opinion *not* be published was unclear. Former Supreme Court Justice Grodin had stated that, in the great majority of cases, depublication is ordered "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent." Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984). Therefore, some courts of appeal found significance in depublication orders. See *People v Dee* (1990) 222 CA3d 760, 764, 272 CR 208, overruled in *People v Saunders* (1993) 5 C4th 580, 597 n9, 20 CR2d 638.

Significance of apparent inconsistency of depublished cases. Some courts of appeal continue to find it significant when the supreme court depublishes an opinion that decides an issue one way, and denies review and leaves published another opinion that decides the issue another way. *Conrad v Ball Corp.* (1994) 24 CA4th 439, 443 n2, 29 CR2d 441. See 9 Witkin, California Procedure, *Appeal*, §§816-818 (5th ed 2008). In light of former Cal Rules of Ct 979(e) (now Cal Rules of Ct 8.1125(d)) and *People v Saunders, supra,* this significance is doubtful. See also §21.19.

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IV. CITING OPINIONS AS PRECEDENT

§21.19 A. Unpublished California Opinions

Unpublished opinions may not be cited or relied on. California Rules of Court 8.1115(a) provides in general that a court or a party in any other action or proceeding may not cite or rely on unpublished opinions. Although the rule does not specifically say that an unpublished opinion is unavailable as precedent, several cases have stated that an unpublished opinion has no precedential value in California. See, *e.g., Nelson v Justice Court* (1978) 86 CA3d 64, 66, 150 CR 39; *Heaton v Marin County Employees Retirement Bd.* (1976) 63 CA3d 421, 431, 133 CR 809; *Powers v Sissoev* (1974) 39 CA3d 865, 872 n8, 114 CR 868.

Unpublished opinions of the California courts of appeal are now posted on the Judicial Council's website at http://www.courtinfo.ca.gov/opinions/nonpub.htm for 60 days solely as public information about actions taken by the court of appeal. As noted on the website, availability of unpublished opinions on the website does not constitute publication under the California Rules of Court, and the unpublished opinions may not be cited or relied on except as permitted by Cal Rules of Ct 8.1115(b) (see discussion below). Cal Rules of Ct 8.1115(a).

Scope of rule's application. The rule applies not only when the issuing court originally orders the opinion not be published, but also when the supreme court orders it depublished (*Alicia T. v County of Los Angeles* (1990) 222 CA3d 869, 884, 271 CR 513 (imposing sanctions in part for relying extensively on a case the supreme court ordered not published); *Ramirez v Moran* (1988) 201 CA3d 431, 437 n4, 247 CR 117), or when the opinion has been vacated by later judicial action. See §21.21. The rule may not be circumvented by asking the appellate court to judicially notice an unpublished opinion. *People v Webster* (1991) 54 C3d 411, 428 n4, 285 CR 31. Because an opinion originally published may later be depublished, care should be taken before citing cases still in the advance sheets of the Official Reports. See §21.21.

For discussion of the application of Cal Rules of Ct 8.1115(a) to unpublished federal and sister-state opinions, see §21.20.

Exception to general rule. The general ban in Cal Rules of Ct 8.1125(a) against citing unpublished opinions does not apply if the opinion (Cal Rules of Ct 8.1115(a), (b)(1)-(2)):

- Is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
- Is relevant to a criminal or disciplinary proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

See 9 Witkin, California Procedure, *Appeal* §824 (5th ed 2008).

When an opinion is cited under one of these exceptions, counsel must furnish a copy of the opinion to the court and all parties by attaching it to the document in which it is cited or, if the opinion will be cited orally, "by letter within a reasonable time *in advance of* citation" (Cal Rules of Ct 8.1115(c) (emphasis added)).

When opinion is available only in computer database. When citing an opinion that is only available in a "computer-based source of decisional law," counsel must furnish a copy of the opinion to the court and all parties by attaching it to the document in which it is cited or, if the opinion will be cited orally, "by letter within a reasonable time *in advance* of citation" (Cal Rules of Ct 8.1115(c) (emphasis added)).

Examples of cases cited but not relied on. Some appellate courts have, in very limited circumstances, *cited*, but not *relied on*, unpublished opinions. See generally 9 Witkin, Procedure, *Appeal* §§820-822. The dissent in *People v Saunders* (1993) 5 C4th 580, 607, 20 CR2d 638 (dissenting opinion of Kennard, J.), cited depublished opinions. In *People v Turner* (1990) 50 C3d 668, 703 n17, 268 CR 706, the court cited depublished opinions in discussing the historical development of the law at issue and in concluding that depublication orders have no precedential value. See also §21.18. In *Cynthia D. v Superior Court* (1993) 5 C4th 242, 254 n9, 19 CR2d 698, the supreme court stated that part of its analysis was "adapted" from a concurring opinion the court had earlier depublished, and gave the name of the case but not the former citation. See also *In re Monique S.* (1993) 21 CA4th 677, 682 n6, 25 CR2d 863 (expressing accord with dissent in depublished case).

Caution must be exercised in citing unpublished decisions. In light of the general ban against citing unpublished opinions and the imposition of sanctions in *Alicia T. v County of Los Angeles*, *supra,* counsel should be careful about citing such opinions. Counsel who believes that one of the exceptions in Cal Rules of Ct 8.1115(b) applies should follow the requirements of Cal Rules of Ct 8.1115(c) described above. If the attorney desires to cite but not rely on an unpublished opinion for some other reason, great caution should be exercised. Although unpublished opinions may not generally be cited as authority, counsel is obviously free to borrow the reasoning of those opinions. The citation to a depublished opinion in *Cynthia D. v Superior Court, supra,* suggests that it may be permissible to inform the court and parties of the source of that reasoning in order to give credit where credit is due. If this is done, counsel should cite *Cynthia D.,* state the unpublished status of the opinion, and make it clear that the citation is solely to credit the source and is not invoking the opinion as authority. Failure to do so could result in sanctions against counsel. For discussion of sanctions awarded in the course of the appellate process, see chap 20.

Caution must be exercised in citing depublication patterns. Similar caution should be exercised if an attorney chooses to follow the precedent of *Conrad v Ball Corp.* (1994) 24 CA4th 439, 29 CR2d 441, and discuss depublication patterns. See §21.18. Again, the precise status of the opinions and the limited purpose of the citation should be made clear. Moreover, counsel should cite Cal Rules of Ct 8.1125(d) and *People v Saunders, supra,* to avoid appearing to claim more significance than is warranted. (Because of this rule and case, prudent counsel might well choose not to attempt to cite unpublished cases in this fashion. See §21.18.)

JUDICIAL PERSPECTIVE: As a matter of sound tactics, practitioners should take care *not* to cite or otherwise rely on unpublished opinions in the Sixth District Court of Appeal. As indicated in *Casella v City of Morgan Hill* (1991) 230 CA3d 43, 58, 280 CR 876, we will disregard any unpublished case cited to us unless it comes within an exception stated in Cal Rules of Ct 8.1115(b). My own reaction to such a citation is negative. Because Rule 8.1115 is so clear, I tend to assume that counsel who includes such a citation is poorly informed, careless, or attempting to take improper advantage. I am sure that counsel would not want me to make such an assumption. Also, I would not encourage practitioners to believe that, in any circumstances in the sixth appellate district, they may *cite* unpublished opinions as long as they do not *rely on* them. It seems to me that even simply to cite an opinion is in a sense to rely on it.

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§21.20 B. Citing Unpublished Federal and Sister-State Opinions

California Rules of Court 8.1115(a), regarding citation of unpublished opinions, refers specifically and only to the citation of an "opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published." The wording of the rule apparently verifies that the prohibition against citing unpublished opinions applies only to California cases. Furthermore, Cal Rules of Ct 8.1115(c) requires that a copy "of a cited opinion of any court that is available only in a computer-based source of decisional law" be furnished to the court and all parties. It thus appears that federal and out-of-state opinions may now be cited without regard to whether they are published. See *City of Hawthorne ex rel Wohlner v H & C Disposal Co.* (2003) 109 CA4th 1668, 1 CR3d 312 (former Cal Rules of Ct 977 (now Cal Rules of Ct 8.1115) does not prohibit appellate court from citing to unpublished federal opinion for persuasive, though not precedential, value).

NOTE: Before 1997, former Cal Rules of Ct 977(a) (now Cal Rules of Ct 8.1115(a)) did not limit its prohibition against citing unpublished cases to California cases. Court of appeal decisions disagreed whether the rule applied solely to California decisions or prohibited citation of unpublished federal and out-of-state cases. Compare *ACL Technols., Inc. v Northbrook Prop. & Cas. Ins. Co.* (1993) 17 CA4th 1773, 1783 n34, 22 CR2d 206 (refusing to consider federal decision appearing in "computerized legal research service") with *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 437, 208 CR 627 (citing federal district court decision not published in federal supplement but appearing in Lexis on-line legal research service).

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§21.21 C. Opinions in Cases in Which Rehearing, Supreme Court Review, or Other Judicial Action Is Ordered

General rule for opinions superseded by grant of review, rehearing, or other judicial action. Unless the supreme court orders otherwise, no opinion superseded by a grant of review, rehearing in the court of appeal, or other judicial action may be published. Cal Rules of Ct 8.1105(e)(1). As a result, these opinions are treated like other unpublished opinions and generally cannot be cited as precedent. See §21.19. Thus, opinions that were originally published in the advance sheets of the Official Reports, and later were not published can no longer be cited. *Barber v Superior Court* (1991) 234 CA3d 1076, 1082, 285 CR 668.

Rule when review is granted but appellate opinion ordered published. Now that the supreme court has the power to review selected issues rather than the entire case (see §22.49), the supreme court may, after granting review, rendering its decision, or dismissing review, order the court of appeal opinion published in whole or in part. Cal Rules of Ct 8.1105(d).

The supreme court has explained that, when it does order an opinion published following grant of review, it is not necessarily adopting the court of appeal's analysis or conclusion:

> If, before ordering postreview publication, we were required to formally decide the correctness of the Court of Appeal's opinion on issues beyond the scope of our grant of review, our authority to order publication of the lower court opinion would be pointless, since the relevant analysis and precedent would then appear in *our* opinion.

Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 709 n12, 238 CR 780. See also *White v Davis* (2003) 30 C4th 528, 563 n14, 133 CR2d 648, discussed in §21.18.

Counsel should ascertain whether opinion is still published and citable. Before relying on a case found in the advance sheets of the Official Reports, counsel should consult an Internet case law service such as Lexis or the Cumulative Subsequent History Table in the back of the most recent advance sheet to see whether the opinion has been superseded by review or rehearing, modified, or ordered depublished. As explained in the preface to the Cumulative Subsequent History Table, no opinion that is not final will be printed in the bound volumes. Counsel may therefore assume that an opinion found in the bound volumes will remain published and citable, although, of course, it may have been overruled.

Attorneys should also be aware that there is about a 20- to 25-day delay between an action affecting publication and its notation in the advance sheets. The current status of a published opinion may be verified either via an Internet case law service such as Lexis or a telephone call to the clerk of the relevant court.

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22

Review by the California Supreme Court

Peter W. Davis
James C. Martin

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I. GROUNDS FOR SUPREME COURT REVIEW

§22.1 A. In General

A party dissatisfied with a court of appeal's decision, including an interlocutory order, may petition the California Supreme Court for review. Cal Rules of Ct 8.500(a)(1). Review is from the decision of the court of appeal, not from the decision of the trial court. Cal Const art VI, §12(b). As a practical matter, filing a petition for review with the supreme court is the only viable means of obtaining relief in a civil case arising from the lower courts.

NOTE: Review may not be sought after a court of appeal denies transfer of a case to its jurisdiction from the appellate division of the superior court. Cal Rules of Ct 8.500(a)(1).

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§22.2 B. When Review Will Be Ordered

Availability of review. The supreme court may grant review of an appellate decision under Cal Rules of Ct 8.500(b):

- When it appears necessary to secure uniformity of decision or to settle important questions of law;
- When the court of appeal was without jurisdiction of the cause;
- When the court of appeal's decision lacked the concurrence of the required majority of qualified judges; or
- For the purpose of transferring the matter to the court of appeal for any proceeding the supreme court may order.

Petitions for review are rarely successful. Typically, only the first ground above applies. Even then, petitions for review are rarely successful, because of the following reasons:

- First, the supreme court receives requests to review nearly 6000 cases annually, but it grants review in only about 6 percent of those cases (see §22.4).
- Second, the supreme court is a court of precedent, not error correction. Thus, the court reviews only the exceptional cases required to develop or settle California law, and it will not resolve issues for the benefit of the parties in a particular case (see §22.6).

Considerations when deciding whether to seek review. Carefully consider whether to advise a client to file a petition for review. The supreme court takes seriously the limits on its jurisdiction imposed by Cal Rules of Ct 8.500(b), no matter how strongly a petition may portray the inequity of a particular result. Counsel should file a petition only in the rare case that presents substantial questions of law that are likely to recur or that involve important public policy or real, not illusory, conflicts in the law. For a more extensive discussion, §§22.3-22.13.

Transfer of cause pending in court of appeal to supreme court. In rare circumstances, on its own or a party's motion, the supreme court may transfer to itself a cause that is pending in the court of appeal before that court issues a decision. The supreme court will not order transfer unless the cause presents an issue of "great public importance that the supreme court must promptly resolve." Cal Rules of Ct 8.552(c). See 9 Witkin, California Procedure, *Appeal* §§922-924 (5th ed 2008).

Review of petitions for extraordinary writs. The supreme court has jurisdiction to entertain petitions for extraordinary writs. See chap 1 for discussion of those proceedings.

Requests for decision by another court. Under Cal Rules of Ct 8.548, the supreme court is authorized to render a decision on a question of California law submitted to it by the United States Supreme Court, a United States Court of Appeal, or a court of last resort of any state, territory, or commonwealth if:

- The question may be determinative of a cause pending in the requesting court; and
- There is no controlling precedent.

The supreme court has discretion to accept or deny the request. Cal Rules of Ct 8.548(f). For a comprehensive discussion of the request for decision procedure, see chap 23.

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II. EVALUATING WHETHER TO PETITION FOR REVIEW

§22.3 A. General Considerations

Must file or join petition. Each party seeking supreme court review of an adverse court of appeal decision must file a petition for review or join in another party's petition. Failure to file a petition or to join in another petition might result in loss of the benefit of a favorable supreme court decision. See *Woods v Young* (1991) 53 C3d 315, 333, 279 CR 613 (Baxter, J., concurring).

Methods for joining petition. A party wishing to join in another party's petition often does so by a simple letter or "joinder" document. Although this practice is common, the safer course is to file a skeleton petition for review, incorporating by reference the other, pending petition. This process will eliminate any doubt that the petitioner has met the requirements for invoking supreme court jurisdiction.

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§22.4 B. Consider Court's Workload and Procedures

Workload imposes practical constraints. In deciding whether to petition for review, it is essential to understand the practical constraints imposed by the supreme court's workload and procedures. Although the number of justices has remained constant over the years, the court's workload has increased significantly.

During the year preceding June 30, 1964, 945 petitions for hearing were filed with the supreme court. Of those, the court granted 113, or 11.9 percent. Judicial Council of California, Annual Report 137 (1965). In contrast, in 2007-2008 the court received 5903 petitions for review (civil and criminal), plus 3981 original proceedings, attorney disciplinary proceedings, death penalty cases, and habeas corpus petitions related to death penalty cases, for a total of 9884. Of the 1500 civil petitions for review, 1360 were denied, 13 were granted and transferred, 21 were granted and held, and only 43 were granted for decision. Judicial Council of California, 2009 Court Statistics Report, *Supreme Court* Tables 1, 5 (2009), available online at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf. Those figures indicate that the odds of obtaining any type of grant are about 6 percent.

Justices must work on pending cases as well as petitions. Each justice must not only evaluate how to vote on the petitions ready for decision at each weekly conference, but he or she must also work on pending cases in which the justice is writing an opinion or a dissent, and on opinions drafted by another justice. Cal Sup Ct, IOPP III, IV(B)(8), VI(D), VIII-IX. Each justice must further prepare for oral argument each month except July and August. Justices also perform a variety of tasks dealing with court administration and Judicial Council rulemaking, as well as a host of ceremonial bench-bar activities. In short, the petitioner faces a court that is deluged with more demands on its limited resources than it can possibly handle.

Conference memorandum includes recommendation. Almost all petitions for review in civil cases are initially analyzed and summarized in a "conference memorandum" prepared by a staff attorney who specializes in this task and is neither assigned to an individual justice nor limited to a 1- or 2-year appointment. Each memorandum includes a recommendation to the court of what action it should take. Cal Sup Ct, IOPP IV. Petitions concerning routine matters or application of settled law are put on the "B" list. The remaining cases are put on the "A" list. Cal Sup Ct, IOPP IV(D).

Justice reviews conference memorandums along with other documents. These conference memorandums, with the petitions and answers, are distributed to each justice who, with his or her staff attorneys, reviews the memorandums and such other materials as the justice deems necessary to vote on disposition of the petition. Cal Sup Ct, IOPP IV(E). In addition, the court has available the record, briefs, and exhibits that were filed in the court of appeal. Cal Rules of Ct 8.512(a).

Court holds conference to vote on petitions. Other than the weeks in which the court is hearing oral arguments (along with a few other exceptions) the court holds a conference each Wednesday to vote on petitions that are ready for decision. Cal Sup Ct, IOPP III. However, not every petition is discussed at the conference. Because the court generally considers between 120 and 180 matters each week, devoting even 15 minutes to each would consume at least 30 hours and leave little time for anything else. Thus, only petitions on the "A" list are discussed and, unless a justice requests otherwise, petitions on the "B" list are simply denied. Cal Sup Ct, IOPP IV(G)-(H). If review is granted, the case is assigned to one justice to prepare a calendar memorandum with a proposed disposition, which is then distributed to the other justices. Those justices may then prepare concurring or dissenting opinions. Cal Sup Ct, IOPP VI(D). For more information, the booklet "Supreme Court of California, Practices and Procedures" provides a detailed description of the court's internal operating procedures and is available at no charge from the Administrative Office of the Courts, Public Relations Office, 350 McAllister St., San Francisco, CA 94102-4783 or online at http://www.courtinfo.ca.gov/courts/supreme/iopp.htm.

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C. Consider Whether Issues Satisfy Cal Rules of Ct 8.516

§22.5 1. Do Issues Meet Standard for Review?

"I will take my case all the way to the supreme court" is the rallying cry of many frustrated litigants and counsel who believe they have not received justice from the lower courts. Given the paucity of cases the supreme court can take, however, there is little likelihood that the disappointed litigant will find salvation in that venue. Indeed, too many petitions are filed when the petitioner believes that the court of appeal erred in a case that does not remotely meet the standards for review under Cal Rules of Ct 8.500(b). Those petitions are a waste of resources for both the parties and the court. On counsel's ethical obligation not to pursue unwarranted appeals, see Cal Rules of Prof Cond 3-200, 3-700.

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§22.6 2. How Will Case Affect the Law?

In evaluating whether to petition for review, the most important consideration is whether the appellate court decision will have an impact on the fabric of the law. The question is whether supreme court review will benefit California law, not whether it will benefit the parties to the case. Thus, the petitioner must ask whether the development of California law requires that the supreme court resolve the issues decided by the court of appeal. In answering that question, the petitioner should consider whether:

- The decision has real precedential value, or whether it is so fact-based that it is unlikely to apply to other litigants.
- The decision presents an issue of law that will arise frequently, or whether it decides a unique question.
- The decision presents an issue of public significance, or whether the dispute is of little interest to anyone other than the parties or a few other persons.
- The decision gives rise to a direct conflict in the decisions of other courts, or whether it simply applies well-established law to a new fact situation.

Remember, the issue is whether the court of appeal decision, not the trial court decision, meets one or more of these criteria. Cal Const art VI, §12(b). If the trial court decision presents an important issue but the court of appeal decision is written to minimize or avoid deciding that issue altogether, the supreme court is not likely to be interested.

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D. Additional Factors for Consideration

§22.7 1. Is Court of Appeal Decision Unpublished?

If the court of appeal decision is unpublished, it has no precedential value by definition (Cal Rules of Ct 8.1115), and therefore the supreme court will usually deny the petition for review. The court may, however, grant and hold, or grant and retransfer. See §§22.51-22.52. An unpublished appellate court decision raises the dilemma of whether the prevailing party in the court of appeal should seek publication of an important but unpublished decision. If the opinion remains unpublished, it is nearly review-proof because it has no precedential value. However, if publication is sought, the importance of the opinion must be explained in terms that the petitioner can use to suggest that review should be granted. Similarly, the losing party may request that the opinion be published to improve chances of review, but that strategy risks a published adverse precedent and denial of review. These considerations must be balanced in each case.

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§22.8 2. Are Issues Clearly and Adequately Presented in the Record?

An important consideration is whether the issues are squarely presented on an adequate record so that they are ripe for the court's determination. A case is probably not an appropriate candidate for review if its legal issues are not properly preserved or are clouded by disputed facts. The chances of review are enhanced, however, if the issue arises in a case that has been tried to judgment, if the issue is narrow in scope but recurs frequently, and if the issue is effectively presented by the briefs.

The clarity of the court of appeal's resolution of the issues is also important. The more squarely the issue is presented in the opinion and the more adequately it is dealt with by the court, the greater the likelihood the supreme court will consider it. If the issue is raised only obliquely or given a summary treatment, it will not be as good a candidate for review.

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§22.9 3. Were Issues Timely Raised in Briefs?

The supreme court as a matter of policy does not normally consider an issue that was not timely raised in the briefs filed in the court of appeal. Cal Rules of Ct 8.500(c)(1). Nor will the court normally consider any issue or material fact omitted from or misstated in the court of appeal decision unless it was called to the attention of the court of appeal in a petition for rehearing. Cal Rules of Ct 8.500(c)(2). On petitions for rehearing, see chap 19.

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§22.10 4. What Will Petition Cost?

The cost of preparing the petition also should be considered. An effective petition for review involves more than simply rehashing the merits of the issues presented in an appeal or recycling the court of appeal brief with a different cover. The purpose of a petition is to show the supreme court why it should invest its scarce resources in deciding the case, not just to show that the court of appeal was wrong. In the latter instance, the court may order the opinion depublished, which is usually of little or no help to the petitioner. The preparation of a petition therefore requires considerable additional effort to refocus and reshape the issues into those that meet the criteria of Cal Rules of Ct 8.500(b). This effort often includes additional legal research on the state of the law in California and other jurisdictions to adequately explain the importance of the legal question or the existence of a conflict in the cases, and factual research on the number of similar cases pending in trial courts or courts of appeal. It also generally involves a more thorough analysis of the public policy implications of the rule of law proposed in the petition.

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§22.11 5. What Will Be Effect of Delay Caused by Petition Process?

The delay that supreme court review will cause is another consideration. An unsuccessful petition will not delay resolution of the case for more than the 100 days within which the court must act. See §22.47. But if the petition is granted, or taken on a grant and hold, the case may not be decided for another 1 to 3 years, and even then the matter may be retransferred to the court of appeal for further proceedings. The effect that such a delay will have on the affairs of the petitioner, including the emotional impact, can be significant.

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§22.12 6. Is There a Risk of Making Bad Law?

In some cases, the risk of making bad law is another factor to consider. The cliché that bad facts make bad law is accurate, and the higher the court, the more important this consideration becomes. Although winning the case before the court is obviously important, remember that a grant of review is no guarantee of victory on the merits. If the case has bad facts, the "bad law" that may be made will usually mean that petitioner's case, as well as future cases, will be adversely affected.

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§22.13 7. Should Case Be Heard by United States Supreme Court?

The litigant who contemplates eventual relief in the United States Supreme Court must bear in mind that certiorari will be granted only when final judgments or decrees have been rendered by a state's highest court in which a decision may be made. 28 USC §1257. In California, a court of appeal decision will satisfy these jurisdictional requirements only if the California Supreme Court has denied review. See, *e.g., Banks v California* (1969) 395 US 708, 23 L Ed 2d 653, 89 S Ct 1901 (petitioner failing to petition in California Supreme Court may not seek review in United States Supreme Court).

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III. DETERMINING DATE TO FILE PETITION

§22.14 A. Time to File Petition Depends on Finality

The petition must be filed within 10 days after the court of appeal decision becomes final in that court. Cal Rules of Ct 8.500(e)(1). See §22.18 on determining the date of finality.

No extension for service by mail. The time for filing a petition is not extended by CCP §1013, which permits an extension of time for documents served by mail. But see §22.18 (for petitions for review, "date of filing" includes the date on which the petition was mailed in certain circumstances).

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§22.15 B. Finality if Rehearing Denied

Unless a rehearing is granted, the court of appeal's decision normally becomes final 30 days after the decision is filed. Cal Rules of Ct 8.264(b)(1). The following decisions by an appellate court are final immediately on filing:

- Denial of a petition for an extraordinary writ without the issuance of an alternative writ, order to show cause, or oral argument, regardless of whether the court of appeal states reasons for the denial (*i.e.,* a summary denial) (Cal Rules of Ct 8.490(b)(1); *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728; *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720);
- Denial of a petition for a writ of supersedeas (Cal Rules of Ct 8.264(b)(2)(A));
- Denial of an application for bail or to reduce bail pending appeal (Cal Rules of Ct 8.366(b)(2)(A)); and
- Dismissal of an appeal by written request of appellant or stipulation of the parties (Cal Rules of Ct 8.264(b)(2)(B)).

The court of appeal may order that a decision granting a petition for a peremptory writ become final in less than 30 days if early finality is necessary to prevent mootness or frustration of the relief granted, or is otherwise necessary in the interest of justice. Cal Rules of Ct 8.264(b)(3). In that circumstance, the court of appeal's decision will state the date of finality.

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§22.16 C. Finality if Opinion Modified

If the court of appeal denies rehearing but modifies the opinion in minor ways, the modification does not change the date of finality. However, if the modification results in a "change in the judgment," then the finality clock starts to run from the filing date of the modification order. The court of appeal's order modifying an opinion and denying rehearing must specify whether it effects a change in the judgment. Cal Rules of Ct 8.264(c)(2).

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§22.17 D. Finality if Rehearing Granted

If the court of appeal grants a rehearing, the original opinion never becomes final, because it is vacated. See 9 Witkin, California Procedure, *Appeal* §910 (5th ed 2008). The 30-day period for finality starts again when a new opinion is filed or the same opinion is refiled.

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IV. PROCEDURES FOR SERVING AND FILING PETITION FOR REVIEW

§22.18 A. Time of Filing

Date of filing. The "date of filing" of the petition for review is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1). This rule also provides, however, that a petition for review is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery, as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3).

Electronic filing. The supreme court does not accept fax filings. See Cal Rules of Ct 2.300 (fax filing rules apply to civil, probate, and family law proceedings in trial courts), 8.44 (supreme court requires "original" copy of all filed documents).

Premature filing. A petition filed before the court of appeal decision is final will be deemed filed on the day after the decision becomes final as to the court of appeal. Cal Rules of Ct 8.500(e)(3).

Relief from default. The time for filing the petition for review cannot be extended in advance by stipulation or order of any court. The supreme court, however, can grant relief from default if the time within which the court could order review on its own motion has not expired. Cal Rules of Ct 8.500(e)(2), 8.536(b), 8.60(d).

Start early. Because the time to file a petition is so short, and because petitions for rehearing to the court of appeal are nearly always denied, work on drafting the petition should begin as soon as possible after deciding to petition from a decision of the court of appeal.

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§22.19 B. Copies to Be Filed

The petitioner must file an original and 13 copies of a petition for review in the supreme court. Cal Rules of Ct 8.44(a)(1). See §22.48 for further formatting requirements.

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§22.20 C. File Proof of Service

The petitioner must file proof of service of the petition on the other parties, the trial court, and the court of appeal that rendered the decision. Cal Rules of Ct 8.500(e), (f)(1). A petition with a defective proof of service will be filed, but unless a proper proof is filed within 5 days, the petition may be stricken or other sanctions imposed. Cal Rules of Ct 8.500(f)(3). Service on the Attorney General must also comply with the service requirements of Cal Rules of Ct 8.212(c)(3), 8.500(f)(2), and 8.29(c). See §12.115.

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§22.21 D. Filing Fee

The petitioner must pay a fee of $420 when the petition for review is filed. Govt C §68927. In addition, the petitioner must pay a $170 fee for deposit in the Appellate Court Trust Fund. Govt C §§68926.1(b), 68933.

PRACTICE TIP: If the petitioner seeks a waiver of the court fees and costs for a petition for review, he or she should submit the application for waiver with the petition. See Cal Rules of Ct 8.26(b)(3).

A fee may not be charged for petitions for review in juvenile cases, proceedings to declare a minor free from parental custody, or proceedings under the Lanterman-Petris-Short Act (Welf & I C §§5000-5120), relating to challenges to involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism. Govt C §68927.

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§22.22 E. Where to File Petition

The supreme court maintains clerk's offices in San Francisco, Los Angeles, and Sacramento, and petitions may be filed at any of these offices. Petitions can also be filed at the:

- Office of the Clerk, Court of Appeal, Fourth Appellate District, Division 1, 750 "B" St., Suite 300, San Diego, CA 92101, (619) 645-2760; and
- Office of the Clerk, Court of Appeal, Fifth Appellate District, 2525 Capitol St., Fresno, CA 93721, (559) 445-5491.

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Source: Civil Litigation/California Civil Appellate Practice/22 Review by the California Supreme Court/§22.23 F. Checklist: Serving and Filing Petition for Review

§22.23 F. Checklist: Serving and Filing Petition for Review

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

___ 1. Calendar the date of finality of the court of appeal's decision. Cal Rules of Ct 8.264 (see §§22.14-22.17).

___ 2. File and serve the petition for review within 10 days after the date the court of appeal decision becomes final. Cal Rules of Ct 8.500(e)(1).

- ___ a. Make sure that the proof of service conforms to the court's rules;
- ___ b. Make sure that the requisite number of copies are provided under Cal Rules of Ct 8.44(a)(1) (see §22.19) and an appropriate computer disk are provided; and
- ___ c. Pay the filing fee (see §22.21).

___ 3. Write a clear and concise statement of the issues presented for review and the reasons review should be granted under Cal Rules of Ct 8.500(b) (see §§22.35-22.36).

___ 4. Conform the format of the brief to the requirements for appellate briefs; the cover should be white. Cal Rules of Ct 8.500(a), 8.204, 8.40(b)(1) (see §§22.28-22.33).

___ 5. Bind the court of appeal decision and any order modifying the opinion or directing the opinion to be published at the back of the brief and all copies. Cal Rules of Ct 8.500(b)(4).

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V. PREPARING THE PETITION

A. General Considerations

§22.24 1. Clearly Present Reasons for Petition

The supreme court justices and staff have a massive workload and do not have time to parse through obscure petitions to discover whether a reviewable issue may be lurking somewhere. To have any chance of serious consideration, the petition must focus on the reasons the court should grant review, and it must clearly present compelling reasons for a grant of review. The court is not looking for opportunities to add another case to its workload, and a petition usually must stand out from the stack to have any chance of success.

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§22.25 2. Limit Scope of Relief Requested; Review Options for Action by Court

Limit the issues. Petitioner should not inundate the court with issues, particularly in light of its workload; generally only one or two issues should be presented. A grant of review on all issues on which the petitioner lost in the court of appeal might be the most desirable result if review is granted, but to request such broad relief makes it more likely that the court will deny review altogether. Further, not all of the issues raised by the court of appeal's decision are likely to be worthy of review under the Cal Rules of Ct 8.500(b) criteria, and to include all such issues may dilute the impact of a review-worthy issue. If issues that are not strong candidates for review are nevertheless included, the strongest issue should be presented first if at all possible, and the petition should concentrate on that issue.

If grant and hold is an option. When the court has already granted review of a case presenting similar issues, the possibility of a grant and hold is fairly strong. See §22.52. If this result is acceptable, then the court should be reminded of the other pending case and the similarity of the issues. However, if a grant and hold would be unacceptable, the petitioner should consider distinguishing the other case or attempt to explain why the case now presented should be taken and decided concurrently. This strategy, of course, increases the risk that the petition will be denied altogether. In some cases, it is possible to do both, *i.e.,* argue both similarity and that the case should be the lead case or decided concurrently with the lead case, to give the court an opportunity to treat related issues comprehensively.

If grant and retransfer is an option. Another option is to invoke the court's grant and retransfer jurisdiction, by which the court grants review but in the same order retransfers the case to the court of appeal for reconsideration in light of a newly published case or cases or for reconsideration of an additional issue or issues as the court may order. Cal Rules of Ct 8.528(d). See §22.51. Once again, a grant and retransfer is a less onerous option for the court because it does not materially add to the court's workload. This option also has the likely advantage of providing the supreme court with the benefit of the court of appeal's reasoning and result before the supreme court needs to determine whether to decide the issue.

Court may depublish court of appeal decision. The court may also simply depublish the court of appeal's opinion instead of granting review. Any person may make a request for depublication (Cal Rules of Ct 8.1125(a)(1)), and a party may file a request for depublication under Cal Rules of Ct 8.1125(a) along with a petition for review under Cal Rules of Ct 8.500. A party may *not,* however, include a request for depublication as a request for alternative relief in its petition for review. The two documents must be filed separately. Cal Rules of Ct 8.1125(a)(2). See chap 21 for an extensive discussion of depublication. On the other hand, the court is well aware of its option of depublication on its own motion. See Cal Rules of Ct 8.1105(e)(2).

PRACTICE TIP: To request depublication along with a petition for review may signal a weakness that the petitioner may not want to express. Indeed, the petitioner may want to argue why depublication is *not* a viable option for the court. If depublication is a viable option, a party can solve this dilemma by asking another person or entity to make the request under Cal Rules of Ct 8.1125(a)(1).

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§22.26 3. Maximizing Chance of Obtaining Review

Create sense of urgency. Within the framework of the standards of Cal Rules of Ct 8.500, the petition must create a sense of urgency that the issue or issues presented must be resolved at that time because of consequences extending beyond the particular case. Unless the supreme court clearly sees the need for immediate intervention, it is likely to conclude that the issues presented, even if important, can be decided at a later date.

Establish importance of issues presented. When drafting a petition, remember that the supreme court is most interested in genuine, well-developed conflicts in the law or in legal issues involving substantial numbers of cases or people. If those issues also involve important social policies, matters of statewide concern, or large sums of money, the likelihood that the supreme court will grant the petition is further enhanced. For example, the issues in a particular case may:

- Have industrywide or statewide import that in the aggregate involve millions of dollars;
- Invoke privilege issues for trade secrets that will affect the way an entire industry conducts its business and protects its competitive position;
- Involve disclosure of information that could affect the way many people are treated;
- Impact directly the litigation of certain types of lawsuits, or the preservation of the public fisc; or
- Raise a question of statutory construction that will have a significant impact on specific public or private interests or a large number of cases.

These examples are not exhaustive, but demonstrate that the practical dimensions and ripple effects of a case can be critical in determining whether the court will grant review.

Compile list of relevant cases. The petitioner should compile a list of other published and unpublished cases at the trial or appellate level, both decided and pending, in which the legal issue presented for review has been raised. If the number of cases presenting the issue is significant, that fact should be highlighted. This list will help substantiate the recurring nature of the question as well as its importance. If any of these cases, trial or appellate, conflict with each other, that fact should also be highlighted. The petition should stress, if appropriate, conflicts with majority rules or well-reasoned opinions from other jurisdictions. In addition, the petition should provide reasons that the time is ripe for the supreme court to step in and establish the appropriate standard. This is particularly important if the issue is relatively new and few cases have addressed it, because the court may be tempted to let the issue percolate further before deciding it.

JUDICIAL PERSPECTIVE: Consider whether particular justices have previously expressed interest in the issue, as evidenced by their individual votes to grant review in other cases. The supreme court minutes, published in the advance sheets of the official reports, note individual justice's votes to grant review in cases in which review is denied. The fact that a justice has previously deemed an issue worthy of review can be an indicator of the issue's continuing importance.

Review other decided cases. Assess the type of civil cases the supreme court accepts by looking at decided cases and consider the ramifications of the opinions. For example:

- Cases like *Bank of the W. v Superior Court* (1992) 2 C4th 1254, 10 CR2d 538 (scope of coverage provided by standardized insurance policy language on advertising injury), and *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 11 CR2d 51 (scope of accounting firm's duty of care to investors with whom it was not in privity), which implicated hundreds of millions of dollars, dozens of cases, and required resolution of conflicting appellate court decisions.
- Cases like *Mitchell v Gonzales* (1991) 54 C3d 1041, 1 CR2d 913 (definition of proximate cause to be used in jury instructions), and *Stangvik v Shiley Inc.* (1991) 54 C3d 744, 1 CR2d 556 (standard for deciding forum non conveniens motions), which involve constantly recurring issues in litigation that have substantial public policy ramifications.

- Cases like *Moore v Regents of Univ. of Cal.* (1990) 51 C3d 120, 271 CR 146 (patent ownership rights regarding human cells used in medical research), and *Freeman & Mills, Inc. v Belcher Oil Co.* (1995) 11 C4th 85, 44 CR2d 420 (extent to which tort remedies can be appended to contractual relations), which involve broad public policy issues that govern legal relationships among Californians.
- Cases like *Dowhal v SmithKline Beecham Consumer Healthcare* (2004) 32 C4th 910, 12 CR3d 262 (federal preemption of state health warnings (Proposition 65) on nicotine replacement products), and *Korea Supply Co. v Lockheed Martin Corp.* (2003) 29 C4th 1134, 131 CR2d 29 (remedies available under Unfair Competition Law (UCL) (Bus & P C §§17200-17210)), which involve recurring issues of statutory construction or preemption that impact numerous cases and public and private litigants alike.

Few cases will be as review-worthy as these extreme examples. But when asking the supreme court to grant review, the petitioner should look for these sorts of issues, even if in lesser degrees.

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§22.27 4. Maximizing Chance of Review by Amicus Curiae Letters

Consider contacting other counsel, companies, public or private organizations, educators, or special interest groups that may be interested in the issue presented in order to try to persuade them to submit letters to the court in support of the petition. Cal Rules of Ct 8.500(g). For procedures and deadlines for amicus curiae letters, see chap 14. Such letters can advise the supreme court that the issues raised in a case are of widespread importance to economic or business affairs, the administration of justice, the general public, the courts, or the resolution of future cases. At the petition for review stage, these letters need not delve into the merits or even be critical of the result reached in the court of appeal. What they do need to emphasize is the direct, immediate, and practical effect of the appellate court's holding on future litigation concerning existing personal or business relationships, or on important public or private interests, or social policies.

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B. Format Considerations

§22.28 1. Use Standard Brief Format

The petition must conform, as far as practicable, to the rules on the form and content of briefs in Cal Rules of Ct 8.204. Cal Rules of Ct 8.504(a). For a more detailed discussion of requirements for briefs, see chap 12. The cover must be white (Cal Rules of Ct 8.40(b)(1)) and include the name, address, telephone number, and California State Bar number of each attorney filing or joining in the pleading (although the cover need not state the bar number of any supervisor of the attorney responsible for the brief). Cal Rules of Ct 8.40(c), 8.204(b)(10)(D).

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§22.29 2. Pleading Language Not Required

A petition for review does not require formal language to address the supreme court justices, or a pleading type of paragraph stating that the party is petitioning for review under Cal Rules of Ct 8.500. Rather, the statement of the issues can directly follow the table of authorities. It is customary, however, to address the petition to the Chief Justice and associate justices, and to sum up in one short paragraph the identity of the court below (and its justices), as well as the dates of filing of the opinion below and of denial of petition for rehearing, if any. See §§22.34-22.39, 22.75.

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§22.30 3. Length Limits

A petition for review may not exceed 8400 words, including footnotes, if produced on a computer or 30 pages if produced on a typewriter. Cal Rules of Ct 8.504(d)(1)-(2). These limits do not include the table of contents, table of authorities, or attachments as described in Cal Rules of Ct 8.504(e)(1). Cal Rules of Ct 8.504(d)(3). See §22.31. Counsel must include with the petition a certificate that states the number of words in the document; the word count may rely on the word count function of the word-processing program used to prepare the petition. Cal Rules of Ct 8.504(d)(1).

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§22.31 4. Attach Copy of Appellate Court Opinion or Order

A copy of the court of appeal opinion showing the date it was filed must be appended to the petition. Cal Rules of Ct 8.504(b)(4). A copy of any order of the court of appeal on rehearing should also be attached. If the petition seeks review of a court of appeal order, a copy of the order showing the date it was entered must be appended to the petition. Cal Rules of Ct 8.504(b)(5). These documents do not count toward the petition's page limit. Cal Rules of Ct 8.504(d)(3).

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§22.32 5. If Attaching Other Documents

When permitted. The court permits attachment of the trial court order from which relief is sought, "unusually significant" evidentiary exhibits or trial court orders, and copies of relevant regulations or rules, out-of-state statutes, or other similar citable material that is not readily accessible. Cal Rules of Ct 8.504(e)(1). Such attachments may not exceed a total of ten pages. Cal Rules of Ct 8.504(e)(2). No other documents may be attached or filed with a petition unless the Chief Justice permits more annexed material on written application and for good cause shown. Cal Rules of Ct 8.504(d)(4). An application to attach additional documents should include an affidavit or declaration setting forth the reasons for including the additional documents.

Avoid limitation by incorporating by reference. With two exceptions, the petitioner may *not* avoid these page limitations on attached documents by incorporating by reference other documents or authorities. The exceptions are (Cal Rules of Ct 8.504(e)(3)):

- Portions of another petition, answer, or reply that was filed in the same case *by another party*; and
- A petition, answer, or reply that was filed *by another party* in a connected case and is still pending or in which review has been granted.

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§22.33 6. Printing or Reproduction

Methods available. The petition must conform, to the extent practicable, with the requirements of Cal Rules of Ct 8.204. Cal Rules of Ct 8.504(a). The brief may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 8½ by 11 inches, and of at least 20-pound weight. Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(1)-(2).

Production by word processing. Most petitions for review are prepared by word processing equipment rather than commercial printing. This process can work well, but it is extremely important, given the court's time constraints, that the petition be easy to read, easy to understand, and easy to deal with mechanically. The petitioner should not use extensive footnotes or otherwise cram words on pages. The petitioner should also use a binding that opens reasonably flat and does not come apart. The requirements for contents and format of briefs, including binding, are set forth in Cal Rules of Ct 8.204(b)-(e).

For a discussion of requirements for computer printed, typewritten, or printed briefs, see §§12.19-12.24. For discussion comparing methods of duplication, see §§12.99-12.104.

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§22.34 C. Drafting Body of Petition

Generally, the body of the petition consists of the following:

- A statement of issues;
- A statement of the case, including whether a petition for rehearing was filed in the court of appeal and the outcome (Cal Rules of Ct 8.504(b)(3));
- An argument; and
- A conclusion.

The petition itself should begin with "a concise, nonargumentative statement of the issues presented for review," and must address "how the case presents a ground for review under rule 8.500(b)." Cal Rules of Ct 8.504(b)(1)-(2).

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§22.35 1. Statement of Issues Presented for Review

State legal issues clearly. The beginning of the body of the petition must state the issues presented for review, "framing them in terms of the facts of the case but without unnecessary detail." Cal Rules of Ct 8.504(b)(1). The statement of issues presented must articulate clearly and concisely the legal issues the court is asked to resolve. It should also be persuasive (rather than totally neutral) without being argumentative, and inclusive without being too detailed. It must be broad enough to suggest the importance and impact of the issues without straying from the legitimate scope of the case under review or becoming amorphous. It should be framed in terms of the grounds for review articulated in Cal Rules of Ct 8.500(c) rather than merely stating that the court of appeal erred.

May have a major effect. Generally the first thing read by the court and its research attorneys, the statement of issues is not a "throwaway" section; it will have a major effect on how the court views the petition. It can be the most important part of the petition for review—and the most difficult to write. It not only alerts the court to the general proposition of law that is at issue; it can also frame how the court will view the reviewability of the issue as well as the correctness of the proposition of law raised. The issues are usually stated as questions, but it is not necessary to do so.

JUDICIAL PERSPECTIVE: This section effectively defines the scope of briefing if the court does grant review and does not otherwise specify the issues (see Cal Rules of Ct 8.516(b)(1)); thus, counsel should carefully consider how he or she wishes ultimately to argue the case to the court and lay the groundwork here.

Construction important. Part of the challenge of drafting the statement of issues is to put the controversy in context, without getting too verbose, complicated, or argumentative. Another equally important challenge is to keep the statement of issues clear and simple. Avoid loading up statements of issues with so many facts or qualifications that they must be studied rather than read.

Some cases lend themselves to simple, self-explanatory statements of the issues, but others seem to need more explanation. When more is needed, some practitioners preface the statement of issues with an extremely short introduction that sets the stage. This approach may not strictly comply with Cal Rules of Ct 8.504(b)(1), which requires that the "body of the petition must begin with … a statement of the issues." However, if the introduction is limited to a few short sentences tied directly to the issues presented and is not too argumentative, the court is unlikely to object.

Another approach is to put an explanation after the statement of issues to put the case in context and to help explain why the court should grant review. Either technique helps reduce the temptation to load up the statement of issues with extra facts or arguments.

Yet another technique that may help clarify a complex question is to subdivide an issue. For example, the issue may start with a two- or three-sentence foundation with two to four subparts in indented form.

Number of issues. Careful thought must be given to the number of issues presented. Given the small percentage of cases in which review is granted, it is very unlikely that a case could present more than one review-worthy issue. For this reason, listing more than three issues may hurt a party's credibility. Raising multiple issues also may give the impression that the case is unduly complex and not presented on a clean record. Therefore counsel should take pains to try to state one or two concise questions for the court's consideration.

Do not present arguments. Remember too that the statement of issues is not the place to argue that the court of appeal erred. Rather, the petition's theme should be on the reviewability of the issues. Thus, for example, instead of posing the question "whether the court of appeal erred" state that "the court of appeal decision reflects a conflict among the courts of appeal on the issue of whether…."

If possible, construct issues to avoid merely depublishing. Be careful not to word the issues in a way that allows the "problem" to be fixed by simply depublishing the court of appeal opinion. See §§21.15-21.17. This result typically occurs when the law was settled before the court of appeal rendered a decision so that depublishing it eliminates any conflict in the published decisions. In that circumstance, the petitioner should focus not just on the conflict, but why it will recur.

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§22.36 2. Consider Section on Why Review Should Be Granted

The petitioner must grab the court's attention early in the petition. Generally, the best way to accomplish this is to explain why the case merits review in a section that follows the statement of the issues. This section may best encompass the various reasons why the case is worthy of a grant of review given the requirements in the rules (*i.e.,* conflict in the cases, substantial public policy issue). It should also put the issues in context so that the court has a feel for what the case is about. Note that the petitioner must address "how the case presents a ground for review under rule 8.500(b)." Cal Rules of Ct 8.504(b)(2).

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§22.37 3. Statement of the Case

General contents. The statement of the case should contain in concise form: the nature of the action or proceedings, a summary of the material facts, the relief sought, the trial court's judgment or ruling, and the appellate court's disposition and reasoning. Cal Rules of Ct 8.204(a)(2).

Tell concise procedural story. The petitioner should tell the procedural story of the case in a way that puts the issues in context, but without unnecessary detail. Irrelevant matters should be omitted. Because of the limited time the court can invest in evaluating a petition, this section is not a place to tell the court about every wrong inflicted on the petitioner in the course of the litigation. Attempting to convince the court that the opposing party or lower courts have treated the petitioner unfairly on issues collateral to those on which review is sought is likely to detract from the petition's effectiveness.

Use headings. Whether the substantive facts are included under one heading with the procedural facts or under a separate heading, the statement of case should provide the court sufficient information to make the legal issues understandable. The court should be able to assess whether this is the proper case in which to resolve those issues.

Cite to the record. Every statement of fact should be supported by a specific citation to the record. If the record is printed, then citations should be to volume and page number. If any portion of the record is in electronic format, then citations to that part should be made with the same level of specificity as is done with the printed record. Cal Rules of Ct 8.204(a)(1)(C).

Should be persuasive in tone. This section of the petition should be persuasive. When drafting the statement of the case, it is important to be fair to the record but also to tell the story in a way that creates a sense of fairness or equity underlying the petitioner's position. The supreme court is not altogether blind to considerations of justice. However, the petitioner should avoid blatant "jury arguments" because the court often resents attempts to sway it by matters not germane to the standard of review. Such efforts detract from the credibility of the presentation.

Court of appeal opinion. When possible, the petitioner should refer to or rely on the opinion of the court of appeal. These references often can be used to shorten the section. In addition, because it is the court of appeal's opinion that is under review, these references can better frame the context in which the request for review is made and, perhaps more importantly, evaluated by the court's staff.

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§22.38 4. Argument

Organization depends on circumstances of case, but always put the strongest argument first. The argument section normally carries the dual burden of persuading the court that the petition raises issues that the court should review and that the court of appeal was wrong on the merits. The organization of these points depends on the circumstances of a particular case. Often, these dual burdens can be intertwined. If stated separately, however, the arguments for review should be stated first, followed by why the court of appeal was wrong. In both sections, the strongest arguments should be stated first. In some petitions it works well to weave the entire argument on why the case is worthy of review into the statement of issues and the statement of the case instead of in the argument section. In other petitions, especially when the review worthy argument is lengthy or can be integrated with the argument on the merits, only a summary is put into an earlier section and a fuller exposition is put into the argument section.

Argument on why case review worthy can be most critical part of petition. If the reasons for review are expressed clearly and powerfully, the petitioner may be able to convince the drafter of the conference memorandum to recommend review and to include in the memorandum arguments that will convince at least four justices to accept the recommendation. Like the statement of issues, this section should not dwell on why the court of appeal was wrong but should explain why the issue presented is important to the development of the California law, or that the lower courts are in true conflict and that the supreme court should use this case as a vehicle to declare what the law should be.

Explain significance of appellate court's decision. In explaining the significance of the court of appeal's decision, petitioner should give the legal, practical, and public policy reasons that the interests of the state are best served by resolving the issue differently from the appellate court's resolution. If there is a conflict in the cases, the petitioner should explain why the better reasoned cases support resolution in the way the petitioner desires. The petitioner should also consider whether the rule advocated would put (or keep) California in the majority nationwide, or in accord with the nationwide trend. If so, the petitioner should briefly highlight that the court of appeal opinion threatens to put California out of step with the rest of the country.

Carefully word headings. Care should also be taken with the argument headings. They should succinctly summarize the arguments made in the petition for review. Argument headings merely reciting that the court of appeal opinion is inconsistent with other opinions or that the court of appeal wrongly decided an important question of law are ineffective. To the extent possible within the confines of an argument heading, the point of the argument should be stated so that the court can gain an understanding of the case and its importance from the statement of the issues and the topical index alone, as these may be as far as some readers will get.

Use of quotes. If the argument requires the court's consideration of exact language from a document or from the record, counsel should consider quoting a *short* excerpt of the exact language in the body of the petition. The reason for this is that the supreme court may not have quick access to the trial court record when the petition is filed. The material should be quoted only if it is critical to the petition and can be no more than a few lines.

Use of exhibits. In rare circumstances, an exhibit that is "unusually significant" and ten pages or less may be attached as an exhibit to the petition. Cal Rules of Ct 8.504(e)(1).

Fairly and squarely address all the issues. As with other submissions to the court, it is important not to misstate the facts or the cases. The petition will be stronger if it fairly and squarely addresses the countervailing arguments relied on by the court of appeal. Remember, it is the court of appeal decision, not the opposing party's position, that is the focus of a petition for review. It is important to treat the court of appeal decision with respect, regardless of how unfair or wrong it may be.

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§22.39 5. Conclusion

The conclusion should be concise but do more than simply state that review should be granted "for the aforesaid reasons." Every point need not be referred to, but the petitioner should reiterate the important themes of why the case should be one of the few in which review is granted. When applicable, the petitioner should also consider reminding the court that less than a full grant is proposed in the first instance or as an alternative. See §§22.10-22.52.

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VI. ANSWER TO PETITION FOR REVIEW

§22.40 A. Answer Not Required But Advisable

A party opposed to supreme court review may file an answer to the petition. Cal Rules of Ct 8.500(a)(2). The court does not require a party opposing a petition for review to file an answer, and some knowledgeable people suggest that in some cases it is unnecessary to do so. Nevertheless, while the odds of the court's denying review are extremely high even if no answer is filed, it is risky to leave the analysis solely to a very busy court without providing any assistance. Furthermore, an answer may raise additional issues for review. Cal Rules of Ct 8.504(c).

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§22.41 B. Procedure and Time Requirements

Time for service and filing. An answer to a petition for review must be served and filed within 20 days after the filing of the petition. Cal Rules of Ct 8.500(e)(4). The "date of filing" of the answer is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1). This rule also provides, however, that the answer is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3). See §22.18.

Length limitations. The length limits are the same for the answer as for the petition—8400 words (including footnotes) if produced on a computer, 30 pages if typewritten, excluding tables, indexes, and the appellate court opinion. Cal Rules of Ct 8.504(b)-(e). Counsel must include with the petition a certificate that states the number of words in the document; the word count may rely on the word count function of the word-processing program used to prepare the petition. Cal Rules of Ct 8.504(d)(1). The Chief Justice may grant leave to file an oversize answer on written application. Cal Rules of Ct 8.504(d)(4).

Style and form requirements. The style and form requirements for the answer are the same as for a petition (see §§22.8-22.39) except that:

- A copy of the court of appeal opinion is not attached as an appendix;
- No statement of the issues is required unless additional issues are counterdesignated (see Cal Rules of Ct 8.504(c)); and
- The cover should be blue. Cal Rules of Ct 8.40(b)(1).

Copies. The number of copies is also the same as for a petition. See §22.19. Service requirements are also the same. Cal Rules of Ct 8.212(c), 8.500(e)(4). See §22.20.

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§22.42 C. Answer Must Focus on Grounds for Review

Maintain focus. Like the petition, the answer focuses not on the underlying merits of the appeal but on the grounds for supreme court review enumerated in Cal Rules of Ct 8.500(b). See §22.2. Normally, neither the court of appeal opinion nor the briefs filed in the court of appeal will directly address the factors reflecting whether the case is an appropriate candidate for review other than whether the court of appeal correctly decided the merits of the issues presented. Even if the opposing party considers review acceptable or desirable, the court begins to form an opinion about the case at the petition stage, and the opposing party should not let the petitioner have an open field in which to run.

When to restate issues presented. An answer sometimes restates the issues presented if the petition does not do so fairly. This practice is controversial and should be approached cautiously. Nevertheless, it can be a useful tool to help refocus the court if the statement of issues in the petition is misleading. For example, a restatement of the issues might refocus the question presented in terms of the absence of a conflict, failure to raise or preserve the issue below, or the unique facts of the case. But the restated issues should be nonargumentative, fair to the record, and not inadvertently identify a potentially reviewable issue that would otherwise not be apparent.

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§22.43 D. Presenting Additional Issues for Review

Procedure for presenting additional issues. The opposing party may identify issues for review not presented in the petition and ask the supreme court to review those issues if it grants the petition for review. The opposing party must set forth additional issues at the beginning of the body of the answer. Cal Rules of Ct 8.500(a)(2), 8.504(c).

When appropriate. The opposing party should consider whether raising new issues will make the case more or less review worthy. The additional issues might deter the court from granting review because they make the case more complex and time consuming. But they might increase the profile of the case or influence the court to think that the case is a good vehicle because it allows clarification or resolution of related matters that the court would like to address together. The opposing party should also consider that failing to raise additional issues means that they are probably waived if the court grants review. If the goal is to convince the court to deny review, new issues should be stated in a way that preserves them for a brief on the merits if the court grants review without making them unduly attractive at the petition stage.

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§22.44 E. Objectives in Structuring Answer

Two primary objectives. The twin objectives of the answer are to persuade the supreme court that the court of appeal correctly resolved the issues presented and that the case is inappropriate for review.

Follow structure of petition. The structure of the answer should mirror that recommended for the petition. Showing that the case is not a candidate for review is the most important objective and involves analysis of each of the same factors that the petitioner should consider, but with the opposite objective. See §§22.3-22.13. The answer should stress the factors ignored by the petitioner and, when appropriate, dispute the factors the petitioner does raise.

Suggest alternatives if appropriate. The answer may also suggest alternatives to a hearing, such as ordering depublication of the court of appeal opinion. See Cal Rules of Ct 8.1105(e)(2); §22.54.

If conflict in cases claimed in petition. If the petitioner claims a conflict in the cases, the answer should explain, if possible, how the cases can be harmonized. When no conflict is claimed, that too should be noted. If the issue is novel in California, the answer should support the reasoning of the court of appeal and suggest that even if the court questioned the court of appeal's result, intervention would be premature. Of course, if the law is well established, that fact should be highlighted. Similarly, if the court of appeal opinion is "fact-bound" so that it has little application to other parties and cases, this aspect too should be explained.

Support court of appeal decision. In demonstrating that the court of appeal's decision was correct, the answer should not just cite cases and statutes but should explain why the competing public policies and the court's reasoning support the rule adopted and that it is fair and best serves the interests of this state. Consider, also, whether the rule the petitioner proposes would be workable in other contexts. Direct reliance on the court of appeal in making this showing can be helpful. As with the petition, it is the court of appeal's reasoning that will be evaluated most closely by the court's staff.

Be honest. One purpose of the answer is to counteract any sense of urgency created by the petition. The answer should be careful not to inadvertently add glamour or interest to the issues raised. However, the answer must be candid. If the petition raises a true conflict in the cases or an issue worthy of review for other reasons, the opposing party should not risk credibility with the court by blowing smoke. Rather, the answer should focus on why the case is not a good vehicle to address the issue. For example, the record may not squarely present the issue, or the facts of the case may have unique aspects that would threaten the precedential value of any opinion the supreme court writes. Other options when appropriate include depublication and suggesting that the court wait to see what other courts of appeal have to say on the issue.

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VII. REPLY TO ANSWER TO PETITION FOR REVIEW

§22.45 A. When Appropriate

The petitioner may file a reply to the answer. Cal Rules of Ct 8.500(a)(3). A reply is recommended in most instances, but particularly if the answer presents additional issues for review. Some petitioners file a reply even if no new issues were presented in the answer, especially if the issues were restated or to correct misstatements in the answer.

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§22.46 B. Procedural Requirements

The reply, which must be filed within 10 days after the answer is filed, is limited to 4200 words, including footnotes, if produced by computer and 15 pages if typewritten, excluding index of contents and table of authorities, unless the Chief Justice orders otherwise. Cal Rules of Ct 8.500, 8.504(d)(1)-(2). The number of copies and requirement for a computer disk are the same as for a petition. See §22.19. The cover of the reply should be white. Cal Rules of Ct 8.40(b)(1). See §22.32 on material that can be annexed to or filed with the reply.

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VIII. COURT PROCEDURE ON DECIDING PETITION FOR REVIEW

§22.47 A. Time for Court to Act

Transmittal of record. When the supreme court receives a petition for review, the court of appeal clerk will send the record to the supreme court. Cal Rules of Ct 8.512(a).

General time frame. The court generally decides whether to grant review within 60 days after the filing of the last petition for review is filed. Cal Rules of Ct 8.512(b)(1). The court, on its own motion, may also order review within 30 days after the decision of the court of appeal becomes final. Cal Rules of Ct 8.512(c).

Extensions of time. The court may extend the time to grant or deny a petition up to 30 additional days. Cal Rules of Ct 8.512(c)(1). The court may also extend its time to grant review on its own motion up to 60 additional days. Cal Rules of Ct 8.512(c)(1). A decision from the court on review is certain within 100 days after the appellate court decision becomes final. If no order is made within the time allotted by the rules, including any extensions, the petition for review is deemed denied. Cal Rules of Ct 8.512(b)(2).

Frequency of extensions. For a variety of reasons, the court regularly extends its time to decide whether to grant review. A justice may have "pulled" the case for more consideration (which any justice may do merely by making the request that a vote be deferred) (Cal Sup Ct, IOPP IV(G)), or the court's calendar may have been too full to consider the case in the time allowed. It is thus difficult to attribute too much significance to an order extending time.

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§22.48 B. When Petition Denied; Issuance of Remittitur

Procedure. A supreme court order denying a petition for review may be made by the chief justice alone. Cal Rules of Ct 8.524(d)(1). It becomes final when the order is filed. Cal Rules of Ct 8.532(b)(2)(A). When the order is filed, the supreme court clerk returns the record to the court of appeal. Cal Rules of Ct 8.512(a). The appellate court clerk issues the remittitur "immediately" on receipt of an order from the supreme court denying review, or when the period during which the supreme court may grant review on its own motion expires, or when the supreme court dismisses review under Cal Rules of Ct 8.528(b). Cal Rules of Ct 8.272(b)(1)(A). At the same time, the appellate court clerk notifies all parties by mail that the remittitur has been issued. Cal Rules of Ct 8.272(d). The appellate court clerk must also send to the lower court the court of appeal remittitur and a file-stamped copy of the opinion or order. Cal Rules of Ct 8.272(b)(1)(B).

Denial not decision on the merits. Denial of a petition for review is not an expression of the supreme court's opinion on the merits of the case or on the correctness of the judgment or any discussion in the court of appeal opinion. See *People v Triggs* (1973) 8 C3d 884, 890, 106 CR 408, disapproved in part on other grounds in *People v Lilienthal* (1978) 22 C3d 891, 897 n4, 150 CR 910; *People v Davis* (1905) 147 C 346, 350, 81 P 718. Nevertheless, such a denial has occasionally been regarded as approval of the court of appeal's conclusion, if not its reasoning. See, *e.g., DiGenova v State Bd. of Educ.* (1962) 57 C2d 167, 178, 18 CR 369; Kanner, *It's a Busy Court: The Effect of Denial of Hearing on Court of Appeal Decisions*, 47 Cal State BJ 188 (1972). Moreover, some courts of appeal have stated that the supreme court's denial is significant in their consideration of an issue. See *In re Eli F.* (1989) 212 CA3d 228, 235, 260 CR 453; *Fire Ins. Exch. v Abbott* (1988) 204 CA3d 1012, 1024, 251 CR 620.

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§22.49 C. When Petition Granted

Majority requirement. A petition for review may be granted only by an order signed by at least four justices and filed with the supreme court clerk. Cal Rules of Ct 8.512(d)(1).

Prevents publication of court of appeal decision. Unless otherwise ordered by the supreme court, the grant of review prevents publication of the court of appeal opinion in the Official Reports and thereby precludes citation to it as precedent. Cal Rules of Ct 8.1105(e)(1). However, the supreme court may order the opinion to remain published in whole or in part even though it has granted review. Cal Rules of Ct 8.1105(e)(2). An opinion ordered published pending review may be cited as precedent. See Cal Rules of Ct 8.1115(d).

Review may be granted on any or all issues. The supreme court may grant review on any or all of the issues in the case. Cal Const art VI, §12(c). If the court has specified the issues it will decide, briefs and oral argument will be confined to the specified issues and issues "fairly included in the petition or answer." Cal Rules of Ct 8.516(b)(1), 8.520(b)(2)-(3). Despite the issues specified by the parties or the court, the court may later order argument on and decide fewer issues *or additional* issues. Cal Rules of Ct 8.516(b). The court must give the parties reasonable notice of any specification of issues or any change in the specification. Cal Rules of Ct 8.516(b)(2). It must also allow briefing on any new issues. Govt C §68081; Cal Rules of Ct 8.516(b)(2).

No endorsement of appeals court ruling on excluded issues. For the same reasons that denial of review does not indicate the supreme court's agreement with the court of appeal opinion, the court's specification that it will consider fewer than all issues the parties request it to decide is not an endorsement of the correctness of the excluded issues.

Issues not decided by supreme court. The court of appeal's resolution of issues that were not decided by the supreme court remains in effect in the absence of:

- Any contrary instructions by the supreme court; or
- A further decision of the court of appeal after remittitur from the supreme court.

Further research. See Cal Rules of Ct 8.528.

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§22.50 D. Alternatives to Grant or Denial

The supreme court is not limited to granting or denying a petition for review, but has a range of alternative dispositions at its disposal. See discussion in §§22.51-22.54.

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§22.51 1. Grant and Retransfer to Court of Appeal

Some or all issues may be transferred. After granting review, the supreme court may retransfer the case to the court of appeal to decide some or all of the issues. Cal Const art VI, §12; Cal Rules of Ct 8.528(d)-(e). For discussion of the alternative of retransferring with instructions, see Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984); *Gillaizeau v Bank of America* (1986) 179 CA3d 836, 838, 224 CR 914.

When grant and retransfer usually occurs. The supreme court usually uses the grant and retransfer procedure after the court of appeal has summarily denied a petition for a writ. The court grants review and retransfers to the court of appeal with directions to issue an alternative writ. On rare occasions, however, it has also been used after the court of appeal decided an appeal on the merits. The court grants review and transfers to the court of appeal with directions to reconsider the case in light of a specified case or cases or to resolve an additional issue or issues. See Cal Rules of Ct 8.528(c)-(e).

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§22.52 2. Grant and Hold

If a petition raises an issue that is related to an issue already before the court in another case, the court can grant the petition and "hold" the new case until the "lead" case opinion is filed. Cal Rules of Ct 8.512(d)(2). The court's order granting review usually stays briefing. When the lead opinion becomes final, the court may order briefing and argument on the "held" case, and then decide the issues presented. But as a practical matter, the court usually retransfers the held case to the court of appeal for reconsideration in light of the lead opinion. See §22.51.

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§22.53 3. Dismissal of Review

The court may dismiss review at any time, meaning that it has decided not to decide the case and is satisfied to let the court of appeal decision stand. When the court of appeal receives the dismissal, such an order is final and its clerk must promptly file a remittitur or "take other appropriate action," and the court of appeal opinion remains unpublished (even if it was published originally) unless the supreme court orders otherwise. Cal Rules of Ct 8.528(b). Because an order dismissing review is "final," no petition for rehearing will be heard. See Cal Rules of Ct 8.528(b)(2). The time for filing a petition for certiorari in the United States Supreme Court begins on the date review is denied. US Sup Ct R 13. A petition for certiorari is timely when filed within 90 days of the final judgment. US Sup Ct R 13(1).

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§22.54 4. Depublication of Appellate Court Opinion

When court uses. When a petition is denied, the court may also order that the court of appeal opinion not be published in the Official Reports. Cal Rules of Ct 8.1105(e)(2). For discussion of depublication in the absence of a petition for review, see chap 21.

Effect of depublication. The effect of depublication is to remove the opinion as precedent in California. An order directing depublication, under Cal Rules of Ct 8.1125(d), "is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." On the implications of an order to depublish a court of appeal decision, see Grodin, *The Depublication Practice of the California Supreme Court,* 72 Cal L Rev 514 (1984). See also *People v Saunders* (1993) 5 C4th 580, 592 n8, 20 CR2d 638; *Conrad v Ball Corp.* (1994) 24 CA4th 439, 443, 29 CR2d 441; *People v Dee* (1990) 222 CA3d 760, 764, 272 CR 208, overruled in *People v Saunders* (1993) 5 C4th 580, 597 n9, 20 CR2d 638.

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IX. PREPARING BRIEF ON THE MERITS

§22.55 A. Options When Review Granted

Notice of intent or brief on the merits. When review is granted, the petitioner must serve and file either a brief on the merits or a notice of its intent to rely on the brief filed in the court of appeal along with a copy of that brief. Cal Rules of Ct 8.520(a)(1), (4). Respondent may also either file a new brief or file a copy of the court of appeal brief along with a notice of intent to rely on that brief. Cal Rules of Ct 8.520(a)(1), (4).

If notice of intent procedure used. If the petitioner elects to rely on the brief filed in the court of appeal, the notice of intent and copy of the brief(s) in the court below must be served and filed within the relevant deadline and the notice of intent must be attached to the brief's cover. Cal Rules of Ct 8.520(a)(1), (4). Even though the rule refers to a "brief," a petitioner who was the appellant in the court of appeal could presumably rely on both the opening and reply briefs in the court of appeal. See §22.56 on time to file opening, answer, and reply briefs.

If new brief used. If the petitioner intends to file a new brief, it is not necessary to file a notice of nonintention to rely on the court of appeal briefs. It is almost always better to prepare a new brief instead of relying on the court of appeal brief. Because the court of appeal is a court of error correction, and the supreme court is a court of precedent, the approach in briefs should generally be significantly different. In particular, the briefs in the court of appeal do not usually focus on the policy implications and reasons for the rule as much as the briefs in the supreme court will. Nor do they usually explore the national majority and minority rules or trends in the law, which are also important considerations in the supreme court. They tend to argue what the law is, rather than what the law ought to be. Moreover, the focus of the case is often changed somewhat by the court of appeal opinion, and new or additional authority often needs to be cited.

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§22.56 B. Procedural Requirements

Petitioner's opening brief. Either the new brief or the court of appeal brief with the attached notice of intention must be served and filed within 30 days after the order granting review has been filed. Cal Rules of Ct 8.520(a)(1), (4). See §22.55. The beginning of the body of the brief must quote either any court order specifying issues to be briefed or, if none, the statement of issues in the petition for review and any new issues in the answer. Cal Rules of Ct 8.520(b)(2).

Answer. The opposing party must serve and file either its new answer brief or its brief from the court of appeal within 30 days after the petitioner's notice or brief was filed or after expiration of the time for filing the petitioner's brief. Cal Rules of Ct 8.520(a)(2). The opposing party may file a new brief on the merits regardless of whether the petitioner has filed a new brief or relied on its brief in the court below.

Reply brief. The petitioner may file a new reply brief or the reply brief it relied on in the court of appeal, along with a notice of intention, within 20 days after the opposing party's brief has been filed. Cal Rules of Ct 8.520(a)(3)-(4).

Number of copies. The original and 13 copies of the notice of intention and the court of appeal brief, or a new brief in the supreme court, must be filed. Cal Rules of Ct 8.44(a)(1). This rule applies to opening briefs, answers, and reply briefs.

Date of filing. The "date of filing" for any brief is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1), (3). This rule also provides, however, that a brief is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3).

Extensions of time in which to file. Although the parties may not stipulate to extensions of time to file briefs on the merits, the court will grant reasonable extensions on a showing of good cause. Cal Rules of Ct 8.60(b), 8.63.

Format. Briefs must conform to the format requirements of Cal Rules of Ct 8.204. Cal Rules of Ct 8.520(b)(1). The petitioner's and opposing party's briefs on the merits shall not exceed 50 pages if typewritten or 14,000 words, including footnotes, if produced on a computer, and a petitioner's reply brief shall not exceed 30 pages if typewritten or 8400 words, including footnotes, if produced on a computer. Cal Rules of Ct 8.520(c). Counsel filing the brief must include in the brief a certificate stating the number of words in the brief. Cal Rules of Ct 8.520(c)(1). Not included in these length limitations are any tables, indexes, the quotation of issues, attachments, and the certificate of length. Cal Rules of Ct 8.520(c)(3). A party may attach copies of relevant regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible; these attachments cannot exceed a total of ten pages. Cal Rules of Ct 8.520(h). The covers of the petitioner's opening and reply briefs should be white; the cover of the opposing party's brief should be blue. Cal Rules of Ct 8.40(b)(1). All original papers and all copies filed or served must be printed on recycled paper. Cal Rules of Ct 8.40(a), 8.204(b)(1).

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§22.57 C. Content

Required content. The petitioner's brief on the merits, at the beginning of the body, shall quote any order of the supreme court specifying the issues or, in the absence of any order specifying the issues, quote the statement of issues included in the petition for review and any additional issues stated in the answer to the petition. Cal Rules of Ct 8.520(b)(2). Unless otherwise ordered, briefs on the merits shall be confined to those issues and issues fairly included in them. Cal Rules of Ct 8.520(b).

Consider burden. The opposing party should not assume that the court is likely to affirm. Once the court has granted review, the opposing party has at least as heavy a burden as the petitioner does in convincing the court what the rule of law should be. Nor should the petitioner assume that the court will decide in its favor simply because it granted review.

Address appropriate rule of law. The brief on the merits should describe and use existing law to advance the arguments made. However, that is only the starting point of the analysis. The supreme court is rarely bound by precedent and can usually declare the law to be whatever it wants. It is essential to convince the court that it should *adopt or create* the rule of law proposed.

Trace development of the law, if appropriate. It is sometimes useful to trace the development of the law so that the court can see the policy reasons for, and the limits of, the rationale of the existing rule. In addition, the briefs must develop a set of pragmatic and policy reasons in support of the rule of law the court is asked to accept. Because the court is usually concerned with how the rule suggested would work in other factual settings, it is important to be precise about the legal standard and its parameters. Exceptions to the rule should be noted and explained. The court must be assured that the rule will not create unfair or improper consequences in future cases.

Review other supreme court decisions. Counsel should consider using the brief on the merits as a road map for the court in drafting an opinion. Examination of supreme court opinions helps to see how the court generally covers the background of the law, develops rules, and explains the reasons for them. See Witkin, Manual on Appellate Court Opinions, chap 5 (1977).

Out-of-state law or treatises. Frequently, the supreme court evaluates issues presented in a broader context, looking to the majority rule nationwide or the position taken by authoritative commentators. In cases raising issues of federal law or public policy, appropriate federal law also will be considered to help reach a resolution. A merits brief often can be enhanced by examining these additional sources to provide a framework for how the court should decide the case.

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X. POSTBRIEFING DEVELOPMENTS

A. Supplemental Briefs

§22.58 1. When Allowed

The parties may file supplemental briefs addressing new authority, recently enacted legislation, or other intervening matters not available in time to be included in a party's brief on the merits. Cal Rules of Ct 8.520(d)(1).

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§22.59 2. When to File

The supplemental brief may be served and filed without court permission, up to 10 days before oral argument. Cal Rules of Ct 8.520(d)(2). The filing, service, and number of copies requirements are the same as for other briefs. See §22.56.

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§22.60 3. Page Length; Color of Briefs

Supplemental briefs cannot exceed 2800 words, including footnotes, if produced on a computer or ten pages if typewritten. Cal Rules of Ct 8.520(d)(2). While the rules do not specify colors, the petitioner's should be white and the opposing party's blue to conform to earlier briefs.

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B. Oral Argument

§22.61 1. When Arguments Will Be Heard

The supreme court hears argument in every case it decides on the merits. See Cal Rules of Ct 8.516(a)-(b).

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§22.62 2. Where Arguments Are Held

The supreme court generally hears argument in San Francisco, Los Angeles, and Sacramento, but it may hold special sessions in other locations. Cal Rules of Ct 8.524(b); Cal Sup Ct, IOPP V. The length of time between granting review and oral argument varies from 6 months to 3 years, and although no time estimate can be made with confidence, the court generally hears argument within 1 year after granting review.

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§22.63 3. Setting the Date

The clerk's office generally contacts the attorneys for the parties before setting a case for oral argument to ascertain whether the attorneys have conflicts that will interfere with the oral argument date. Once a matter has been placed on the calendar for oral argument, it is difficult for the court to change the date. Relief is possible in extreme cases, and the clerk's office should be consulted in that situation. In an appropriate case, a motion may be made to continue the oral argument, but the motion should be made only for real and demonstrable hardship. Oral argument should never be waived; it is counsel's only opportunity to engage in a dialog with the court, which may be necessary to ensure that a party's position is understood, or to sway a swing justice to that party's point of view.

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§22.64 4. Procedure

The procedure for oral argument in the supreme court is governed by Cal Rules of Ct 8.524. On supreme court review, the petitioner or appellant has the right to open and close. If opposing parties each file a petition for review, the court will set the order of argument. Cal Rules of Ct 8.524(d). The parties should write the court before oral argument to suggest an order and obtain a decision on the question. For further discussion of oral argument procedure, see §§16.1-16.7.

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§22.65 5. Justices Will Have Tentative Opinions

By the time of oral argument, the supreme court will be well versed on the issues. The justices will have conferred about the result and taken a tentative vote. Cal Sup Ct, IOPP VI(D). At the argument they will have before them a calendar memorandum (or memorandums if there are concurring or dissenting opinions) that is a tentative opinion. Cal Sup Ct, IOPP VI. Accordingly, the court may be interested in specific issues. The advocate should be attentive to the court's questions because they often indicate its areas of concern.

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§22.66 6. Focus on Issues

Oral argument is usually the time to focus on the important themes in the issues to be resolved rather than the procedural history and factual setting of the case. It is difficult to argue all possible points, and usually a mistake even to try. However, counsel should be prepared to deal with questions that explore the weaknesses of any aspect of the case, and the ramifications of the rule that each side advocates.

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§22.67 7. Prepare for Oral Argument

It is wise to prepare thoroughly for oral argument. Although a good oral argument rarely wins an appeal, a poor one, in which concessions are made or in which the attorney's lack of preparation raises questions about the soundness of the arguments, can lose an appeal. On preparation for oral argument, see §§16.18-16.28.

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§22.68 8. When Letter Brief Appropriate

If during oral argument the justices indicate substantial interest in a point that has not been briefed or ask questions counsel is not prepared to answer, counsel should request permission to file a short letter brief within a few days.

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§22.69 9. When Opinion Will Be Issued

Cases are normally submitted at oral argument. Cal Sup Ct, IOPP VII(A). Because the court applies the 90-day rule (see Cal Const art VI, §19; Govt C §68210, discussed in §17.2) to itself, it usually issues its opinion before the first of the month following the 90th day after oral argument. See §17.2.

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§22.70 C. When Decision Final; Rehearing

Procedure for rehearing. A California Supreme Court decision on the merits becomes final 30 days after it is filed unless the court specifies a different time. Cal Rules of Ct 8.532(b). The supreme court may grant a rehearing on its own motion or on the motion of a party made within 15 days after the decision is filed. Cal Rules of Ct 8.536(a). A party must not file an answer to a petition for rehearing unless the court requests one; any answer must be filed within 8 days after the order has been filed. A petition for rehearing normally will not be granted absent the court's request for an answer. Cal Rules of Ct 8.268(b)(2).

Rarely granted. The supreme court rarely grants rehearings (one out of 58 in 2004-2005, according to the Judicial Council of California, Court Statistics Report, *Supreme Court* Table 7 (2006)), and a rehearing should be sought only in special circumstances. Petitions for rehearing sometimes result in the court's modifying an opinion without changing the result or rehearing the case. If dissatisfied with the wording of an opinion or if the opinion is unclear, counsel might file a petition for rehearing to point out the problem. This procedure may be of particular importance to institutional litigants concerned about the interpretation and application of the court's decision. See chap 19 for discussion of petitioning for rehearing in the court of appeal.

Issuance of remittitur. When the decision becomes final, the supreme court clerk issues the remittitur and sends two copies of the remittitur with two file-stamped copies of the supreme court opinion or order to the court of appeal from which the appeal was taken. Cal Rules of Ct 8.540. See discussion in §18.4. The rules provide that in certain instances the court may (Cal Rules of Ct 8.540(c)):

- Stay issuance of the remittitur on a party's or its own motion;
- Recall it; or
- Issue it immediately for good cause or if the parties so stipulate.

Further research. For a complete discussion of the remittitur, see chap 18.

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XI. COMMUNICATION WITH COURT

§22.71 A. Two Usual Methods of Communication

There are two types of communication with the court, and they should be approached very differently.

- One is ordinary telephone communication with the clerk's office inquiring about particular rules or about the status of a case. These communications are not intended to influence the court's decision on any pending matter and can be handled informally with the clerk without notice to opposing counsel.
- The other is any communication intended to influence the outcome of a decision of the court in any pending case, which should be made in writing with proof of service of the writing on opposing counsel.

PRACTICE TIP: Counsel should also request e-mail notification from the supreme court about their case. Such notification includes information on case activity, including whether an answer has been filed and whether oral argument is set. Although the court warns that e-mail notification should not be the sole source for case updates, it may be a less cumbersome method of keeping apprised of the status of a case.

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§22.72 B. Addressing Letters to Court

Letters to the court should normally be addressed to the clerk of the court, including the clerk's full name and title. When addressing letters to justices, the Chief Justice should be addressed as "The Honorable _____, Chief Justice of California." Other justices should be addressed as "The Honorable _____, Associate Justice of the California Supreme Court."

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XII. FORMS

§22.73 A. Form: Cover

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22.73-1 Cover

No. _ _ _ _ _ _

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_ _[*Name*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff and Appellant,	)	
	)	
v	)	
	)	
_ _[*Name*]_ _,	)	
Defendant and Respondent	)	
_____	)	

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL _ _[*NUMBER*]_ _ APPELLATE DISTRICT DIVISION _ _[*NUMBER*]_ _

_ _[*Firm name*]_ _
_ _[*Attorney's name and State Bar number*]_ _,
Attorney at Law
_ _[*Address and telephone number*]_ _
Attorney for _ _[*name*]_ _

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Source: Civil Litigation/California Civil Appellate Practice/22 Review by the California Supreme Court/§22.74 B. Form: Topical Index

§22.74 B. Form: Topical Index

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22.74-1 Topical index

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§22.75 C. Form: General Format of Petition for Review

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22.75-1 General format of petition for review

PETITION FOR REVIEW

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California:

_ _[*Name*]_ _, plaintiff and appellant, respectfully petitions for review following the decision of the Court of Appeal, _ _[*number*]_ _ Appellate District, Division _ _[*number*]_ _ (per _ _[*name*]_ _, P.J.), filed on _ _[*date*]_ _.

ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review: _ _[*State issues concisely, without repetition or argument. List in numerical order if more than one issue is stated*]_ _.

STATEMENT OF THE CASE

[*State concisely the procedural history of the case and the decision reached by the court of appeal*]

ARGUMENTS IN SUPPORT OF REVIEW

[*Provide the reasons to grant review on the issue identified and discuss the merits of the case*]

I. _ _[*First Argument Heading*]_ _

II. _ _[*Second Argument Heading*]_ _

III. CONCLUSION

[*Briefly summarize the reasons to grant review*]

Date: _ _ _ _ _ _ **Respectfully submitted,**
_ _[*Firm name*]_ _
By _ _[*name*]_ _
Attorney for plaintiff and appellant

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23

Request for Decision to the California Supreme Court

James C. Martin

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I. NATURE AND PURPOSE

§23.1 A. Purpose of Request for Decision

Former Cal Rules of Ct 29.5, effective January 1, 1998, created a process for sister-state courts of last resort and federal appellate courts to certify unresolved questions of California law to the California Supreme Court. Under Rule 8.548 (former Rule 29.8, effective January 1, 2003), the supreme court no longer agrees to provide an "answer" to a legal question, but instead is mandated to make a *decision* on that point of law. When it makes a decision on a point of law as requested, the resulting opinion carries the same precedential weight as any other high court decision. Counsel in out-of-state or federal cases can utilize a request for decision, in appropriate circumstances, to obtain direct supreme court review of significant, disputed legal issues. See Martin and Shatz, *You've Got to Know When and How to Ask: A Look at Eight Years of "Certified" Questions to the California Supreme Court,* 27 CEB Civ Litigation Rep 132 (Aug. 2005).

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§23.2 B. Requirements for Request for Decision

The supreme court may accept and decide questions of law asked of it by the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth. Cal Rules of Ct 8.548(a).

To meet the rule's criteria, the questions should be

- determinative of a matter pending in the requesting court; and
- not resolved by any controlling California appellate precedent.

Cal Rules of Ct 8.548(a)(1)-(2). In exercising its discretion in light of these two prerequisites, the supreme court considers "whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law." Cal Rules of Ct 8.548(f)(1). That includes circumstances in which there is a conflict in the appellate case law on the disputed issue or where resolution of the issue will affect a number of other cases, public institutions, or the public interest. In addition to these typical factors, the court has the discretion to consider any other factors it deems appropriate. Cal Rules of Ct 8.548(f)(1).

NOTE: Federal district courts—on the front lines of applying state law—are a noteworthy omission from the enumeration of courts eligible to request a decision under Rule 8.548. Several different district courts within and outside California have expressed a desire to use former Rule 29.5, noting that they would have certified questions under that rule if allowed to do so. See, *e.g., Chong v State Farm Mut. Auto. Ins. Co.* (SD Cal 2006) 428 F Supp 2d 1136, 1142 n2; *Bryan v United Parcel Serv.* (ND Cal 2004) 307 F Supp 2d 1108, 1115; *Stonewall Ins. Co. v Argonaut Ins. Co.* (ND Ill 1999) 75 F Supp 2d 893; *California Teachers Ass'n v Davis* (CD Cal 1999) 64 F Supp 2d 945. This could be one direction in which requests for decision might expand.

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§23.3 II. EVALUATING WHETHER TO REQUEST DECISION

The request for decision procedure of Cal Rules of Ct 8.548 is particularly useful in addressing novel questions when there is a demonstrable conflict in the published case authority or a potentially recurring issue and there is need for guidance given the relevant (or lack of relevant) authority. If a request for decision seems appropriate, counsel should raise the issue in an application or motion to the requesting court. If the court agrees, it can make the request by issuing an appropriate order. Cal Rules of Ct 8.548(b). See §§23.9-23.13. Such an application or motion should contain all the material the requesting court would need to draft a request for decision, including information regarding the parties, the question to be decided, a statement that the requesting court will accept the decision, the relevant background facts, a discussion of why existing precedent does not resolve the question, the reasons the decision will affect large numbers of cases or the public interest, and an analysis of why an answer to the requested question would have a determinative effect on the parties' appeal. See Cal Rules of Ct 8.548(b).

Litigants should appreciate, however, that the court has broad discretion on whether such a request should be granted. In at least three cases decided before enactment of former Cal Rules of Ct 29.8 (now Cal Rules of Ct 8.548), the Ninth Circuit has refused to do so. *Delgado v Rice* (9th Cir 2001) 236 F3d 548, 549 (denying state's motion to certify questions of state law because those precise questions were currently pending before California court of appeal in related case and state could move under former Cal Rules of Ct 27.5 (see now Cal Rules of Ct 8.552) to transfer case to California Supreme Court); *Cucamongans United for Reasonable Expansion v City of Rancho Cucamonga* (9th Cir 2000) 210 F3d 382 (affirmance of discretionary dismissal on abstention grounds); *Ashmus v Woodford* (9th Cir 2000) 202 F3d 1160 (denying state's motion to certify two questions considered to be irrelevant).

There is no litmus test for the circumstances in which a request for decision might appropriately be made. However, the cases accepted by the supreme court highlight some of the areas in which a request for decision certainly is possible. They also indicate the nature of the issues the court considers appropriate under the rule.

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§23.4 A. Constitutional Issues

The majority of cases under former Cal Rules of Ct 29.5 (now Rule 8.548) in which certification (now request for decision) has been granted have implicated state constitutional concerns. For example, in *Los Angeles Alliance for Survival v City of Los Angeles* (9th Cir 1998) 157 F3d 1162, the Ninth Circuit asked whether a city's ban on aggressive panhandling violated the state constitution's free speech clause. The court certified this question after noting conflicting views among California cases interpreting the scope of the clause, as well as among federal district courts attempting to apply California law. The supreme court accepted the request, but rephrased its precise wording to avoid unnecessarily restricting its analysis—a procedure allowed by former Cal Rules of Ct 29.8(f)(5) (now Cal Rules of Ct 8.548(f)(5)). Thereafter, the court answered the question, issuing an opinion upholding the law's constitutionality. *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 93 CR2d 1.

The supreme court likewise accepted the Ninth Circuit's request for guidance interpreting California's constitution in *Ventura Group Ventures, Inc. v Ventura Port Dist.* (9th Cir 1999) 179 F3d 840. There, the Ninth Circuit certified two questions concerning "the interplay of Article XIIIA of the California Constitution and California's statutory writ of mandate providing for the payment of judgments by local public entities." The federal circuit court found it "difficult to harmonize" this portion of California's constitution with portions of the Navigation and Government Codes. The supreme court answered these questions in *Ventura Group Ventures, Inc. v Ventura Port Dist.* (2001) 24 C4th 1089, 104 CR2d 53.

In *Fashion Valley Mall, LLC v NLRB* (DC Cir 2006) 451 F3d 241, the D.C. Circuit asked whether a shopping mall operator could enforce its rule requiring those seeking a permit to conduct expressive activities on the premises to agree not to urge consumers to boycott any of the mall's tenants. The supreme court answered this question in *Fashion Valley Mall, LLC v NLRB* (2007) 42 C4th 850, 69 CR3d 288, finding the rule unenforceable because a shopping mall is a public forum in which the public's right to free speech applies.

The supreme court also agreed to resolve certified questions in two cases from the Ninth Circuit asking about the extent to which local governments may regulate gun shows consistent with the state constitution. The circuit court noted the tension in the reasoning underlying several decisions of the courts of appeal related to the issue, as well as in relevant opinions of California's Attorney General addressing the topic. Guidance therefore was sought on the powers local governments may exercise in passing local gun control regulations. See *Nordyke v King* (9th Cir 2000) 229 F3d 1266, certified to California Supreme Court under former Cal Rules of Ct 29.5 (now Cal Rules of Ct 8.548); *Great W. Shows v County of Los Angeles* (9th Cir 2000) 229 F3d 1258, certified to California Supreme Court under former Cal Rules of Ct 29.5 (now Cal Rules of Ct 8.548). The supreme court then issued two opinions concerning the possible preemption of local gun control ordinances: *Great W. Shows v County of Los Angeles* (2002) 27 C4th 853, 118 CR2d 746, and *Nordyke v King* (2002) 27 C4th 875, 118 CR2d 761.

The supreme court declined to accept a certified question concerning the constitutionality of a county ordinance requiring adult-oriented businesses to close between 2:00 a.m. and 6:00 a.m. In *Fantasyland Video, Inc. v County of San Diego* (9th Cir 2007) 496 F3d 1040, the Ninth Circuit certified the question of whether the constitutionality of the ordinance should be reviewed under strict scrutiny, intermediate scrutiny, or another standard. The supreme court denied certification, stating that California law is clear that content-neutral time, place, and manner regulations affecting protected speech are subject to an intermediate standard of scrutiny. *Fantasyland Video, Inc. v County of San Diego* (Sept. 25, 2007, S155408) 2007 Cal Lexis 10551.

An unusual circumstance occurred following the Ninth Circuit's request for certification in *Barnes-Wallace v City of San Diego* (9th Cir 2006) 471 F3d 1038. In its opinion on December 18, 2006, the Ninth Circuit certified several constitutional questions related to whether the City of San Diego showed an unlawful religious preference for the Boy Scouts in the use of leased premises. In an order issued 8 days later (on December 26, 2006), the Ninth Circuit requested that the California Supreme Court delay consideration of the certification request because of the possibility of the Ninth Circuit's own en banc review of the certification order. Then, in its en banc opinion filed June 11, 2008, the Ninth Circuit renewed its request (*Barnes-Wallace v City of San Diego* (9th Cir 2008) 530 F3d 776), only to have the

California Supreme Court deny it. *Barnes-Wallace v City of San Diego* (Apr. 1, 2009, S169465) 2009 Cal Lexis 3507. The motivation for the Ninth Circuit's request is, however, instructive. First, two California constitutional clauses were involved. Second, neither clause, in the Ninth Circuit's view, had received a definitive interpretation on facts like those before it. The Ninth Circuit thus was reluctant to undertake such a significant state law interpretative role on its own.

The supreme court acted favorably on the request made in *International Soc'y for Krishna Consciousness v City of Los Angeles* (9th Cir 2008) 530 F3d 768, in which the court requested insight on whether an airport constituted a public forum under the state's constitution. *International Soc'y for Krishna Consciousness v City of Los Angeles* (Aug. 13, 2008, S164272) 2008 Cal Lexis 10021. In explaining its request, the Ninth Circuit paid particular attention to why it believed there was confusion in the application of the test and stated that resolution by the supreme court was warranted because California's more expansive approach to the public forum issue would take precedence over analogous federal constitutional law.

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§23.5 B. Insurance Issues

In *Vu v Prudential Prop. & Cas. Ins. Co.* (9th Cir 1999) 172 F3d 725, the supreme court accepted a certified question from the Ninth Circuit concerning whether the statute of limitations bars an insured's claim more than 1 year after earthquake damage was sustained but within 1 year of discovery of additional damage. Interestingly, the court certified this question on its own motion without the urging of either party, noting "(i)f the court declines to accept the certified question, we will resolve the issue according to our own understanding of California law, misguided though it be." The California Supreme Court answered the Ninth Circuit's question in *Vu v Prudential Prop. & Cas. Ins. Co.* (2001) 26 C4th 1142, 113 CR2d 70.

In another Ninth Circuit case, *Blue Ridge Ins. Co. v Jacobsen* (9th Cir 1999) 197 F3d 1008, the supreme court agreed to resolve whether an insurer defending a personal injury case under a reservation of rights may recover settlement payments made over the insured's objections when it later determines there was no coverage. The supreme court held that insurers did have an implied-in-law right to reimbursements from insureds in *Blue Ridge Ins. Co. v Jacobsen* (2001) 25 C4th 489, 106 CR2d 535.

The insurance arena also represents another area in which the supreme court declined to accept a certified question. In *In re KF Dairies Inc.* (9th Cir 1999) 179 F3d 1226, the Ninth Circuit certified the question of whether insurance coverage existed for groundwater contamination occurring within the policy period but after the policyholder purchased the property. The federal court recognized that two California court of appeal decisions answered this question (in the negative), but nonetheless noted a "potential conflict" between these decisions and the general rule that policy language governs the scope of coverage. The supreme court denied certification without stating reasons, but it seems reasonable that the court viewed the "potential conflict" either as nonexistent or insignificant.

In *California ex rel RoNo, LLC v Altus Finance S.A.* (9th Cir 2003) 344 F3d 920, the Ninth Circuit certified two questions of law dealing with the pursuit of actions under the California False Claims Act against an insolvent insurance company for whom the insurance commissioner was acting as conservator or liquidator. The issues involved the high-profile proceedings surrounding the seizure of the junk bond portfolio of Executive Life Insurance Company. The issues implicated what the Ninth Circuit described as core sovereign interests of the State of California. The supreme court granted the request and answered the questions in *State v Altus Finance S.A.* (2005) 36 C4th 1284, 32 CR3d 498.

In *Philadelphia Indem. Ins. Co. v Findley* (9th Cir 2005) 395 F3d 1046, the Ninth Circuit certified a question involving the scope of the duty to investigate insurability, if any, on the part of an automobile liability insurer that issued an excess policy in a rental car transaction. The duty was recognized for primary insurers in *Barrera v State Farm Mut. Auto. Ins. Co.* (1969) 71 C2d 659, 79 CR 106. Because the answer to the duty issue was dispositive and involved an issue of public importance, the Ninth Circuit panel decided that the California Supreme Court should decide the question. The supreme court granted the request for certification in *Philadelphia Indem. Ins. Co. v Montes-Harris* (Mar. 2, 2005, S130717) 2005 Cal Lexis 2320, and resolved this question in *Philadelphia Indem. Ins. Co. v Montes-Harris* (2006) 40 C4th 151, 51 CR3d 709 (insurer has no duty to investigate when rental company examined driver's facially valid but suspended driver's license).

In *Sentry Select Ins. Co. v Fidelity & Guar.* (9th Cir 2006) 455 F3d 956, the Ninth Circuit certified a question concerning the appropriate test for determining whether an insured is "engaged in the business of renting or leasing motor vehicles without operators" under former Ins C §11580.9(b). The supreme court answered the question in *Sentry Select Ins. Co. v Fidelity & Guar. Ins. Co.* (2009) 46 C4th 204, 208, 92 CR3d 639, finding that as long as the remaining statutory requirements in former Ins C §11580.9(b) were satisfied, the renting or leasing of commercial vehicles in the course of any business qualifies for the conclusive presumption that the insured's coverage is excess.

In *Minkler v Safeco Ins. Co.* (9th Cir 2009) 561 F3d 1033, the Ninth Circuit asked the supreme court to resolve a policy interpretation question on how a severability-of-interests clause affected the scope of an exclusion barring coverage for the intentional act of an "insured." Specifically, the question concerns whether the exclusion applies when one insured negligently fails to prevent the intentional acts of another insured. No California case has directly addressed that question, and the supreme court has agreed to decide it. *Minkler v Safeco Ins. Co.* (Aug. 12, 2009,

S174016) 2009 Cal Lexis 8391.

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§23.6 C. Employment Issues

The Ninth Circuit certified a question involving an employment contract: Can an employer unilaterally rescind a policy requiring employees to be retained as long as a specific condition does not occur, even though the specified condition has not occurred? *Asmus v Pacific Bell* (9th Cir 1998) 159 F3d 422. No controlling precedent answered this question, which the circuit court noted was determinative of part of the appeal. After slightly rephrasing the question, the California Supreme Court answered it affirmatively. *Asmus v Pacific Bell* (2000) 23 C4th 1, 96 CR2d 179.

The D.C. Circuit asked the supreme court to determine several open questions related to labor activity on private property during a labor dispute in *Waremart Foods v NLRB* (DC Cir 2003) 333 F3d 223. Over dissents from Justices Kennard and Brown, however, the supreme court denied the request. *Waremart Foods v NLRB* (Oct. 1, 2003, S117744) 2003 Cal Lexis 7448.

The certified question in *D'Este v Bayer Corp.* (9th Cir 2009) 565 F3d 1119 met a similar fate. *D'Este v Bayer Corp.* (June 10, 2009, S172832) 2009 Cal Lexis 6391. The Ninth Circuit sought guidance on whether certain of the defendant's personal sales representatives (1) qualified as outside salespersons and were thus exempt from overtime pay or (2) were employed in administrative capacity and thus exempt for that reason. The Ninth Circuit believed that certification was warranted because these issues were raised in at least five other class actions filed in California and elsewhere, and the leading supreme court case did not provide dispositive guidance on how either question should be answered.

The panels had better luck in *Murray v Alaska Airlines* (9th Cir 2008) 522 F3d 920 and *Sullivan v Oracle Corp.* (9th Cir 2009) 557 F3d 979. In *Murray*, the supreme court agreed to decide whether an issue-preclusive effect could be given to the investigative findings of the Federal Aviation Administration (FAA) in an action involving an alleged retaliatory termination, as against public policy, of a whistleblower. *Murray v Alaska Airlines, Inc.* (June 18, 2008, S162570) 2008 Cal Lexis 7523. In *Sullivan*, the certified questions related to the application of California's Labor Code and Unfair Competition Law (UCL) to employees who perform overtime work in California for California-based employers domiciled in other states. *Sullivan v Oracle Corp.* (Apr. 22, 2009, S170577) 2009 Cal Lexis 4610. These latter issues had special practical significance because they affected large numbers of workers.

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§23.7 D. Tort Issues

Tort law-related issues have also made their way to the California Supreme Court, although some tort-related questions have been rejected. The Ninth Circuit asked whether the January 1, 1998 amendment to CC §1714.45, stripping tobacco manufacturers of their immunity from product liability lawsuits, applies to a claim that accrued after January 1, 1998, but which is based on conduct that occurred before that date. *Myers v Philip Morris Cos.* (9th Cir 2001) 239 F3d 1029. The court resolved the issue. *Myers v Philip Morris Cos.* (2002) 28 C4th 828, 123 CR2d 40. More recently, the Ninth Circuit asked questions regarding the accrual of personal injury claims based on tobacco use; the supreme court granted certification in *Grisham v Philip Morris USA* (Aug. 10, 2005, S132772) 2005 Cal Lexis 9342. The supreme court answered the accrual question in *Grisham v Philip Morris USA* (2007) 40 C4th 623, 54 CR3d 735.

Tobacco cases arrived again with *Pooshs v Phillip Morris USA, Inc.* (9th Cir 2009) 561 F3d 964, in which the supreme court agreed to decide whether the sustaining of two separate physical injuries allegedly resulting from cigarette smoking (1) invades two different primary rights or (2) can be considered "qualitatively different" for purposes of determining when the applicable statute of limitations begins to run. *Pooshs v Philip Morris USA, Inc.* (May 20, 2009, S172023) 2009 Cal Lexis 5307. These questions went unanswered in *Grisham*, with an apparent split of California authority on each one.

In *Cadence Design Sys. v Avant! Corp.* (9th Cir 2001) 253 F3d 1147, the Ninth Circuit certified a question about whether a claim for trade secret infringement under the California Uniform Trade Secrets Act arises only once when the initial misappropriation occurs or with each subsequent misuse of the trade secret. The supreme court accepted the question (*Cadence Design Sys. v Avant! Corp.* (review granted Oct. 31, 2001, S098266) 2001 Cal Lexis 7137 (question of state law certified to California Supreme Court by U.S. Court of Appeals for Ninth Circuit under former Cal Rules of Ct 29.5 (now Cal Rules of Ct 8.548)). The supreme court answered the certified question in *Cadence Design Sys. v Avant! Corp.* (2002) 29 C4th 215, 127 CR2d 169.

The Ninth Circuit also inquired whether it is "wrongful" for purposes of the tort of intentional interference with prospective economic advantage for a defendant in a civil lawsuit to refuse to deal with the plaintiff in that lawsuit when that refusal is intended to coerce the plaintiff to abandon or settle the lawsuit and precludes business between the plaintiff and other third parties who do business with the defendant. *Marin Tug & Barge, Inc. v Westport Petroleum, Inc.* (9th Cir 2001) 238 F3d 1159. The California Supreme Court, however, denied the request for certification. *Marin Tug & Barge, Inc. v Mudgett* (May 23, 2001, S095067).

The same result transpired when the Ninth Circuit certified the question of whether the tort of conversion applied to Internet domain names. *Kremen v Cohen* (9th Cir 2003) 325 F3d 1035. The supreme court denied the request (*Kremen v Cohen* (Feb. 25, 2003, S112591) 2003 Cal Lexis 1342), and the Ninth Circuit then decided the issues in *Kremen v Cohen* (9th Cir 2003) 337 F3d 1024.

Similarly, the supreme court denied the Ninth Circuit's request in *Readylink Healthcare v Lynch* (9th Cir 2006) 440 F3d 1118 to certify the question of whether a nonmedia defendant may be held liable for the tort of invasion of privacy based on the publication of facts about past crimes obtained from public records. *Readylink Healthcare v Lynch* (May 17, 2006, S141869) 2006 Cal Lexis 5967. The Ninth Circuit then decided the issues based on California law in *Readylink Healthcare v Lynch* (9th Cir, July 13, 2006, No. 04-55890) 2006 US App Lexis 17694.

In *Ileto v Glock Inc.* (9th Cir 2004) 370 F3d 860, 861, the judges dissenting from the denial of rehearing en banc stated that the issues of whether negligence and public nuisance law could be relied on to expand the liability of gun manufacturers should have been certified to the California Supreme Court. The dissenters reasoned that principles of federalism argued for the supreme court to resolve the question of whether such expanded liability made sense for California and its manufacturers.

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§23.8 E. Bankruptcy Issues

Because state law determines the validity of a creditor's claim against a bankrupt estate, including allocating the appropriate burden of proof in bankruptcy proceedings, the Ninth Circuit certified a question arising from a bankruptcy appeal. The issue concerns what burden of proof—clear and convincing evidence or a preponderance of the evidence—is necessary to prove civil tax fraud under California law. *In re Renovizor's, Inc.* (9th Cir 2001) 236 F3d 518. The supreme court declined to grant certification. *In re Renovizor's, Inc.* (Feb. 28, 2001, S094152).

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§23.8A F. Energy Law

In *Southern Cal. Edison v Lynch* (9th Cir 2002) 307 F3d 794, the district court entered a stipulated judgment in an action by an electric public utility against the California Public Utilities Commission (PUC). A nonprofit organization devoted to protecting the interests of consumers of utility services intervened in the action, objected to the stipulated judgment, and appealed it. The Ninth Circuit recognized that there was a "serious question" about whether the stipulated judgment (and the procedures used in consummating it) violated state laws, especially laws requiring publicly open meetings for utility rate decisions. The Ninth Circuit certified three questions to the California Supreme Court regarding whether the stipulated judgment and the process by which it was reached violated California law.

The supreme court granted the request, slightly restating one of the questions. After briefing, the court then stated an additional question, asking the parties to simultaneously brief the question of whether the PUC's agreement to the stipulated judgment occurred during a "meeting" as defined in the Open Meetings Act (Govt C §§11120-11132.5). *Lynch* is particularly noteworthy because the supreme court not only restated one of the Ninth Circuit's questions, which is expressly allowed by Cal Rules of Ct 8.548(f)(5), but also added a question.

In *Southern Cal. Edison v Peevey* (2003) 31 C4th 781, 3 CR3d 703, the supreme court answered the certified questions, concluding that the agreement to the settlement and the stipulated judgment did not violate state law.

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§23.8B G. Attorney Fees

The case of *Tipton-Whittingham v City of Los Angeles* (9th Cir 2003) 316 F3d 1058 involved class action claims for sex and race discrimination by female employees of the Los Angeles Police Department. After the city voluntarily implemented policy changes that mooted the plaintiffs' injunctive relief claims, the plaintiffs sought an award of attorney fees, arguing that they had prevailed on their claims by virtue of the city's policy changes. The Ninth Circuit certified two questions: (1) May attorney fees under CCP §1021.5 and the Fair Employment and Housing Act be awarded when the plaintiff has been the "catalyst" in bringing about the relief sought by litigation, and (2) if so, will that theory support an award of attorney fees when the plaintiff "activates" the defendant to modify its behavior, or does California law require a judicially recognized change in the legal relationship between the parties (*e.g.,* a judgment on the merits or a consent decree)? *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371.

The Ninth Circuit noted that the United States Supreme Court recently had rejected the catalyst theory as a legal basis for the recovery of prevailing-party attorney fees under federal disability and fair housing laws in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835. The question was therefore whether California would continue to endorse the catalyst theory under its own law in light of the new Supreme Court ruling. The California Supreme Court granted the Ninth Circuit's request after granting a petition for review in a California case raising essentially the same issue. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331.

The supreme court first decided *Graham* and then applied its reasoning in that case to *Tipton*. The court held in *Graham* that the catalyst theory of attorney fees recovery would continue to apply under California law, and that fees recovery under CCP §1021.5 does not require a judicially recognized change in the legal relationship between the parties. To prevail via a catalyst theory, a plaintiff must establish that: the lawsuit was a catalyst of the defendant's changed behavior; the lawsuit has some merit and achieved its effect by threat of victory, not by means of nuisance or threat of expense; and the plaintiff must have made a reasonable effort to settle its dispute with the defendant before filing the lawsuit. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 560, 21 CR3d 331. See *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371.

PRACTICE TIP: The cases discussed in §§23.4-23.8B show the Ninth Circuit's willingness to seek guidance using the request for decision procedure. These cases also reflect the supreme court's willingness to grant requests for decision in appropriate circumstances. In those instances in which the court acted favorably on the request, there were demonstrable conflicts in the case law or a lack of clear guidance in California's case law. The issues presented also were likely to reoccur and could be resolved on the records presented. The message to counsel from this line of cases is plain enough. When you are in an out-of-state high court or federal appeals court and need resolution of an unsettled issue of California law, consider utilizing the request for decision procedure outlined in Cal Rules of Ct 8.548. If the supreme court accepts the request for decision, counsel will get the most definitive answer possible to the disputed question.

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§23.8C H. Public Entities

An issue involving the regulatory powers of public entities made its way to the California Supreme Court. In *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (9th Cir 2007) 487 F3d 694, the Ninth Circuit certified the question of whether Pub Util C §§7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights of way on aesthetic grounds. The supreme court requested the Ninth Circuit to clarify its question in light of *Sprint Telephony PCS, LP v County of San Diego* (9th Cir 2007) 490 F3d 700. *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (Aug. 15, 2007, S152481) 2007 Cal Lexis 8756. The Ninth Circuit again certified the question, finding that *Sprint Telephony* did not answer the question of California law. *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (9th Cir 2007) 508 F3d 897. The supreme court denied the request in *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (Jan. 30, 2008, S152481) 2008 Cal Lexis 280. Concluding that the issue had not been resolved in a published opinion on which it could rely, the Ninth Circuit predicted how the supreme court would resolve the issue. *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (9th Cir 2009) 583 F3d 716, 722 n2 (Pub Util C §§7901-7901.1 do not divest cities of authority to consider aesthetics in regulating placement of telephone equipment in public rights of way).

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§23.8D I. Miscellaneous Statutes and Issues

In *Kleffman v Vonage Holdings Corp.* (9th Cir 2008) 551 F3d 847, the Ninth Circuit asked whether sending unsolicited commercial e-mail advertisements from multiple domain names for the purpose of bypassing spam filters constituted falsified, misrepresented, or forged header information under Bus & P C §17529.5(a)(2). The Ninth Circuit noted that the issue was likely to occur again, but no California court had interpreted the statute since its enactment in 2004. The supreme court accepted review. *Kleffman v Vonage Holdings Corp.* (Jan. 28, 2009, S169195) 2009 Cal Lexis 1181.

Review was denied in *Chaffer v Prosper* (Mar. 11, 2009, S166400) 2009 Cal Lexis 2693, which concerned the timeliness of a California inmate's petition for writ of habeas corpus. The question turned on the impact of *Evans v Chavis* (2006) 546 US 189, 163 L Ed 2d 684, 126 S Ct 846, on California case law, with no controlling precedent resolving the question. In particular, the issue related to the meaning of "substantial delay" in the filing of such a petition under California law, as that phrase might be impacted by the holding in *Evans*. See *Chaffer v Prospect* (9th Cir 2008) 542 F3d 662.

The supreme court accepted certification, however, in *Klein v U.S.* (9th Cir 2008) 537 F3d 1027, which implicated California's recreational land use statute (CC §846). *Klein v U.S.* (Oct. 16, 2008, S165549) 2008 Cal Lexis 12674. The question turned on whether the statute immunized a landowner from liability for acts of vehicular negligence committed by the landowner's employee that injured a recreational user. Interestingly, in *Klein*, the Ninth Circuit certified the question because it did not believe that an otherwise controlling intermediate court of appeal case had construed the scope of the statute the same way the supreme court would have. Given that "doubt," the panel opted to see if the supreme court would resolve the issue.

In *Imperial Merchant Servs., Inc. v Hunt* (9th Cir 2008) 528 F3d 1129, the Ninth Circuit certified the question of whether a debt collector recovering on a dishonored check could impose both a service charge under CC §1719 and prejudgment interest under CC §3287. The supreme court took up the statutory construction question because there was no controlling precedent and decided that the payee of a dishonored check who recovered a service charge could not also recover prejudgment interest. *Imperial Merchant Servs., Inc. v Hunt* (2009) 47 C4th 381, 97 CR3d 464. The statutory damages prescribed in CC §1719 were deemed exclusive.

Munson v Del Taco, Inc. (9th Cir 2008) 522 F3d 997 asked two questions related to the Unruh Civil Rights Act (CC §§51-52), and both were taken up by the supreme court. *Munson v Del Taco, Inc.* (June 25, 2008, S162818) 2008 Cal Lexis 7876. The first related to whether a plaintiff claiming a violation of the public accommodations provision in the statute had to prove intentional discrimination. The second asked how, if proof were required, "intentional discrimination" should be defined. Because of the public policy implications of both issues, the panel wanted clear guidance from the supreme court on their resolution. The supreme court cut off the second question with its answer to the first, holding that a plaintiff was not required to prove intentional discrimination. *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 94 CR3d 685.

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III. REQUEST FOR DECISION PROCEDURE

§23.9 A. Contents of Request for Decision

To initiate the request for decision process, the requesting court must request a decision in the form of an order for a decision on the question or questions. Cal Rules of Ct 8.548(b). The clerk of the requesting court must file an original and ten copies of the request in the supreme court and a certificate of service on the parties. The court seeking a request for decision should include the title and number of the case, the names and addresses of counsel and of parties appearing pro se, and a designation of the party who is deemed to be the petitioner on the certified question. Cal Rules of Ct 8.548(b)(1).

Beyond the identifying information, the requesting court's order must set out the question (or questions) of law to be decided, including a statement that the requesting court will accept the decision, and a statement of the relevant facts prepared by the requesting court, or if prepared by the parties, approved by the court. Cal Rules of Ct 8.548(b)(2)-(3). Finally, for the benefit of the supreme court in determining whether to exercise its discretion, the requesting order must include further statements:

- Demonstrating that the decision is determinative of a matter pending in the requesting court; and
- There is no controlling precedent.

Cal Rules of Ct 8.548(b)(4).

In addition to the required contents of the order, the requesting court also must provide copies of all the relevant briefs. Cal Rules of Ct 8.548(c).

At any time, the supreme court may restate the question or ask the requesting court to restate or clarify it. Cal Rules of Ct 8.548(f)(5). The court also can request any additional material that it believes could be useful in answering the question. Cal Rules of Ct 8.548(c). If the question concerns the interpretation of the California Constitution or the validity or meaning of a state law affecting the public interest, the supreme court clerk must notify California's Attorney General, if he or she is not already a party to the proceeding. Cal Rules of Ct 8.548(f)(4).

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§23.10 B. Letters Supporting or Opposing Request

Previously, under former Cal Rules of Ct 29.5(e), a series of briefs were required to be filed by a party supporting or opposing the motion for certification. Under current Cal Rules of Ct 8.548(e), within 20 days after the request is filed, any party or other person or entity wanting to support or oppose the request for decision must send a letter to the supreme court supporting or opposing the request, with service on the other parties and the requesting court. Cal Rules of Ct 8.548(e)(1). A party can reply to another party's letter within 10 days after the letter is filed, with service on the other parties and the requesting court. Cal Rules of Ct 8.548(e)(2).

PRACTICE TIP: Counsel supporting or opposing a request should keep the factors determining the supreme court's exercise of discretion in mind. Thus, a party supporting a request should explain why the supreme court needs to review the issue to settle a conflict in the case law or resolve an issue of public importance or import to a significant number of pending or future cases. The party likewise should emphasize how a resolution of the question will advance the disposition of the case in which a request for decision is requested or will materially affect the functioning of the requesting court. The supporting party also should note why the question is ripe for immediate review and presented on an adequate record.

A party opposing the request, in turn, should attempt to minimize or eliminate any case conflict or advise the court on why the question is not in need of immediate disposition or is unlikely to recur. The import of controlling appellate precedent that arguably resolves the question should be discussed with sufficient detail to permit the court to understand that there is no need for an additional opinion on the disputed issue. If the question does not arise in a case that adequately presents the legal issue, this should be highlighted as well. For example, if the facts of the requested case are unique or not settled, it may impede the supreme court's ability to provide a workable precedent for future cases. Further, if resolution of the question will not result in the disposition of the requested case, counsel should emphasize this factor as well.

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§23.11 C. Time in Which Court Must Respond to Request for Decision

There is no time limit within which the supreme court must respond to a request for decision. The court generally has done so within the 90-day time frame for appellate decisions. So far, the court has taken an average of 83 days to issue an order either granting or denying the request (with 137 and 44 days as the longest and shortest periods for a ruling). If the court accepts the request, it announces that determination in the same ordinary manner as it announces the acceptance of cases for review. See Cal Rules of Ct 8.512.

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§23.12 D. Rules Governing Grants of Request

In order for the matter to be accepted for decision, at least four justices of the supreme court must sign the order. Conversely, an order denying the request may be signed by the Chief Justice alone. Cal Rules of Ct 8.548(f)(2). Once the court grants the request, supreme court rules on review and decisions govern further proceedings in that court. Cal Rules of Ct 8.548(f)(3).

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§23.13 E. Transmission of Opinion; Precedential Effect

After filing the opinion, the clerk forwards the written opinion to the requesting court, with copies to counsel of record, and must notify that court and all parties when the decision is final. Cal Rules of Ct 8.548(f)(6). The answer to a certified question has the same precedential effect as any other supreme court decision. Like other opinions, it also is published in the Official Reports. Cal Rules of Ct 8.548(f)(7).

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Appendix A

Sample Opening Brief*

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

MAE L. EVANS	)	**San Mateo. No. 299 565**
Plaintiff/Appellant,	)	
	)	**Case No. A051003**
vs.	)	
	)	
NORMA B. TAYLOR	)	
Defendant/Respondent	)	
_____	)	

APPELLANT'S OPENING BRIEF

On Appeal from Judgment After Jury Trial
San Mateo Superior Court
The Honorable Geraldine Williams

ELLEN LAKE
State Bar No. _____
4230 Lakeshore Avenue
Oakland, CA 94610
(510) 272-9393

Attorney for
Plaintiff/Appellant
MAE L. EVANS

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Prosser and Keeton, The Law of Torts (5th ed. 1984)

INTRODUCTION

This case involves simple facts and a single, simple legal issue. Defendant parked her car in a store parking lot and went shopping for 15 minutes. While she was gone, her unattended parked car mysteriously started moving across the parking lot and out into the street, where it hit plaintiff's vehicle, which was stopped at a traffic light. Plaintiff asked the trial court to instruct the jury on the res ipsa loquitur doctrine. The court refused because the doctrine was "not applicable" and it was "possible" that some unidentified person had released defendant's parking brake. A general verdict for defendant resulted.

The lower court's ruling directly conflicts with unbroken California precedent, holding that under such circumstances plaintiff was entitled to res ipsa loquitur instructions and that refusal to give them was

reversible error.

Consequently, plaintiff requests reversal of the judgment below.

STATEMENT OF THE CASE[1]

A. The Accident: Defendant's Driverless Car Hits Plaintiff's Stopped Vehicle.

On March 8, 1986, at about 11 a.m., plaintiff/appellant Mae L. Evans "Evans") was sitting with her foot on the brake of an automobile, waiting for a red traffic light to change on Middlefield Avenue in Belmont. Evans's car was next to a driveway leading into a Safeway store parking lot. Suddenly, Evans heard cars honking behind her. The next thing she knew, a driverless car owned by defendant/respondent Norma B. Taylor ("Taylor") hit the right rear bumper of Evans's vehicle. When Evans got out of her car to inspect the damage, she saw that the parking brake in the Taylor vehicle was not set. (Reporter's Transcript [hereinafter "RT"] 443, 1037-1042)

The only eyewitness to the events leading up to the crash was an employee at a gas station next to the Safeway parking lot. He saw Taylor drive her vehicle, a Honda Civic, to an isolated spot in the Safeway lot and park it. He later saw the driverless vehicle moving at five to ten miles per hour across the lot and out the driveway into Middlefield Avenue, where it hit Evans's car. The parking lot is graded so that it declines toward Middlefield. It was a very windy day. (RT 423:6-8; 443-453; 1041:5-9)

Defendant Taylor offered no explanation about how the accident occurred. She testified that she parked and locked her car, put her gear shift in neutral, took her keys, and went into Safeway to shop. She did not remember whether she had set the parking brake, although it was her habit to do so. When she returned after 15 minutes in the store, her car had rolled away. (424-426; 428:13-16; 435-438)

Taylor speculated that someone might have tampered with her car after she parked it, but admitted, "That's just conjecture" and "a guess." (RT 439:6-9; 440:10-15) In fact, she had left her dog in the car to guard her camcorder, which was in the back of the vehicle. The dog was "so aggressive" that if "somebody would have walked by the car, she would think to attack them." (RT 427:26 to 428:7) Nothing was missing from or damaged in the car when Taylor returned and there was no evidence that anyone had entered it. (RT 434:4-9; 439:10-15)

The gas station attendant, who had the Taylor car in his sight almost the entire time it was parked, saw no one tamper with it. (RT 445:7-15; 450:9-11; 451:17-18)

B. Plaintiff's Injuries: A Herniated Disk and Pain that Feels Like "Someone Taking an Icepick that Was Heated and Stabbing Me."

Evans testified that the impact of the crash thrust her to the left, after which she twisted her body to the right to see what had happened. (RT 1039) The next day, Evans had great difficulty getting out of bed and had such searing pain in her left leg and buttock that she could not put any weight on her left foot. (RT 1045-1046) "This is like someone was taking an icepick that was heated and stabbing me," she testified. "It just takes your breath away. It's such an intense pain." (RT 1052:10-11) She had never had that type of pain before. (RT 1045; 1050:3-9)

In the weeks and months that followed, the leg pain continued, along with pain in her low back, shoulders, neck, and head. (RT 1049:11-14; 1053:14 to 1054:2; 1057:5-10) Evans had suffered from back, neck, and leg pain in the past, as a result of a number of previous accidents. (RT 916-921; 924-926; 927-929; 934-938; 949-951; 953-954) However, the pain following the March 1986 accident was "completely totally different." It was a "very intense type of pain where you have difficulty getting around." (RT 1057:11-15)

Evans was treated by two physicians for her injuries: Dr. Arthur Bedford, who is board certified in physical medicine and rehabilitation (diagnosing and treating spinal injuries) (RT 557:15-23; 562:13-1), and Dr. James Wandell, who is board certified in orthopedic surgery (RT 754:5), both testified that the crash caused a herniated disk in Evans's previously weakened back. (RT 673:16 to 674:6; 724:4 to 725:8; 727:2 to 729:6; 814:9-24) The herniated disk precluded Evans from continuing her career as a traveling salesperson because she could not sit in a car for long periods of time, Dr. Bedford testified. (RT 715:19 to 716:14)

Evans lost her sales job after the accident and, because of her injuries, was unable to obtain new work. "For me to get back into sales and marketing, companies just will not hire anyone with a back herniated disk," she testified. (RT 1054:14-19; 1060:18-19)

The defense expert, a neurosurgeon who examined Evans only once, testified that the accident did not cause any injury to her back. (RT 843:17-20; 845:11-12; 886:7-24) An accident reconstruction expert called by defendant testified that the impact from the collision was so slight that her body would not have moved at all.

(RT 970)

C. The Trial: The Disputed Res Ipsa Loquitur Instructions.

Evans filed an action for negligence against Taylor. (Clerk's Transcript [hereinafter "CT"] 1) Before the start of the eight-day trial, Evans's counsel submitted BAJI Instructions numbers 4.00, 4.02, and 4.03 and requested the court to instruct on the doctrine of res ipsa loquitur. (RT 1127:11-22; CT 96, 272-274) Although stating that "the matter appears close," the trial court refused to give the instructions, on the ground that they were "not applicable." (RT 1128:10-14) The jury rendered a general verdict in favor of defendant Taylor, and judgment was entered accordingly. (RT 1201:20-22; CT 287)

Evans moved for a new trial on several grounds, including the court's refusal to give the res ipsa loquitur instructions. (CT 307-308, 311-312) In opposition, Taylor argued that plaintiff had not established the elements of res ipsa loquitur but, if she had, the instructional error was harmless because the jury based its general verdict for defendant on another ground. (CT 333) In support of the opposition, Taylor's attorney submitted his own hearsay declaration, based on his alleged discussions with jurors, in which he purported to report the ground on which the jury had decided in Taylor's favor. (CT 335-336)

The trial court denied the new trial motion, stating:

> [T]he court expressed views both ways in the preliminary discussions as to whether that instruction should be or should not be given, but became convinced that it was possible under the facts of the case for someone else to have released the brake due to the manner in which the car was placed, the place in which it was parked and that no one actually saw it start to move.
>
> So that it could be a reasonable inference in the court's mind that either the defendant didn't set the brake correctly or that someone had entered the car and released the brake.
>
> Be that as it may, the court then would be of the view that although that particular area was close in the court's mind that there was a sufficient basis for refusing the giving of the res ips [sic] loquitur decision or instruction.
>
> The issue as to proximate cause also I think was paramount to the court's decision, but that's only what I can gain from what you gentlemen have said in your conversations with the jury, and from what I gather from the evidence presented. (RT 1214:17 to 1215:10; emphasis added)

Plaintiff filed a timely notice of appeal from the judgment, which disposed of all issues between the parties. (CT 290, 354)

ARGUMENT

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE THE REQUESTED JURY INSTRUCTIONS BECAUSE PLAINTIFF MET ALL THE CONDITIONS OF THE RES IPSA LOQUITUR DOCTRINE.

Plaintiff presented sufficient evidence to prove all the conditions of res ipsa loquitur and the court's refusal to give her proposed jury instructions was prejudicial error.

A. Plaintiff Established All the Elements of Res Ipsa Loquitur, and the Trial Court Erred in Refusing the Instructions Based on Speculation that Someone May Have Released Defendant's Parking Brake.

The doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the defendant's exclusive control or over which the defendant had the exclusive right of control originally and which was not mishandled after the defendant relinquished control; and (3) it must not be due to any voluntary action or contribution by the plaintiff. (*Shahinian v McCormick* (1963) 59 Cal.2d 554, 559; *Zentz v Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 443-444; BAJI Instr. 4.00-4.03)

Evans presented sufficient evidence of all three conditions that she was entitled to have the res ipsa loquitur instructions given. The evidence was undisputed on the first and third conditions and, on the second, was arguably undisputed or, at worst, was subject to conflicting inferences.[2]

The first condition—an accident that does not ordinarily occur without negligence—was not disputed. It is common knowledge that parked cars do not ordinarily start moving and hit other automobiles in the absence of someone's negligence. Thus, in *Price v McDonald* (1935) 7 Cal. App.2d 77, 81, where the defendants' parked car rolled down their driveway and crashed into the plaintiff's house, the court held that a res ipsa loquitur instruction was properly given. "We are of the opinion that under such allegations a presumption of negligence arises when an unattended automobile coasts down a hill and that upon proof of these facts, it becomes

incumbent upon the person having control to explain the cause of the car's movement," the court declared.[3] (See Anno., Presumption of Negligence and Application of Res Ipsa Loquitur Doctrine in Action for Injury or Damage Caused by *Accidental Starting Up of Parked Motor Vehicle* (1974) 55 ALR3d 1260, 1267 [because motor vehicles do not ordinarily move about of their own volition, the fact that a vehicle under someone's control has moved from the place where he left it may justify an inference of negligence in securing the vehicle])

The third condition—plaintiff's lack of involvement in causing the accident—was similarly undisputed. Evans was stopped at a traffic light when Taylor's car hit the rear of her vehicle. Evans did not contribute to the collision in any way.

The second condition—the accident was caused by an instrumentality over which the defendant originally had the exclusive right of control and which was not mishandled after she relinquished control—was sufficiently established by the evidence to warrant the instruction.

The evidence showed that Taylor drove her car into the Safeway parking lot, parked it, and went into the store to shop. There was no evidence that anyone else ever touched the car between the time that Taylor left it and the time it started moving and hit Evans's vehicle. Taylor's speculation that someone tampered with her car was admittedly "just conjecture" and "a guess" (RT 436:6-9; 440:10-15), and was contradicted by the gas station attendant's testimony that he was watching Taylor's car most of the time and saw no one touch it.

California case law is clear that the plaintiff's entitlement to res ipsa loquitur instructions may not be defeated by unsupported speculation that an unidentified third person intervened after the defendant relinquished control. As the Supreme Court stated in *Zentz v Coca Cola Bottling Co., supra,* 39 Cal.2d 436, 443-444:

> The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident.

In *Zentz v Coca Cola Bottling Co.,* the plaintiff was injured by an exploding soda bottle which was filled and delivered to her restaurant by defendant Coca Cola. After a verdict for the plaintiff, Coca Cola appealed, contending that the trial court erred in giving res ipsa loquitur instructions because the evidence did not establish the second res ipsa condition, the defendant's exclusive control. Coca Cola argued that the soda bottle might have had a latent defect caused by improper manufacture before it came into Coca Cola's possession or it might have been improperly handled by the plaintiff's employees after it was delivered to the restaurant.

The court affirmed the plaintiff's judgment, holding that the res ipsa instructions were properly given. The court noted that the plaintiff had introduced evidence sufficient to warrant an inference that the bottle was not mishandled at her restaurant. "It is not necessary that plaintiff eliminate every remote possibility of injury to the bottle after defendant relinquished control...." (Id. at 447) As to the possibility of a latent manufacturing defect in the bottle, the court stated firmly: "It is our opinion ... that the existence of this possibility is insufficient to prevent application of the doctrine of res ipsa loquitur." (Id. at 449)

Similarly, in *Roddiscraft, Inc. v Skelton Logging Co., supra,* 212 Cal. App.2d at 798-800, the plaintiff corporation, which owned timberland, filed suit against the defendant logging company, alleging that the defendant's negligence caused a forest fire that destroyed the plaintiff's timber. At the time the fire began, the defendant's employees were logging in the area with a tractor that emitted sparks, and the evidence indicated that no one else was nearby. Upholding the trial court's determination that a res ipsa loquitur instruction was required, the court of appeal stated:

> The record is ... barren of any conduct or activity on the part of any third person. While it is possible that third persons may have been on Skelton's [defendant's] land, we have the testimony adduced from Skelton's employee ... that he did not see anyone in the area on the day of the fire other than the employees of Skelton. This testimony, when considered with the other circumstances, would not only justify the inference that there were no third persons in the area but also that it was more likely that the cause of the accident was the activity of Skelton's employees who were present in the area. (Id. at 800)

Finally, in *Price v McDonald, supra,* 7 Cal. App.2d 77, where the defendants' parked car rolled down the driveway and hit the plaintiff's house, the court also rejected the defendants' claim that the possibility of third party intermeddling should defeat the res ipsa loquitur instructions:

> Defendants in the case at bar did not relieve themselves from liability by mere proof that they safely parked the car. Their testimony to that effect enables them to argue with plausibility that someone must have interfered with the car, but that argument was one for the jury and does not constitute a sufficient defense in the absence of all evidence that such was the fact. We are of the opinion that the case made by plaintiff satisfactorily establishes all the elements necessary to bring into operation the doctrine of res ipsa loquitur. (Id. at 81;

emphasis in original).

(See Prosser and Keeton, The Law of Torts (5th ed. 1984) §39 at 249 [where parked car starts to move, negligence in parking the car is the most probable explanation, not a "tampering stranger"])

In the instant case, as in Zentz, Roddiscraft and Price, there was no evidence that anyone else handled defendant's car after she parked it. Thus, the trial court erred in refusing to give res ipsa loquitur instruction simply because the court speculated that "it was possible … for someone else to have released the brake…." (RT 1214:19-21)

Moreover, assuming arguendo that such speculation rises to the level of evidence or inference, plaintiff was still entitled to have her proposed instructions given. "Where, as here, the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are [sic] present." (*Shahinian v McCormick, supra,* 59 Cal.2d at 561) "Where … plaintiff has produced evidence sufficient to support findings that the conditions requisite to the drawing of the inference are present, it is error for the trial court to refuse to allow the inference by refusing a proper instruction." (*Keena v Scales* (1964) 61 Cal.2d 779, 783; *Wolfsmith v Marsh* (1959) 51 Cal.2d 832, 835-836)

Because Evans presented evidence supporting each of the res ipsa loquitur conditions, the trial court committed error in refusing to instruct on the doctrine.

B. The Trial Court's Refusal to Give the Res Ipsa Loquitur Instructions Was Prejudicial Error, Requiring Reversal.

The trial court's rejection of res ipsa loquitur instructions was reversible error because it is reasonably probable that a result more favorable to Evans would have been reached in the absence of the error. (*Henderson v Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670)

In determining whether a trial court's refusal to instruct is prejudicial, the reviewing court has an independent constitutional duty to examine the entire record. The appellate court must assume that the jury might have believed the evidence upon which the omitted instruction was predicated, and that if the correct instruction had been given, the jury might have rendered a verdict in favor of the party offering the instruction. Most important, the court may not speculate on the basis on which the jury reached the verdict. (Id. at 673-674)

The prejudicial impact of an erroneous failure to give res ipsa loquitur instructions is so well established that reversal is routinely ordered. Although appellate courts have offered different explanations for this result, one persuasive rationale is that the res ipsa loquitur doctrine shifts the burden of producing evidence to the defendant. (Evid C §646 and Law Rev. Comm. Comment) Thus, failure to give res ipsa loquitur instructions prejudicially deprives the plaintiff of that advantage. As the court stated in *Pappas v Carson* (1975) 50 Cal. App.3d 261, 269:

> Given the unexplained cause of the fire, the decision in the case at bench turned upon the burdens of producing evidence placed upon the parties. The action of the trial court in refusing instructions which would have permitted the jury, once it found the preliminary facts to be true, to place the burden upon defendant rather than upon plaintiffs-appellants of necessity is prejudicial.

Reversal was ordered in each of the following cases.[4] *Kerr v Bock, supra,* 5 Cal.3d at 325 [reversed; plaintiff's evidence supports inference of negligence]; *Tomei v Henning* (1967) 67 Cal.2d 319, 323-324 [prejudicial; plaintiff met conditions and court refused to speculate on how jury reached defense verdict]; *Keena v Scales, supra,* 61 Cal.2d at 783 [reversed; plaintiff produced evidence sufficient to support findings on res ipsa loquitur conditions]; *Shahinian v McCormick, supra,* 59 Cal.2d at 564 [prejudicial because "close" case and conflicting testimony would support jury verdict either way]; *Davis v Memorial Hosp.* (1962) 58 Cal.2d 815, 819 [prejudicial in light of entire record]; *Wolfsmith v Marsh, supra,* 51 Cal.2d at 836-837 [reversed; plaintiff met res ipsa loquitur conditions]; *Rimmelle v Northridge Hosp. Found.* (1975) 46 Cal. App.3d 123, 131-132 [prejudicial not to instruct that two conditions established as a matter of law; "close case" and court refused to speculate on jury's thought processes]; *Roddiscraft, Inc. v Skelton Logging Co., supra,* 212 Cal. App.2d at 803 [prejudicial because plaintiff entitled to instructions; court refused to speculate on basis of defense verdict].

The above principles make clear that, in the instant case, the trial court's refusal to instruct on res ipsa loquitur was reversible error. Although the trial court called the matter "close" (RT 1128:10-11; 1215:3), in fact, plaintiff's showing under the res ipsa loquitur doctrine was very strong. Evans produced undisputed evidence on two of the three res ipsa loquitur conditions, and her evidence of the other condition was extremely strong.

Because the cause of the starting up of Taylor's car remained unexplained, decision in the case turned on the parties' respective burdens of producing evidence. (See *Pappas v Carson, supra,* 50 Cal. App.3d at 269) By refusing to instruct on res ipsa loquitur, the trial court left the burden of producing evidence on plaintiff; had

the instruction been given, the jury would have been told that it could place that burden on defendant.

Moreover, without the res ipsa loquitur instructions, the jury was not told that it could infer defendant's negligence from the happening of the accident. (See BAJI No. 4.02) In closing argument, defendant's counsel took advantage of this error by emphasizing the lack of clear evidence on what caused the car to start moving. He argued:

> **[W]e don't know what happened. All we know is that June, like all of us do, parked her car, set her brake, went into the store, left the window down so her dog wouldn't suffer ill consequences or ill affects [sic] of a warm day.**
>
> **What happened after that can be speculated upon, but we've not attempted to speculate upon it. But just know that that's what happened.**
>
> **If she acted unreasonably in doing that then she was negligence [sic]. If she didn't act unreasonably, then she's not. Simple as that, case closed. (RT 1163:20 to 1164:4)**
>
> **Had plaintiff's requested instructions been given, the jury could have utilized the absence of evidence on the car's start up to infer defendant's negligence.**
>
> **In sum, the trial court's error in refusing the res ipsa loquitur instructions was prejudicial, and the judgment for defendant Taylor must be reversed.**

CONCLUSION

For all the above reasons, this court should reverse the judgment below and should remand the case for retrial.

Date: March 15, 1991

Respectfully submitted,

_____
ELLEN LAKE
Attorney for Appellant
MAE L. EVANS

PROOF OF SERVICE

I, Ellen Lake, declare: I am over the age of 18 years and not a party to the within action. My business address is 4230 Lakeshore Avenue, Oakland, California 94610, in the County of Alameda. On the date set forth below, I served Appellant's Opening Brief by depositing a true and correct copy with postage prepaid in the U.S. mail in Oakland, California, addressed to:

Laura Edwards
Christopher Martin
Johnson, McDonald & Martin
123 Santa Maria Way
P.O. Box 1200
Belmont, CA 93342

Clerk
San Mateo Superior Court
Hall of Justice
Redwood City, CA 94063

Clerk California Supreme Court 455 Golden Gate Avenue, Room 4250, San Francisco, CA 94102. I declare under penalty of perjury that the foregoing is true and correct. Executed on April __, 1990, at Oakland, California.

(5 COPIES)

_____
ELLEN LAKE

---

[1]Because the issue on appeal is whether the court erred in refusing to give jury instructions requested by plaintiff, this factual statement presents the evidence in the light most favorable to plaintiff. (*Kerr v Bock* (1971) 5 Cal.3d 321, 323-324; *Gicking v Kimberlin* (1985) 170 Cal. App.3d 73, 76; *Roddiscraft, Inc. v Skelton Logging Co.* (1963) 212 Cal. App.2d 784, 795)

[2]>Because defendant produced no evidence to dispute the existence of any of the three conditions, plaintiff was arguably entitled to have the jury instructed on res ipsa loquitur as a matter of law. (See Use Note to BAJI No. 4.00) However, plaintiff did not specifically request such an instruction and submitted BAJI Instruction No. 4.00 (conditional res ipsa loquitur) as well as BAJI Instructions No. 4.02 and 4.03. Consequently, for purposes of this appeal only, plaintiff contends that she was entitled to the conditional res ipsa loquitur instruction.

[3]Plaintiff's counsel cited Price to the trial court in arguing for the res ipsa loquitur instructions. The court held it was not controlling, stating, "There are certain elements of the case which are similar to this case. There are other elements that aren't, of course." (RT 1128:8-10)

[4]Counsel for plaintiff has found only one case in which an erroneous failure to give requested res ipsa loquitur instructions was not deemed reversible error. That case, *Tobler v Chapman* (1973) 31 Cal. App.3d 568, 588, is completely distinguishable. In *Tobler*, the defendant caused an accident while driving on the wrong side of the road. As a result, the jury was instructed that the defendant bore the *burden of proof* to show she was not negligent. On appeal after a defense verdict, the court held that failure to give a res ipsa loquitur instruction was not prejudicial because the defense verdict showed that the defendant had already met a heavier evidentiary burden than would have been imposed under the res ipsa loquitur instruction, which only shifted the *burden of producing evidence*.

*Editor's Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. Names of parties and attorneys who have not contributed to this book have been changed for publication.

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Appendix B

Sample Respondent's Brief*

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No. H-143389-4

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

ANGELA RAMOS and	**)**	**Case No. A065617**
JAIME ALBANO	**)**	
Plaintiffs/Respondents	**)**	**Alameda Superior Ct.**
	)	**No. H-143389-4**
vs.	**)**	
	)	
BELL PROPERTIES, et al.,	**)**	
Defendants/Appellants.	**)**	
_____)		

BRIEF OF RESPONDENTS
On Appeal From Judgment
After Jury Verdict
The Honorable George Anderson
Alameda Superior Court

MORTON GOULD
State Bar No. 12345
WATSON & GOULD
229 Main St., Suite 50
Oakland, CA. 94612
(510) 893-6622

ELLEN LAKE
State Bar No. 47636
LAW OFFICES OF ELLEN LAKE
4230 Lakeshore Avenue
Oakland, CA 94610-1136
(510) 272-9393

Attorneys for Plaintiffs/Respondents

Angela Ramos and Jaime Albano

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INTRODUCTION

Plaintiffs and respondents Angela Ramos and Jaime Albano brought this wrongful death action against defendant and appellant Bell Properties ("Bell") seeking damages for the death of their 18 month old son Miguel. Miguel drowned in a swimming pool in an apartment complex owned by Bell. The jury awarded Angela and Jaime $1,500,000 for the loss of Miguel's love, companionship, comfort, and society. The verdict was comparable to other recent wrongful death verdicts involving children.

In this appeal, Bell does not contest liability but presents a shotgun attack on the damages verdict. Bell's claims of error are without merit and, in several instances, were waived by its failure to request instructions and failure to present evidence.

Bell's principal claim of error illustrates how weak its arguments are. Bell contends that the damages verdict was unsupported because there was no evidence of the monetary value of Miguel's love and companionship. Apparently, Bell would have an economist testify about what love is worth. Of course, there is no requirement for such evidence.

Bell also complains that the jury committed misconduct by calculating damages using a "per diem" analysis. That approach was approved by the California Supreme Court in *Beagle v Vasold* (1966) 65 Cal.2d 166.

Bell's remaining arguments are no stronger. The judgment should be affirmed.

STATEMENT OF THE CASE

STATEMENT OF FACTS

A. Miguel Drowned in Bell's Swimming Pool at the Age of 18 Months.

Plaintiffs Angela Herrera and Jaime Molina, Mexican nationals, were married in Michoacan, Mexico, in 1989. One year later, in May 1990, their only child Miguel was born in Michoacan. RT 461:7-21, 483:14-20.

On Christmas Day in 1990, Angela, Jaime and Miguel immigrated to the United States. They moved into an apartment in the Royal Arms Apartments in Oakland, where they lived with Jaime's parents, Yolanda and Jorge. RT 463:1-12. Royal Arms Apartments was owned by defendant/appellant Bell Enterprises. AOB 4:24-25.

Each weekday Angela and Jaime went to work very early, around 4:00 a.m. RT 464:25 to 465:4. Angela was a cook on a lunch truck and Jaime had his own business, recycling cardboard. RT 465:1, 484:1-4. When they left the apartment, they would lift their sleeping child out of their bed and gently place him in his grandmother Yolanda's bed. RT 411:1-2, 477:4-8. Yolanda took care of Miguel while his parents were at work. RT 465:11-12. Angela trusted Yolanda to take good care of Miguel because "I knew already that she loved him very much as a child—as a son, she would take care of him as a son." RT 465:13-19.

One morning in November 1991, Yolanda took Miguel with her to the laundry room in the apartment complex while she did the wash. Miguel, aged 18 months, was sitting at her feet, playing with some sticks, while Yolanda loaded the wash into the washing machine and put in the money. As soon as the washing machine started, she turned around, but Miguel was gone. RT 413-419.

Yolanda rushed out of the laundry room, looking for Miguel. After a few minutes of searching, she found him floating unconscious in the apartment complex swimming pool. RT 423:22 to 424:11. Miguel died three months later. The parties stipulated that his death was the result of the drowning incident. RT 9:7-11, 478:22-25.

Although no one saw Miguel enter the pool area, a code enforcement officer for the Oakland Building and Safety Department, who investigated Miguel's drowning, testified to the many defects in the pool's security on the day of the accident.

Numerous boards were missing from the fence surrounding the pool, leaving enough space for a small child to crawl through the fence. The gate nearest the laundry room, which was supposed to remain tightly latched, slipped open easily because the self-closing latch on top did not work. Another gate had a missing board at

the bottom, so that a small child could crawl beneath the gate. RT 511-515.

Bell's own employees and the contractor who serviced the swimming pool confirmed that missing boards and broken gate latches were not uncommon at the Royal Arms pool. RT 495-496, 499-500, 525-529, 549:1-9. An Oakland police officer also testified that the latches on the pool gates were not working on his previous visits to the Royal Arms Apartments. RT 355:3-19.

B. Miguel and His Parents Had a Warm, Loving Relationship. "He Was the Utmost for Me," His Father Testified.

Angela and Jaime had developed a deeply loving relationship with Miguel before his death.

On weekdays, as soon as their work was over, Angela and Jaime would return to the apartment to be with Miguel. RT 465:6. "After work by the afternoon we would all be together there," Angela testified. RT 468:27 to 469:1. Miguel was a strong healthy little boy, who was never sick. RT 445:23-24; 464:23-24. His grandmother Yolanda described him as "very, very, very vivacious." RT 412:1.

Angela loved to follow Miguel around the apartment and grounds with her camera, snapping photographs. "Wherever I liked it, wherever it was pretty I would put him there so I could take photos," she testified. RT 471:16-19, 472:2-6. The pictures, which were in evidence, show a smiling toddler holding toys and a ball, playing with piñatas during his first birthday party, being held by his father and grandparents, and accompanying his father at a work site on a weekend. Exhibits 4A-4N, RT 463-475.

To Jaime, his son Miguel was the pinnacle of all his dreams. He testified that Miguel was "[a] very healthy little boy, beautiful for me, affection, and I loved him very much. And his deeds, I think that he also loved me very much. I am not able to explain to you what he feels for me, but in fact his expressions, his way of being was that he loved us very much. He was the utmost for me. I wanted the utmost for him." RT 484:16-22.

The jurors evidently understood the enormous loss that Jaime and Angela suffered from Miguel's death. One juror wrote in a declaration filed in opposition to Bell's motion for new trial, "[E]ach plaintiff lost a healthy, beautiful eighteen month-old son." CT 213.

PROCEDURAL HISTORY

The case proceeded to trial on plaintiffs' second amended complaint before Alameda Superior Court Judge George Anderson. During pretrial motions, the court granted plaintiffs' in limine motion to exclude evidence that the plaintiffs were allegedly illegal immigrants, subject to deportation. RT 39:12-13. However, the court agreed to consider further defense argument that plaintiffs' life expectancies should be measured by statistics involving Mexican citizens, not the standard BAJI life expectancy table. RT 19:8 to 20:7; 39:14-21.

The court also granted plaintiffs' in limine motion to exclude evidence of one incident of alleged spousal abuse and related criminal proceedings, which occurred after Miguel's death. RT 22:10-12, 24:18 to 25:6, 39:7-11.

From the outset plaintiffs' counsel made clear that plaintiffs were seeking damages only for the loss of Miguel's love, affection, society and comfort, and not for any tangible monetary losses. RT 17:22-24. During the jury instruction conference, defense counsel, Mr. Campbell, argued that the jury should be instructed to deduct the amount that plaintiffs saved by not having to raise and educate Miguel. Defense counsel admitted that there was no evidence of any such savings but argued that the jurors could use their own experience as parents to estimate the amount. RT 702:14 to 703:13

The court refused to give such an instruction for two reasons. First, the judge said, the jurors "would only be speculating—from what you've suggested on their own life experience, not on any evidence that's been presented in this court." RT 704:6-8. Second, the court ruled that such an offset was appropriate only when the plaintiffs were seeking to recover tangible economic losses, such as the child's future earnings. RT 703:14 to 704:20.

At the instructions conference, defendant's counsel also renewed his argument that plaintiffs were not entitled to use the BAJI life expectancy tables applicable to people living in the United States because they were allegedly subject to deportation to Mexico. Mr. Campbell urged the court to use a life expectancy table for Mexico citizens, which he provided to the trial court but which is not part of the record on appeal. RT 707:24 to

708:22.

Plaintiffs' counsel objected on several grounds. First, unlike the BAJI tables, the Mexican table gave life expectancy figures at birth. Because of the high infant mortality rate in Mexico, the Mexican table underestimated the life expectancy of people who had reached adulthood. RT 709:4-11, 711:6-8. Second, the BAJI instruction adequately informed the jury that the life expectancy figures were just guidelines and were not binding. For that reason, California cases had permitted use of the BAJI table even for plaintiffs who were seriously ill and were unlikely to live a normal life span. RT 708:25 to 709:20.

The court held that it would use the BAJI life expectancy table. Judge Anderson ruled—and defense counsel agreed—that there was no evidence that the plaintiffs would return or be deported to Mexico. RT 708:5-12. Moreover, the BAJI instruction properly cautioned the jury that some people live longer and some people live shorter, leaving the jury free to make its own determination of plaintiffs' life expectancies. RT 708:12-14, 709:12, 710:12-19, 711:12-13.

After an eight-day trial, the jury assessed plaintiffs' loss at $1,622,000 and found that 90 percent of their damages were caused by Bell's negligence and 10 percent by Yolanda's negligence. Judgment for $1,459,800 was entered against Bell. CT 141-145.

Bell moved for a new trial, arguing that there was insufficient evidence to support the damage verdict, that the damages were excessive, that the damages verdict was the result of errors of law, and that the jury committed misconduct by computing damages on a "per diem" basis. CT 151-188. Plaintiffs filed opposition, rebutting Bell's arguments. CT 189-272. The court denied the new trial motion. CT 273.

ARGUMENT

I. THE JURY'S DAMAGE VERDICT WAS AMPLY SUPPORTED BY EVIDENCE OF THE LOVE AND AFFECTION BETWEEN PLAINTIFFS AND MIGUEL. NO EVIDENCE OF THE MONETARY VALUE OF PLAINTIFFS' LOSS WAS NECESSARY.

Bell's shotgun attack on the jury's damage verdict is entirely without merit. Bell's basic premise—that parents must introduce evidence of the monetary value of their dead child's love and companionship—is fallacious. Bell's subsidiary argument concerning alleged jury misconduct is equally flawed.

A. Parents in a Wrongful Death Action Need Not Prove the Monetary Value of Their Child's Love and Companionship.

At the outset, it should be noted that Bell is not contending that there was insufficient evidence of the love, affection, and companionship between Miguel and his parents. The warmth of that relationship is amply described in the statement of facts. See, supra, pp. 2-4. Instead, Bell argues that the verdict was defective because there was no evidence of the "amount" or "monetary value" of plaintiffs' injury from the loss of their relationship with Miguel. AOB 8-10.

The simple answer is that there is no requirement for such evidence. In *Krouse v Graham* (1977) 19 Cal.3d 59, 69, the California Supreme Court made clear that wrongful death damages for lost society, comfort, care and protection are inherently "nonpecuniary."

In *Krouse,* the Supreme Court reviewed the history of the cause of action for wrongful death. The Court noted that California has not restricted wrongful death recovery to losses with an ascertainable economic value, such as lost earnings or lost services. For nearly a century, recovery has been allowed for deprivation of the decedent's "society, comfort and protection," based on precisely the type of evidence presented here: the closeness of the family unit, the warm feeling among family members and the "kind and loving" character of the decedent. *Krouse v Graham, supra,* 19 Cal.3d at 67-68.

Consequently, parents have received compensation for the death of young children, and adult children have recovered for the wrongful death of retired, elderly parents, the high court stated. "[I]f damages truly were limited to 'pecuniary' loss, recovery frequently would be barred by the heirs' inability to prove such loss. The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial 'injury' to the family for which just compensation should be paid," the Supreme Court wrote in *Krouse v Graham, supra,* 19 Cal.3d at

The high court recognized that some older decisions had purported to limit recovery to the "pecuniary value" of lost society, comfort, and protection. That "confusing" limitation was simply intended to preclude recovery for grief and sorrow, the Court explained. Damages for lost society, comfort and protection are "nonpecuniary," the Court held. Id. at 68-69.

Thus, the Supreme Court's decision in *Krouse v Graham* demonstrates that parents may recover for the real but intangible injury they suffer when their minor child is wrongfully killed, without proof of the "pecuniary" value of their loss. This seemingly obvious conclusion is supported by California Supreme Court decisions in related areas of law, such as claims for pain and suffering and loss of consortium.

For example, in *Beagle v Vasold* (1966) 65 Cal.2d 166, the high court was confronted with the issue of how a jury can calculate damages for pain and suffering in a personal injury suit. The defendants in Beagle contended that the plaintiff's counsel had engaged in improper argument by asking the jury to compute pain and suffering on a "per diem" basis—i.e., a certain number of dollars for each day of suffering. The Supreme Court rejected the argument, holding that counsel may argue for a "per diem" approach.

The Court declared: "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. [Citation.] In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy." Id. at 172, emphasis added. "Yet," the court emphasized, "the inescapable fact is that this is precisely what the jury is called upon to do." Id. at 176.[1]

The determination of pain and suffering damages is entrusted to the "impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence … guided by their observation, experience and sense of fairness and right," the court declared in Beagle. Id. at 181.

In other cases, the high court has also held that no evidence is necessary of the monetary value of intangible losses. See *Rodriguez v Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 401-402 [jury may award damages for loss of consortium despite difficulty of assigning monetary value thereto]; *Capelouto v Kaiser Found. Hosps.* (1972) 7 Cal.3d 889, 893, 896 [jury may award pain and suffering damages to infant without explicit evidence of pain, based on jury's "common experience"]; *Seffert v Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507-508 [because there is no accurate standard to compute pain and suffering damages, jury must be given wide discretion and appellate court must uphold the jury and trial judge whenever possible].

In sum, there was no necessity—indeed, no reasonable method—of presenting evidence of the dollar value of the love, companionship and society, which plaintiffs have lost with Miguel's death. Bell's challenge on this ground must fail.

B. The Jury's Use of a "Per Diem" Analysis to Calculate Damages Was Entirely Proper.

Bell's claim of jury misconduct is based on the fact that the jury used a "per diem" approach to reach its damage verdict. (AOB 9-10) Beagle establishes such an approach is entirely proper. If counsel may argue that the jury should evaluate damages on a "per diem" basis (*Beagle v Vasold, supra*), obviously, the jury may do so.

Bell's contention that use of the "per diem" process violated BAJI instructions 14.60, 14.62 and 15.33 (AOB 8-9) is specious. BAJI 14.60 prohibits the award of speculative damages. BAJI 14.62 forbids the jury from considering the argument of counsel as "evidence of reasonable compensation." BAJI 15.33 prohibits the jury from determining any issue by flipping coins, drawing lots, averaging, or other chance determinations. Bell has presented no evidence that the jurors did anything forbidden by these instructions. See *Beagle v Vasold, supra,* 65 Cal.2d at 180-181.

To the contrary, juror declarations presented by both sides demonstrate the reasonableness of the jury's deliberative process. The jurors began by calculating plaintiffs' damages at $100 per day per plaintiff. When that calculation showed that the total verdict would be near $3 million, they decided that $100 per day was too high and continued their deliberations using the "per diem" approach as a tool. They voted on various totals

by using different daily loss figures and ultimately voted for a verdict of approximately $1.6 million, which was approximately $55 per plaintiff per day. CT 181, 212-213. Because 10 percent of the fault was attributed to Yolanda's negligence, the judgment against Bell was $1,459,800.

This method of calculation was proper under Beagle and under the court's instructions. Moreover, the $1.6 million verdict was comparable to other parents' recent verdicts for the wrongful death of their children. A survey by plaintiffs' counsel of verdicts reported in Jury Verdicts Weekly between 1990 and 1993 was included in plaintiffs' opposition to Bell's motion for new trial. CT 214-268. It revealed that the average wrongful death verdict for parents was $1,821,584. CT 214-215. The trial court denied Bell's motion for new trial (CT 273), rejecting its arguments that the damage verdict was speculative, excessive, or the product of jury misconduct. CT 161-169, 174-175.

In sum, the jury properly used a "per diem" process to help it calculate the amount of plaintiffs' losses. Bell's challenge to this process is without merit.

II. BELL WAS NOT ENTITLED TO BAJI INSTRUCTION 14.70 ON PRESENT VALUE BECAUSE BAJI 14.70 APPLIES ONLY TO ECONOMIC LOSSES AND BECAUSE BELL WAIVED THE ISSUE.

Bell's claim that the trial court should have given BAJI 14.70 on present value is fatally flawed for two independent reasons. First, BAJI 14.70 is given only where a party seeks damages for objective economic losses, not for the intangible losses which plaintiffs claimed here. Second, Bell failed to request BAJI 14.70 at trial and presented no evidence on how to calculate present value.

A. BAJI 14.70 on Present Value Should Be Given Only Where a Party Seeks an Award for Future Economic Loss.

Bell's argument that BAJI 14.70 should have been given is based on a version of BAJI 14.70 that was no longer in effect at the time of trial.

The prior version of BAJI 14.70, which is quoted in Bell's brief (AOB 12), provided in its first paragraph: "Any [award for] [finding of] future pecuniary loss must be only for its present cash value." (Emphasis added) A Use Note explained, "This instruction should be used in every instance where a future pecuniary loss is involved." (Emphasis added) Bell argues that plaintiffs' loss of Miguel's love, affection and companionship were "pecuniary" losses even though that view was rejected in *Krouse v Graham, supra*, 19 Cal.3d at 69, where the Supreme Court labeled such losses "nonpecuniary."

In addition to misreading *Krouse v Graham,* Bell totally ignores the fact that BAJI 14.70 was revised in 1993; the current version was in effect at the time of this trial in 1994. The first paragraph of BAJI 14.70 now provides, "Any [award for] [finding of] future economic loss must be only for its present cash value." (Emphasis added) A Comment to the instruction points out that the revision "substitutes economic for pecuniary" and refers to the definition of "economic damages" in BAJI 14.76.

BAJI 14.76, in turn, defines "economic" and "non-economic damages." "Economic damages" are "[objectively verifiable] monetary losses such as medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining domestic services, loss of employment and loss of business or employment opportunities." By contrast, "Non-economic damages means [subjective] non-monetary losses such as pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, humiliation and injury to reputation."

It is thus clear that Bell was not entitled to BAJI 14.70's instruction on present cash value because BAJI 14.70 applies only to economic losses, while plaintiffs were seeking recovery only for non-economic losses.[2]

The Restatement Second of Torts also supports plaintiffs' position that intangible losses should not be reduced to present value. Bell's claim that the Restatement bolsters its argument (AOB 12) again reveals Bell's poor legal research.

As Bell recognizes, Restatement section 913A provides, "The measure of a lump-sum award for future pecuniary losses is the present worth of the full amount of the loss of what would have been received at the later time." However, Bell disregards Comment (a), which makes clear that only economic losses should be reduced to present value. Comment (a) states that future losses in earnings and damage awards covering

future medical expenses should be discounted. "But an award for future pain and suffering or for emotional distress is not discounted in this fashion." Rest. 2d Torts §913A, Comment (a).[3]

Restatement section 913A thus makes the same distinction as BAJI 14.70: tangible economic losses are discounted to present value, but intangible non-economic losses are not.

B. Bell's Failure to Request BAJI 14.70 or to Offer Evidence on Calculation of Present Value Constituted a Waiver.

Even if BAJI 14.70 were applicable to non-economic damages, Bell waived any right to the instruction by failing to request it and by failing to introduce evidence on how to determine present value.

In order to complain of failure to instruct on a particular issue, the aggrieved party must request the specific proper instruction. If the party fails to do so, the court has no duty to instruct on its own motion. *Finn v G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701; *Agarwal v Johnson* (1979) 25 Cal.3d 932, 951; *Null v City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535. Neither a trial court nor a reviewing court in a civil action is obligated to seek out theories a party might have advanced. *Finn v G.D. Searle & Co., supra,* 35 Cal.3d at 701-702.

In *Null v City of Los Angeles, id.*, the court pointed out the strong policy factors behind these rules: "[D]efendants' theory of review would allow a party to withhold a theory from the jury, by failing to request instructions, and then to obtain appellate review of the evidence and reversal of the judgment on a theory never tendered (or tendered in a different form) to the jury. This process could require a new trial even though the original trial judge and jury did their respective duties without error. That result would also violate the strong rule of policy that parties to civil lawsuits 'ought not have two trials where they could have had but one.'" [Internal citations omitted]

Because Bell never requested an instruction on present value or raised the issue in any fashion, it has waived any claim that the trial court committed error by not giving such an instruction.

Code of Civil Procedure §647, on which Bell relies (AOB 11), does not relieve Bell from its waiver. Section 647 provides that "giving an instruction, refusing to give an instruction, or modifying an instruction requested" is deemed excepted to. Here, however, Bell did not request an instruction, so §647 is not applicable.

Even if Bell had requested BAJI 14.70, its request should have been refused because there was no evidence on which to predicate such an instruction. A party is entitled to an instruction only when there is "evidence of a substantial character" to support a finding on that issue. *Hasson v Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607. It is error to instruct on any theory that is not supported by the evidence. *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 Cal.App.3d 762, 783.

In *Wilson v Gilbert* (1972) 25 Cal.App.3d 607, the court held that the trial court had properly refused to give a requested instruction on present value because the defendant had not offered any evidence on how to make the necessary calculations. The computation of present cash value is "difficult and confusing … to present to a jury," the court reasoned. Absent evidence, the jury would have been put to "sheer speculation" in determining the "complicated factors of compounding and discounting which the instruction necessarily involved." Id. at 613-614. Compare *Fox v Pacific Southwest Airlines, supra,* 133 Cal.App.3d at 568, 570, fn. 5 [defendants preserved issue by requesting instruction and offering expert testimony on calculating present value].

Thus, Bell's argument for a present value instruction is wrong on two counts: BAJI 14.70 is inapplicable to intangible losses and Bell has waived any claim to the instruction.

III. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY TO DEDUCT FOR FUTURE CHILD-RAISING COSTS.

A. Child-Raising Costs Are an Offset Only Against Economic Losses, Which Plaintiffs Were Not Seeking.

The trial court properly refused to instruct the jury to deduct from plaintiffs' damages for the loss of Miguel's love, affection and companionship the amount they "saved" by not having to support and educate him. Such child-rearing costs are an offset only against damages for economic losses.

BAJI 14.52 sets forth the measure of damages for the death of a child. The court properly modified that instruction to fit the circumstances of this case. See *Finn v G.D. Searle & Co., supra,* 35 Cal.3d 691, 701. The court noted that BAJI 14.52 allows recovery for both tangible economic losses, such as the child's earnings and financial support, and the intangible non-economic losses claimed by plaintiffs. BAJI 14.52 then informs the jury to "take into consideration" what it would have cost the plaintiffs to support and educate the deceased child "as an offset against the factors of loss mentioned." The trial court had already modified the instruction to omit any reference to tangible economic losses, which plaintiffs were not seeking. Consequently, the court held, it was proper to omit the corresponding offset for child-raising costs. RT 703:14 to 704:20.[4]

1. The Court's Decision Was Supported by the "Benefit" Doctrine in the Restatement of Torts.

The court's reasoning was consistent with the "benefit" doctrine in tort damages, which is set forth in Restatement Second of Torts section 920, which states the general California rule on the subject. *Turpin v Sortini* (1982) 31 Cal.3d 220, 236. Section 920 provides, "When the defendant's tortious conduct has caused harm to the plaintiff … and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." (Emphasis added)

A comment to section 920 emphasizes the limitations of the "benefit" doctrine: "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited.… Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act.… Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife." Rest. 2d Torts §920, Comment (b), p. 510 (emphasis added).

The California Supreme Court applied Restatement section 920 in *Turpin v Sortini, supra,* 31 Cal.3d 220, a "wrongful life" case by a child born with hereditary deafness against the doctors who had failed to diagnose the same ailment in an older sister. The theory of the action was that if the defendants had diagnosed the older sister's deafness, the parents might have chosen not to bear a second child, who was also likely to be deaf.

The high court held that the plaintiff did not have a cause of action for general damages for being born impaired because, under the "benefit" doctrine of Restatement section 920, any damages must be offset by the "benefit" of being born at all. However, the court held that the plaintiff could recover the medical expenses necessary to treat her condition.

The court explained: "[P]ermitting plaintiff to recover the extraordinary, additional medical expenses … is also consistent with the established parameters of the general tort "benefit" doctrine discussed above. As we have seen, under that doctrine an offset is appropriate only insofar as the defendant's conduct has conferred a special benefit 'to the interest of the plaintiff that was harmed.' Here, the harm for which plaintiff seeks recompense is an economic loss, the extraordinary, out-of-pocket expenses that she will have to bear because of her hereditary ailment. Unlike the claim for general damages, defendants' negligence has conferred no incidental, offsetting benefit to this interest of plaintiff." Id. at 239.

Thus, *Turpin* underscores the restrictions inherent in the "benefit" doctrine of Restatement section 920. It applies only where the defendant's tortious conduct has conferred a benefit to the interest of the plaintiff that was harmed. In *Turpin,* the intangible injury of being born deaf was offset by the intangible benefit of being born at all. However, the plaintiff could recover for her economic losses because the defendants' tortious conduct had conferred no economic benefits on her.

Here, the interest of Angela and Jaime that was harmed was the loss of Miguel's love, affection, and companionship. That non-economic interest was not benefited by the economic "savings" in child-rearing costs resulting from Miguel's death. The loss of the son who was "the utmost" to Angela and Jaime simply cannot be treated as an economic benefit. Consequently, the child-raising costs cannot be set off against their damages.

The policy underlying this conclusion was well expressed by the Fifth Circuit Court of Appeals in *Hoyt v U.S.* (5th Cir. 1961) 286 F.2d 356, a suit under the Federal Tort Claims Act for the death of a child: "Such a [child-rearing] deduction is not actually logical for it would treat an incalculable loss as a 'pecuniary gain.' What makes life worth living more than the privilege of raising a son? Shall that privilege be treated by the law

as a liability of which the child's death relieves the parent? … We are entirely without doubt that Congress intended no deduction to be made for the cost of rearing the child to majority." Id. at 362, emphasis in original.[1]

2. California Cases Have Permitted the Offset Only Where "Pecuniary" Damages Were Claimed.

The trial court's reasoning was also consistent with California case law. No California case has ever held that it is necessary to offset the costs of raising a child where parents seek recovery only for the loss of their child's love, companionship, society.

Instead, the few California decisions to allow a child-raising offset in a wrongful death action have involved parents seeking damages for "pecuniary" losses. This was true in both *Fuentes v Tucker* (1947) 31 Cal.2d 1, 9 and *Fields v Riley* (1969) 1 Cal.App.3d 308, 315, the two cases cited by Bell. (AOB 14) *Fuentes*, *Fields,* and other early decisions viewed all of a parent's damages, even those for loss of the child's love, comfort, and society, as "pecuniary." *Fuentes v Tucker, id.; Fields v Riley, id.* Consequently, some courts permitted an offset for child-raising costs against the parent's "pecuniary" losses.

In *Krouse v Graham, supra,* 19 Cal.3d 59, 69, however, the California Supreme Court made clear that damages for loss of love, companionship, affection, and society are "nonpecuniary." This change destroyed the conceptual basis for allowing a child-rearing offset against such damages.

B. There Was No Evidence of Child-Raising Costs to Support an Instruction.

The other reason for the court's refusal to instruct about an offset was that there was no evidence in the record concerning the cost of raising Miguel. Defense counsel did not ask a single question to either plaintiff concerning their child-rearing expenses. No economic testimony was offered and no statistics were presented.

The court stated the problem succinctly: "They [the jurors] would only be speculating—from what you've suggested on their own life experience, not on any evidence that's been presented in this court. They would each of them say to themselves according to your argument, well, I think, and—in my family it would be this. And another would say, no, in my family it would be this. And I don't think we're giving them any more guidance. I think we would be thoroughly confusing them…." RT 704:6-13.

As discussed, supra, a party is entitled to an instruction only when there is "evidence of a substantial character" to support a finding on that issue. *Hasson v Ford Motor Co., supra,* 19 Cal.3d at 548. It is error to instruct on any theory that is not supported by evidence. *Levy-Zentner Co. v Southern Pac. Transp. Co., supra,* 74 Cal.App.3d at 783.

Here, even defense counsel conceded that "there is no evidence on how much to would cost to raise this child and educate this child…." RT 702:27-28. Consequently, the trial court properly refused to instruct concerning an offset for child-raising costs.

Bell errs in its suggestion that plaintiffs had the burden to present evidence of future child-raising costs. Bell's only authority is a treatise, Johns, California Damages, which cites no basis for its conclusion. (AOB 15) The burden for presenting offset evidence should be on Bell since the offset would be a defense which reduces plaintiffs' recovery. Evid C §500 [party has burden of proof as to facts which are essential to a defense which it is asserting].

Moreover, the benefit doctrine is an aspect of mitigation of damages. See 6 Witkin, Summary of California Law, *Torts* §§1382-1386. The defendant has the burden to present evidence of mitigation. *Parker v Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 182; *Hunter v Croysdill* (1959) 169 Cal.App.2d 307, 318.

C. If the Court Finds That an Offset Instruction Should Have Been Given, Any New Trial Should be Limited to That Issue.

Assuming arguendo that this Court determines that the jury should have been instructed on the child-raising offset, any new trial should be limited to that discrete issue.

"The appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried

without such confusion or uncertainty as would amount to a denial of a fair trial." *Brewer v Second Baptist Church* (1948) 32 Cal.2d 791, 801 [ordering new trial limited to exemplary damages]; see 9 Witkin, California Procedure, *Appeal* §643, pp. 625-626.

Both the California Supreme Court and appellate courts have expressed their preference for a limited new trial where the error in the first trial was limited to a specific, separable issue. In *Schelbauer v Butler Mfg. Co.* (1984) 35 Cal.3d 442, the trial court held that the jury erred in apportioning damages among defendants but the court granted a new trial on all issues. The Supreme Court modified the new trial order to limit it to the apportionment issue. "There is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence," the court stated. Id. at 457. Accord: *Interstate Group Adm'rs, Inc. v Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700 [new trial limited to setoff issue].

In the instant case, the calculation of the amount of the offset, if any, is separate and distinct from any other issue. Therefore, any new trial should be limited to that issue.

IV. THE TRIAL COURT PROPERLY USED THE BAJI LIFE EXPECTANCY TABLE, RATHER THAN THE MEXICAN TABLE, BECAUSE THERE WAS NO EVIDENCE THAT PLAINTIFFS WOULD RETURN TO MEXICO AND BECAUSE THE MEXICAN TABLE WAS INACCURATE.

Because Angela and Jaime will experience the loss of Miguel's love, companionship, and society for the rest of their lives, the trial court properly instructed the jury on Angela's and Jaime's life expectancies. BAJI 14.52, 14.69. The court determined those figures from the standard BAJI life expectancy table, using the data applicable to persons who are neither white nor black. BAJI Instr. Appendix A; RT 750:1-5.

The court refused to use a Mexican table offered by Bell, which gave life expectancies at birth for persons in Mexico. RT 707:24 to 711:15. Because that table is not part of the appellate record, Bell's argument about how much the verdict would have been reduced (AOB 16-17) is not properly before this Court. Cal Rules of Court 8.200; *Null v City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532; *Kendall v Baker* (1988) 197 Cal.App.3d 619, 625.

The trial court's use of the BAJI, rather than the Mexican, table was a proper exercise of discretion for several reasons.

First, Bell's argument rests on a faulty premise—that Angela and Jaime would return to Mexico and, therefore, would not live as long as they would have in the United States. However, as the trial court stated, "We don't know they're going to go back to Mexico." RT 708:5-6. Defense counsel, Mr. Jensen, agreed: "No, we don't." The court noted that "there was no evidence that the parents or child would be living in Mexico" and whether they would be deported "would be speculation." RT 710:12-13 and 17-19. The court concluded, "[W]e take the Plaintiffs as they are, and we'll use the life expectancy of people in the United States…." RT 711:12-13.

The California Supreme Court considered a very similar issue in *Clemente v State of California* (1985) 40 Cal.3d 202. In that personal injury action, the plaintiff was an illegal immigrant who was seriously injured in a traffic accident. The trial court refused to permit questioning of the plaintiff's wife regarding her husband's citizenship. On appeal, the defendants contended that such evidence was relevant to plaintiff's claim for future loss of earnings because, if he were deported, the plaintiff's earning capacity would be much lower.

In upholding the exclusion of the evidence, the high court's reasoning was nearly identical to the trial court's here: "Plaintiff had been gainfully employed in this country prior to his two accidents, there was no evidence that he had any intention of leaving this country and the speculation that he might at some point be deported was so remote as to make the issue of citizenship irrelevant to the damages question," the court stated. *Id.* at 221.[2]

The second reason why the trial court properly refused to use the Mexican table was that it calculated life expectancy on an entirely different basis from the BAJI table. The Mexican table gave only a baby's life expectancy <u>at birth</u>. Because of the infant mortality rates in Mexico, the Mexican table significantly underestimated the life span of persons who had reached adulthood. RT 709:4-11; 711:6-8. By contrast, the BAJI table measures life expectancy from a person's <u>present</u> age. BAJI, App. A. Using the BAJI table, the trial court was able to instruct on Angela's and Jaime's life expectancies based on their actual ages at trial. RT

750:1-5. Bell offered no comparable Mexican data for persons of plaintiffs' ages. Consequently, the trial court could reasonably determine that the BAJI table was far more accurate than the Mexican table. See *Finn v G.D. Searle & Co., supra,* 35 Cal.3d at 701.[3]

The third reason why the trial court properly utilized the BAJI table is that use of such standard statistics has been approved even when the plaintiff was in poor health. For example, in *Christiansen v Hollings* (1941) 44 Cal.App.2d 332, the court held that there was no error in admitting the standard life expectancy tables although the plaintiff had a bad heart and diseased kidneys. However, the court held that the defendant was entitled to a qualifying instruction that, in estimating a particular person's life span, the individual's state of health, occupation, habits and surroundings must be taken into account. Accord: *Groat v Walkup Drayage etc. Co.* (1936) 14 Cal.App.2d 350, 359.

If the standard life expectancy tables may be used when the plaintiff is ill, it was certainly not error to use such a table here, where plaintiffs were in good health but merely from a foreign country. The jury in this case received a qualifying instruction like that approved in Christiansen. Reading BAJI 14.69, the court told the jury that the life expectancy information was "not conclusive" but was "an average life expectancy" of persons that have reached that age." The court said that the jury could consider the life expectancy figures in connection with other evidence relating to the plaintiffs' probable life span, including "evidence of occupation, health, habits, and other activities, bearing in mind that many persons live longer and many die sooner than the average." BAJI 14.69; RT 750:6-12.

Based on that instruction, Bell's counsel could have argued that plaintiffs would not live as long as the BAJI average life expectancies because they had grown up in Mexico and had lived there until 1990; they held menial jobs; and they were apparently poor and uneducated. Defense counsel, however, made no argument about plaintiffs' life expectancies.

At any rate, the trial court's decision to use American statistics for plaintiffs who were living in the United States, rather than an inaccurate Mexican table, was well within its discretion.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OF AN INCIDENT AFTER MIGUEL'S DEATH AND EVIDENCE OF PLAINTIFFS' IMMIGRATION STATUS.

California trial judges have wide discretion under Evidence Code §352 to exclude evidence if its probative value is substantially outweighed by the probability that its admission will consume too much time or create a substantial danger of undue prejudice, confusion of the issues, or misleading of the jury. Evid C §352; *Nally v Grace Community Church* (1988) 47 Cal.3d 278, 304.

Bell ignores this basic principle in arguing that the lower court committed error in excluding evidence of "one domestic violence incident between Jaime Molina and Angela Herrera," "criminal proceedings involving the plaintiffs," and plaintiffs' immigration status as alleged illegal aliens. (AOB 17-18) These references are to issues raised in plaintiffs' in-limine motions, which were not included in the clerk's transcript and which were only briefly discussed in the reporter's transcript. RT 22:9 to 25:11, 39:7-13.

The "one domestic violence incident" and the "criminal proceedings involving the plaintiffs" refer to a single incident which occurred after Miguel's death. RT 22:9-12, 24:14 to 25:6. Bell's assertion that "it is unclear from the record if the incident(s) took place before or after the child's death" is incorrect. (AOB 17) When the family went to the cemetery for Miguel's burial, Miguel's casket was too big for the hole that had been dug. Cemetery employees kept the family waiting for an hour and then told them that the burial would have to be rescheduled. Jaime became enraged, got drunk and hit Angela. He was arrested and later sought counseling. RT 24:14 to 25:6.

The trial court engaged in the required balancing process before deciding to exclude that evidence. *Kessler v Gray* (1978) 77 Cal.App.3d 284, 291; RT 25:9-11, 39:7-11. The court recognized that admission of the evidence could lead to speculation about why Jaime struck Angela. "There's all kinds of things we could get into. I just don't want to do that with Evidence Code §352," the court stated. RT 25:7-11. Exclusion of the evidence was well within the court's discretion, in light of the facts that the event occurred after Miguel's death, was irrelevant to plaintiffs' relationship with Miguel, and arose out of unique circumstances which were not likely to recur.

Evidence of plaintiffs' immigration status as alleged illegal aliens was also properly excluded under §352. In *Clemente v State of California, supra,* 40 Cal.3d at 221, the Supreme Court held that evidence that a personal injury plaintiff was an illegal alien is, at best, "marginally relevant" and "highly prejudicial." Consequently, the high court in Clemente affirmed the exclusion of the evidence of illegal immigrant status.

The high court's reasoning in Clemente applies in this case. There is no basis for inferring that plaintiffs' immigration situation had any impact on their relationship with Miguel or the extent of their losses. Bell has advanced no reasonable argument that Angela and Jaime loved Miguel any less or that Miguel's disposition was less "kindly" or "affectionate" (BAJI 14.52, AOB 18) because the family may not have had proper immigration papers.

Yet, given the current raging debate in California concerning illegal immigration and Proposition 187, admission of the evidence could have prejudiced the jury's fair consideration of the case. The trial court's exclusion of this evidence was a reasonable balancing of these factors.[4]

CONCLUSION

When Miguel drowned, Angela Herrera and Jaime Molina lost the child who was "the utmost" to them. Although no economist can calculate the precise value of Miguel's love and companionship, the jury acted reasonably in awarding Angela and Jaime a sizable verdict for their devastating loss. Bell has not presented a single valid argument in its various challenges to the damage verdict. Consequently, the judgment should be affirmed.

DATED: November 14, 1994

Respectfully submitted,
LAW OFFICES OF ELLEN LAKE
MORTON GOULD

By: _____
ELLEN LAKE
Attorneys for Respondents
Angela Herrera and Jaime Molina

PROOF OF SERVICE

I, Ellen Lake, declare:

I am an active member of the State Bar of California and not a party to the above-entitled action. My business address is 4230 Lakeshore Avenue, Oakland, California 94610-1136.

On the date set forth below, I served the attached REQUEST FOR ORAL ARGUMENT by enclosing a true copy thereof in a sealed envelope with first class postage fully prepaid and placing it in the United States Mailbox at Oakland, California, addressed as follows:

JOHN W. CHARLES
HAROLD B. WATKINS
HANCOCK, ROTHERT & BUNSHOFT
4200 Market Street, Suite 400
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct. Executed on April __, 1994, at Oakland, California.

_____
ELLEN LAKE

1The trial court in the instant case made a similar observation about plaintiffs' claim for loss of Felipe's comfort, society and

protection: "So we start off with the appropriate position that the only thing [the jury is] entitled to award damages for is something on which there is no evidence of value." RT 703:22-25. This comment simply recognized the obvious; it did not, as Fuller argues (AOB 8), suggest some defect in the evidence.

2Fuller's reliance on *Fox v Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 is misplaced. (AOB 11) *Fox*, a pre-1993 decision, emphasized the instruction's prior use of "pecuniary." Additionally, *Fox* persisted in viewing a claim for lost love, society and companionship as "pecuniary" despite the Supreme Court's contrary holding in *Krouse v Graham, supra*. *Fuentes v Tucker* (1947) 31 Cal.2d 1, 9, which Fuller also cites for its present value argument (AOB 12), does not deal with present value at all.

3Comment (a) states in pertinent part:

The requirement of reduction to present worth applies to future pecuniary losses in general, but it arises most frequently with personal injuries. If earning capacity has been lost or impaired, the future losses in earnings are discounted. So also with damage awards covering future medical expenses; the payment of them at the future date will be a pecuniary loss. But an award for future pain and suffering or for emotional distress is not discounted in this fashion.

4The first two paragraphs of BAJI 14.52 are set forth below. The underlined portions were included in the trial court's charge to the jury:

<u>If you should find that plaintiff[s] [are] entitled to a verdict, you will award [them] such sum as, under all the circumstances of the case, may be just compensation for the loss</u> [they] [have] suffered by reason of the death of [their] child.

In determining that loss, you may consider [as economic damages] not only the benefit that plaintiff[s] [were] reasonably certain to have received from the earnings and services of [their] child during the child's minority, but also the support and financial benefit which it is reasonably certain plaintiff[s] would have received from the child after the latter's majority and during the period of their common expectancy of life. You may also consider [as non-economic damages] what loss, <u>if any, plaintiff[s] [have] suffered, and will suffer in the future with reasonable certainty, by being deprived of the love, companionship, comfort, affection, society, solace or moral support of the child.</u> As an offset against the factors of loss mentioned, you should take into consideration what it would have cost the plaintiff[s] to support and educate the deceased child, had [he] lived.

[1]Comparable reasoning was expressed in *Sanchez v Schindler* (Tex. 1983) 651 S.W.2d 249, 251, in which the Texas Supreme Court reversed prior case law and allowed parents to recover for the loss of companionship and society in the death of their child: "Strict adherence to the pecuniary loss rule could lead to the negligent tortfeasor being rewarded for having saved the parents the cost and expense of raising a child. The real loss sustained by a parent is not the loss of any financial benefit to be gained from the child, but is the loss of love, advice, comfort, companionship, and society."

[2]Fuller relied below on *Rodriguez v Kline* (1986) 186 Cal.App.3d 1145, which held that an illegal alien's future lost earnings should be governed by those which he would earn in his country of origin. That case does not help Fuller here for two reasons. First, it conflicts with the Supreme Court's reasoning in *Clemente v State of California* and is not good law. Second, the jury here was compensating plaintiffs for intangible emotional losses, the nature of which does not vary with the place of one's domicile.

[3]The Mexican table suffered from an additional shortcoming—it was based on 1970 data and was thus 24 years out of date. Although Fuller has failed to include the Mexican table in the appellate record, the Court is requested to take judicial notice of this fact if Fuller seeks to augment the record. Evid. Code, §§452, subd. (c); 459.

[4]*Fields v Riley, supra,* 1 Cal.3d 308, to which Fuller cites (AOB 19), did not involve the exclusion of evidence and has no bearing on this issue.

*Editor's Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. Names of parties and attorneys who have not contributed to this book have been changed for publication.

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Appendix C

Sample Petition for Review*

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAUREEN I. HANKS,	)	**1 Civil No. A033433**
Plaintiff and Appellant,	)	
	)	**Santa Maria County**
vs.	)	**Superior Court No. P37451**
	)	
GREEN'S PHARMACY, et al.,	)	
Defendants and Respondents.	)	
_____	)	

PETITION FOR REVIEW BY MELROSE AND COMPANY AND ARIEL DRUG COMPANY

From the Opinion of the Court of Appeal
First Appellate District, Division One

On Appeal from the Judgment of the Superior Court of the State of California, County of Santa Maria

Honorable J. Arnold Tuchin

Samuel O. Osten
EDWARDS, EDWARDS & OSTEN
State Bar No._____
Five Lakeshore Blvd., Suite 900
Oakland, CA 94006
(510) 843-4210
Attorneys for Defendant and Respondent Green's Pharmacy

Richard J. Heafey
Peter W. Davis
James C. Martin
CROSBY, HEAFEY, ROACH & MAY
State Bar No._____
1999 Harrison Street
Oakland, CA 94612
(510) 763-2000
Attorneys for Defendant and Respondent Melrose and Company

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To the Honorable Chief Justice Rose E. Bird and the Honorable Associate Justices of the California Supreme Court:

Respondents Melrose and Company, a corporation, and Green's Pharmacy petition from the opinion of the Court of Appeal, First Appellate District, Division One filed on July 3, 1985. A copy of the opinion is attached as Exhibit A.

I. ISSUES PRESENTED FOR REVIEW

1. Are this Court's holdings on accrual of the statute of limitations in *Gutierrez v Mofid* (1985) 39 C3d 892, *Miller v Bechtel Corp.* (1983) 33 C3d 868, and *Sanchez v South Hoover Hosp.* (1976) 18 C3d 93, which provide that the statute of limitations begins to run when the plaintiff's suspicions have been aroused of the need to pursue her legal remedies, applicable to a plaintiff who alleges injuries from a pharmaceutical product?

2. Does this Court's holding in *Monroe v Trustees of Cal. State Colleges* (1971) 6 C3d 399, which provides that a change in the law does not revive a claim that is already barred by the statute of limitations, apply to a plaintiff who did not file her action for alleged injuries from a pharmaceutical product until after this Court changed the law in *Sindell v Abbott Labs.*?

II. STATEMENT OF THE CASE

After this Court decided *Sindell v Abbott Labs.* (1980) 26 C3d 588, cert. denied 449 US 912, a number of suits were filed by women who had believed for years that they had been injured by DES. The depositions of these plaintiffs revealed that they knew of their injury, believed it was caused by DES, thought DES was a bad product for causing that injury and in several cases, as here, knew other women were suing for similar injuries allegedly caused by the same product. The only reason they had not filed suit before was a belief that they had to identify the manufacturer of the product involved.

Defendants moved to dismiss on statute of limitations grounds those suits where the plaintiffs had admitted facts in discovery that would bar their suits under the prevailing law. Five of these cases have now been decided on appeal with conflicting results despite the similarities of the factual allegations that have been demonstrated in discovery. Four others are still pending in the First District Court of Appeal.

The first case to be decided on appeal was *Shoup v Abbott Labs.*, No. A023551. In *Shoup*, by late 1974 the plaintiff knew of her injury and its alleged cause by in utero exposure to DES. She also knew by early 1975 that other women similarly situated had filed lawsuits against the manufacturers of DES. Nevertheless, she made no investigation of her potential claim until 1981 because she believed that she would be required to identify the actual manufacturer of the DES taken by her mother. The trial court granted summary judgment, and Division Three of the First District, relying on cases like *Gray v Reeves* (1977) 76 CA3d 567, affirmed in an unpublished opinion.[1] The court held that plaintiff's knowledge of her injury and its cause put plaintiff on notice that she must investigate whether she had a claim. The court specifically rejected the contention that actual knowledge of wrongdoing was required before plaintiff's cause of action could accrue. Plaintiff did not petition for review.

The next two cases were argued and decided together in Division One of the First District. *Kensinger v Abbott Labs.*, A021931, and *Bertot v Abbott Labs.*, A021930.

In 1973, plaintiff Bertot believed her injury was caused by DES, that the drug was ineffective, and that the manufacturers knew it was ineffective when her mother took it. In 1975, she heard about a lawsuit over the same injuries she had which were allegedly caused by the same drug. She wrote a woman familiar with these allegations for information, and received a highly pejorative "fact sheet" about DES, with the name and address of a person in Michigan to contact about the other lawsuit. At that time, plaintiff Bertot was upset and thought it was "pathetic" that DES had been sold. She could not understand how her mother's doctor could prescribe such a drug. Yet, she made no investigation and took steps to file a lawsuit only when she heard about Sindell. Indeed, she admitted in her deposition that she learned absolutely nothing else between 1975 and November, 1980, when she filed suit, except for the change in the law created by *Sindell*.

Plaintiff Kensinger had also believed since 1974 that her injuries were caused by exposure to DES. Before June, 1977, she was "angry" and resentful that she had been injured by DES, and thought that DES was a "bad product." She was also told in 1977 that her mother had allegedly taken Melrose's DES. Yet, she also made no inquiry for six years and took no steps to file a lawsuit until 1980, when she also heard about *Sindell*. Like plaintiff Bertot, she admitted in deposition that she learned nothing new between 1974 and when she filed in 1980, except the change in the law created by the *Sindell* decision.

In these two cases, Division One held that plaintiffs' causes of action did not accrue until they knew or should have known of the specific acts of alleged wrongful conduct of the defendants, *i.e.,* what tests were or were not performed and what warnings were or were not given.[2] The court specifically rejected the argument that any of the facts of either case, individually or in combination, would cause plaintiffs' causes of action to accrue as a matter of law—not knowledge of the injury and its cause, not knowledge of other lawsuits involving the same injury and product, not a belief that the product was bad, and not feelings such as anger or disgust toward the manufacturers of the product that allegedly caused the injury. The court also used the change in the law created by Sindell as a policy ground to support its holding in each instance.

This Court denied review of *Kensinger* and *Bertot* perhaps because it had just spoken on the statute of limitations question in *Gutierrez v Mofid, supra*, 39 C3d 892. In *Gutierrez,* this Court reaffirmed *Sanchez v South Hoover Hosp., supra*, 18 C3d 93 (where summary judgment for defendant was also ordered), holding that the applicable standard for determining when the statute of limitations accrues is when plaintiff has "notice or information of circumstances to put a reasonable person on *inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation...." *Gutierrez v Mofid, supra*, 39 C3d at 896-897 (emphasis in original). As this Court held:

> Thus, when the patient's 'reasonably founded suspicions [have been aroused],' and she has actually 'become alerted to the necessity for the investigation and pursuit of her remedies,' the one-year period for suit begins. *Id.* at 897.

Division Two of the First District subsequently applied *Gutierrez* to affirm the dismissal of an action on summary judgment. That case, *Sobieski v Abbott Labs.*, A025586, was denied review by this Court on June 25, 1986. Division Two concluded that a plaintiff who, more than one year before she filed her lawsuit, had consulted an attorney, was aware of other lawsuits involving DES, and who had read newspaper articles concerning other lawsuits involving the product, had sufficient knowledge to put a reasonable person on inquiry of the need to pursue her remedies. The court therefore concluded that the statute of limitations had run despite plaintiff's protestations that she did not know the precise facts about the allegedly tortious conduct of the defendants. Following Gutierrez, Division Two held that plaintiff's argument misapprehended the relevant inquiry. Instead, the question was could reasonable minds differ on whether plaintiff was under a duty to inquire of the need to pursue her legal remedies. Since plaintiff's suspicions had undeniably been aroused, the answer was "no" and the statute of limitations started to run.

In the present case, the record establishes as a matter of law that the plaintiff had the requisite knowledge to arouse her suspicions of the need to pursue her legal remedy. No inferences are required to so hold—plaintiff admitted as much in her deposition.[3] Yet, Division One refused to hold that her claim was barred by the statute of limitations, finding instead that a triable issue of fact was presented because the record "did not reflect" that the plaintiff knew precisely of the allegedly tortious conduct of the defendants. The court justified this result on the ground that plaintiff was unaware of this Court's opinion in *Sindell* until one year before she filed her lawsuit.

It is clear that Division One of the First District has a different rule for the commencement of the statute of limitations than the one which is being followed in Divisions Two and Three of that District. While there may have been room for doubt when *Kensinger* and *Bertot* were decided, there is no ambiguity at the present time. Unless this Court acts, the Divisions will continue to apply a different rule on a dispositive statute of limitations issue that is pending in other First District cases. *Habermann v Abbott Labs.*, A025127 (Division One); *Marrot v Abbott Labs.*, A026705 (Division One); *Pomeranz v Abbott Labs.*, AO31754 (Division Four); *LeVeque v Abbott Labs.*, A025684 (Division Five). Statute of limitations issues will no doubt be presented in other products liability cases in the First District in the future, generating the same conflicting results on virtually identical facts.

Our legal system is—at least in principle—designed to apply and interpret rules of law to eliminate uncertainty and confusion. As the English Jurist Justice Wallis remarked, "that's our law; if, however, it were not, its absurdity would be readily apparent." See Atiyah, Wechsler, *Principles to Pragmatism: Changes in the*

Function of the Judicial Process and the Law, 65 Iowa L Rev. 1249, 1270-1272 (1980); Wechsler, Principals, Politics, and Fundamental Law 21 (1961).

While perfection in application and interpretation is obviously not possible, it is also true that the same set of facts should generally give rise to the same legal result. If they do not because intermediate appellate courts do not see the issue the same way, this Court should act and put a stop to such erratic results. Indeed, Rule 8.500(b)(1) expressly enumerates securing "uniformity of decision" as a ground for review. When there are five existing conflicting opinions and four more coming, the issue has matured long enough.

The tort system has already drawn criticism for not effectively achieving risk spreading because its erratic results distribute costs unfairly among manufacturers and the public alike. Sugarman, *Doing Away with Tort Law*, 73 Cal L Rev 558 (1985).

When courts dispense with any attempt to uniformly apply rules of law and strive solely to reach a result (*i.e.,* compensation of injured parties) it exacerbates both problems—erratic results and unfairness. How can it be explained to plaintiffs Shoup and Sobieski that they are out of court when, on the same facts, plaintiffs Hanks, Bertot and Kensinger are told the opposite? Conversely, how can these divergent results be explained to the various defendants? There is no rational or fair answer.

We respectfully submit that the parties and the public deserve a small piece of this Court's time to resolve this illogical conflict.

III. THIS COURT MUST ESTABLISH CONSISTENT RULES FOR THE ACCRUAL OF THE STATUTE OF LIMITATIONS IN PRODUCT LIABILITY ACTIONS

When respondent Melrose's motion for summary judgment was heard, the following uncontradicted facts confronted the trial court:

(1) By 1975, plaintiff was interested in "obtaining more information" about DES because she wanted to "make a claim" or "recover from someone" for her injuries that she believed were related to DES (CT 136-137);

(2) By 1978, plaintiff believed that she should be compensated by a DES drug manufacturer because of her medical problems (CT 136-137);

(3) By 1978, plaintiff believed a DES drug manufacturer had wrongfully harmed her (CT 137-138);

(4) Despite the fact that plaintiff believed she was entitled to compensation, she did not talk to any attorneys about what recourse she might have before 1980 (CT 146-147);

(5) Prior to 1978, plaintiff knew that other women were filing lawsuits regarding DES, but she did not make any effort to find out more information about such lawsuits other than what she read in the newspaper (CT 148-149); and

(6) Between 1978 and the time she first contacted a law firm in 1980—the date she alleges her cause of action accrued—plaintiff did not learn any new facts about DES; rather she learned only about a "change in the law." (CT 139-140)[4]

The trial court held that these facts compelled the conclusion that the statute of limitations had run. (CT 315) Relying primarily on its opinion in *Kensinger v Abbott Labs.* (1985) 171 CA3d 376, the Court of Appeal reversed finding that the record did not show that plaintiff knew precisely of the allegedly tortious conduct which allegedly caused her injuries. (Exh. A attached at 5-6)

As noted above, the statute of limitations is commenced under *Gutierrez v Mofid, supra*, 39 C3d 892:

> [W]hen the [plaintiff's] 'reasonably founded suspicions [have been aroused]' and she has actually 'become alerted to the necessity for investigation and pursuit of her remedies,' the one-year period for suit begins. *Id.* at 897.

This standard is the same one that this Court had previously articulated in *Sanchez v South Hoover Hosp., supra,* 18 C3d at 101-102 and reaffirmed in *Miller v Bechtel Corp., supra*, 33 C3d at 875. Under these cases, the

appropriate inquiry does not focus on the state of plaintiff's actual knowledge of the allegedly tortious cause of her injury but whether plaintiff's "suspicions have been aroused" of "the need to investigate and pursue her remedies." *E.g.*, *Christ v Lipsit* (1979) 99 CA3d 894, 898.

In this case it is undisputed that, more than two years before plaintiff filed her lawsuit, she knew of her injury and its cause. (CT 131-135) It is also undisputed that, more than two years before she filed her lawsuit, plaintiff: (1) was interested in "obtaining more information" about DES because she wanted to "make a claim" or "recover from someone" for her injuries that she believed were related to DES; (2) believed that she should be compensated by a drug manufacturer for her medical problems because a drug company had wrongfully harmed her; and (3) knew that other women were filing lawsuits regarding DES based on what she read in the newspaper, but elected not to talk to any attorneys before 1980 about what recourse she might have.

There is accordingly no room for doubt on this record. Under this Court's holding in *Gutierrez*, plaintiff clearly had enough knowledge to make a reasonably prudent person suspicious—to have put a reasonable person on notice of the necessity for investigation of a claim—and the statute of limitations *started to run* at that time. Indeed, plaintiff conceded both that her suspicions were aroused and that she was in fact looking for someone to sue. Plaintiff's statute of limitations therefore had run, as a matter of law, when she filed suit in 1981, as an unbroken line of California cases provide. *E.g.*, *Sidney-Vinstein v A. H. Robins Co.* (9th Cir 1983) 697 F2d 880, 882-884 (summary judgment because more than one year elapsed from time plaintiff was aware of her injury and its cause); *Miller v Bechtel Corp., supra*, 33 C3d at 874-876 (summary judgment because more than four years elapsed from time plaintiff had knowledge of facts to make a reasonably prudent person suspicious); *Sanchez v South Hoover Hosp., supra,* 18 C3d at 101-102 (summary judgment because more than one year elapsed from time when plaintiff suspected defendant had done something wrong); *Graham v Hansen* (1982) 128 CA3d 965, 975 (summary judgment because more than one year elapsed from time plaintiff became alerted to necessity of investigating her remedies); *McGee v Weinberg* (1979) 97 CA3d 798, 803-804 (demurrer upheld because more than one year elapsed from time when plaintiff knew of facts showing the cause of her injury); *Burgon v Kaiser Found. Hosps.* (1979) 93 CA3d 813, 822-823 (nonsuit granted because more than one year elapsed from time when plaintiff knew that injuries were caused by side effect from drug).

Moreover, between the time of her surgery in 1978 and the time she first contacted a law firm in 1980—the date she alleges her cause of action accrued—plaintiff admitted she did not learn any new facts about DES; rather she learned only about a "change in the law." (CT 139-140) Thus, plaintiff did not sue *only* because she thought *the law* barred her claim. Yet, the awareness or lack of awareness of a legal cause of action or legal theory is immaterial: "It is irrelevant that plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action." *Gutierrez v Mofid, supra*, 39 C3d at 898. Accordingly, plaintiff's "unawareness" of the *Sindell* theory *cannot* affect the running of the statute. *E.g.*, *Call v Kezerian* (1982) 135 CA3d 189, 197; *Graham v Hansen, supra*, 128 CA3d at 972-973; *McGee v Weinberg, supra*, 97 CA3d at 802-804.

Under the Court of Appeal's ruling, therefore, a plaintiff who believed she had been injured by a faulty product could, by doing nothing, toll the statute of limitations for any period she chose. Only when a plaintiff admits that she knows—because she chose to find out—the precise facts of alleged wrongdoing on the part of the defendants would the statute of limitations even begin. There would be no duty to investigate the need to pursue her legal remedies despite the fact that plaintiff's suspicions have undeniably been aroused of the need to seek relief. In the meantime, evidence can be lost, and memories of witnesses will fade, thus impeding or destroying potential defenses to the suit. That cannot be the law.

Statutes of limitations are "favored in the law because they promote desirable social ends and give security and stability to human affairs." *McGee v Weinberg, supra*, 97 CA3d at 804; accord, *U.S. v Kubrick* (1979) 444 US 111, 117, 125, 62 L Ed 2d 259; *U.S. v Gutterman* (9th Cir 1983) 701 F2d 104, 107; *Lackner v LaCroix* (1979) 25 C3d 747, 751; *Scherer v Mark* (1976) 64 CA3d 834, 844.

As Justice Wiener pointed out in *Krusesky v Baugh* (1982) 138 CA3d 562, 566, "the policy behind statutes of limitations is as meritorious as the policy of trying cases on their merits." Accord, *Scherer v Mark, supra*, 64 CA3d at 844; see, *Welco Construction Inc. v Modulux, Inc.* (1975) 47 CA3d 69, 74 (statutes of limitations are "vital to the welfare of society"). Thus, while it is not the policy of the law to unjustly deprive one of his or her remedy, if the plaintiff has "knowledge or cause for knowledge, there is no policy which requires the protection of plaintiffs." *Warrington v Charles Pfizer & Co.* (1969) 274 CA2d 564, 573.

The Court of Appeal here has lost sight of these fundamental principles. This Court should act now to restore certainty to the statute of limitations analysis in product liability cases and avoid the unfairness that

results from inconsistent opinions of the Courts of Appeal.

IV. THIS COURT MUST ESTABLISH WHETHER THE RULE THAT A CHANGE IN THE LAW DOES NOT REVIVE PREVIOUSLY BARRED CLAIMS APPLIES IN PRODUCT LIABILITY ACTIONS

Before *Kensinger v Abbott Labs., supra*, 171 CA3d 376, it was well established that a change in the law would not create a new statute of limitations. *E.g.*, *Monroe v Trustees of Cal. State Colleges* (1971) 6 C3d 399, 406-408 n5; *Priola v Paulino* (1977) 72 CA3d 380, 383; *Bartolo v Superior Court* (1975) 51 CA3d 526, 532-534; *Lopa v Superior Court* (1975) 46 CA3d 382, 389-391. *Kensinger* acknowledged the rule, but then suggested that it could be ignored by simply transforming the awareness of a new legal theory into the discovery of facts. *Kensinger v Abbott Labs., supra*, 171 CA3d at 384-385.

While that issue was not clearly presented in *Kensinger*, it is fundamental here since plaintiff Hanks conceded that the only reason she waited until 1981 to sue, and why she sued then, was the change in the law created by *Sindell*. In the trial court and in her briefs in the Court of Appeal, plaintiff did not dispute that she had adequate knowledge of facts to otherwise commence the statute of limitations. (See n4, *supra*) The Court of Appeal, however, held (quoting *Kensinger*) that:

> **It bears emphasis that it is not lack of knowledge of available legal theories but lack of knowledge of the operative facts of specific wrongdoing which tolls the statute, a distinction not always readily discernible.**
>
> **Knowledge of the occurrence and origin of harm cannot necessarily be equated with knowledge of the factual basis for a legal remedy.**
>
> **Understandably, she was unaware of any right of legal recourse until after the benchmark holding in Sindell. Thus, we cannot say as a matter of law that plaintiff failed to use reasonable diligence before 1980 to discover the wrongful conduct of the drug manufacturer responsible for her injuries. (Exhibit A attached at 4-5)**

Under the Court of Appeal's approach to the running of the statute, the awareness of a new legal theory becomes a "fact necessary to pursue a remedy," and the statute of limitations is tolled until the plaintiff acquires knowledge of that "fact" despite the rule to the contrary. This abandonment of the established rule is justified on the basis that the distinction between knowledge of facts and knowledge of a legal theory (like *Sindell*) is "not readily discernible." Yet, the distinction was readily apparent to plaintiff Hanks. She admitted she delayed consulting an attorney until she heard about the change in the law created by *Sindell*. She was otherwise prepared to go forward with a lawsuit.

Apparently, the First District intends to restrict this new rule to products liability actions, or at least to drug product liability cases. Whether there should be a different rule for the accrual of the statute when the law changes in the product liability context, however, is a very significant issue with wide ramifications that should be addressed by this Court.

V. CONCLUSION

This case presents the sharply focused issue of when a cause of action accrues in product liability cases. The opinion in this case has created an irreconcilable conflict in the law which will cause havoc in pending cases in the First District, not to mention other product liability cases involving the statute of limitations that will make their way up on appeal in the future.

The conflict in the First District cases should be resolved now by this Court. Otherwise, the outcomes of these cases will turn solely on the division to which the case is assigned. Such a result is unconscionable and the law should be more predictable to protect the rights of all parties concerned. The petition for review should accordingly be granted and the ruling of the trial court affirmed.

DATED: July 1, 1986.

Respectfully submitted,
EDWARDS, EDWARDS & OSTEN
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By: _____
Peter W. Davis

Attorneys for Defendant and Respondent
Melrose and Company,
a corporation

EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

MAUREEN I. HANKS, Plaintiff and Appellant,	)	A033433 (Santa Maria County Super. Ct. No. P 37451)
vs.	)	
MELROSE & CO. et al., Defendants and Respondents.	)	

On March 5, 1981, plaintiff Maureen Hanks filed suit against various drug companies alleging causes of action for negligence, strict products liability, breach of warranty, misrepresentation and statutory violation.[1] On May 27, 1983, defendant Melrose & Company, joined by other defendants, moved for summary judgment alleging the statute of limitations as a bar to plaintiff's action. Summary judgment was granted on July 22, 1983, and judgment in favor of defendants was then entered and filed on September 20, 1983.[2] This appeal ensued.

Factual Background

Plaintiff was born in 1951. In 1972, she first learned that her mother had taken the synthetic estrogen diethylstilbestrol (DES) for prevention of miscarriage during her pregnancy with plaintiff. Plaintiff then went to a special DES clinic at UCLA Medical Center and was diagnosed as having adenosis, a precancerous condition. In 1976, she had an abnormal Pap smear and a D & C (surgical procedure). In 1978 plaintiff underwent a complete hysterectomy because of a malignancy. Beginning in 1972, plaintiff and, primarily, her parents made efforts to discover the identity of the DES manufacturer. Her mother knew the prescribing physician was dead; the hospital had no records. Her parents consulted the dispensing pharmacist, who remembered dispensing DES to Mrs. Hanks but had no records thereof. Although plaintiff believed that her cancer was caused by DES, she thought she had no legal recourse unless she knew the specific company that had manufactured her mother's drug; thus, she did not consult an attorney until after learning of the California Supreme Court's decision in *Sindell v Abbott Labs.* (1980) 26 C3d 588, cert. denied 449 US 912.[3]

DISCUSSION

In *Kensinger v Abbott Labs.* (1985) 171 CA3d 376, as modified at 172 CA3d 210b, review denied Dec. 9, 1985, a factually similar case, we reversed a summary judgment granted on the basis that plaintiff's action was barred by the statute of limitations. We concluded that the special circumstances surrounding injury by DES, underscored by the *Sindell* majority, warranted a different perspective on the traditional discovery rule which triggers the statute. We stated that "'... in a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer'" and ultimately concluded that "[s]ince the record fails to show facts demonstrating *as a matter of law* that appellant should have been aware of a factual basis for her suit against Melrose more than one year before the complaint was filed," it was error to grant "respondents' motion for summary judgment on grounds the action was time-barred." (*Id.*, at pp. 385-386.)

As in *Kensinger,* the two-year statute of limitations for personal injuries provided by CCP §335.1 is modified here by the "rule of discovery," so that the period of limitations begins to run only when the plaintiff has

discovered or, using reasonable diligence, should have discovered the injury and its wrongful cause. (*Kensinger v Abbott Labs., supra*, 171 CA3d at pp. 381-383; *Brown v Bleiber* (1982) 32 C3d 426, 435-436.) This is essentially a triable factual question. (*Kensinger v Abbott Labs., supra*, 171 CA3d 376, 382-383 and cases there cited.) It bears emphasis that it is not lack of knowledge of available legal theories but lack of knowledge of the operative facts of specific wrongdoing which tolls the statute, a distinction not always readily discernible. As we there noted: "In the context of drug product liability cases, a plaintiff may be aware of an injury and its cause, while possessing no knowledge of facts indicating wrongdoing by a particular defendant. In such a situation, litigation might be premature for lack of knowledge of any factual basis for imputing fault to a manufacturer rather than ignorance of supportive legal theories.

"…Knowledge of the occurrence and origin of harm cannot necessarily be equated with knowledge of the factual basis for a legal remedy. Plaintiff may be aware of the former but ignorant of the latter, in which case we can discern no reason in fairness or logic to bar the suit." (*Kensinger v Abbott Labs., supra*, 171 CA3d 376, 383-384.)

Finally, we noted the recent trend in relevant case law consonant with our view that the period of limitations will begin *only* when a plaintiff knows or should have known of some *wrongdoing* by a drug manufacturer.[4] (See cases cited in *Kensinger v Abbott Labs., supra*, 171 CA3d at p. 385.)

Here, while plaintiff may have believed at the time of her 1978 surgery that DES caused her cancer, the record does not show that she had knowledge of any drug manufacturer's wrongdoing, either failure to test or failure to warn. Understandably, she was unaware of any right of legal recourse until after the benchmark holding in *Sindell*. Thus, we cannot say as a matter of law that plaintiff failed to use reasonable diligence before 1980 to discover the wrongful conduct of the drug manufacturer responsible for her injuries. We conclude, as before, that the trial court erred in granting defendant's motion for summary judgment on the grounds the action was time barred.[5] Our conclusion is, we think, in symmetrical alignment with the broad policy considerations articulated in *Sindell* (*supra*, 26 C3d at p. 611) and does no more than afford to the victim of the insidious disease "a *fair* opportunity to discover the [manufacturer's] tortious conduct." (*Yustick v Eli Lilly and Co.* (E.D.Mich. 1983) 573 F Supp 1558, 1566, emphasis added.)

We reverse and remand for further proceedings consistent with the views expressed herein.

_____
Racanelli, P.J.

WE CONCUR:

_____
Elkington, J.

_____
Newsom, J.

EXHIBIT B

Court of Appeal of the State of California

In And For The
First Appellate District
Division One

Maureen I. Hanks,	)	No. A033433
Plaintiff and Appellant,	)	
	)	Santa Maria Co.
vs.	)	Superior Court P37451
	)	
Melrose & Co., *et al.*,	)	
Defendants and Respondents.	)	
	)	

BY THE COURT:

The petition for rehearing is denied.

Dated: _____

PROOF OF SERVICE BY MAIL (CCP §§1013, 2015.5)

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within action; my business address is 1999 Harrison Street, Oakland, California 94612. On July 1, 1986, I served the within

PETITION FOR REVIEW

in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, Alameda County, California, addressed as follows:

SEE ATTACHED LIST.

I declare under penalty of perjury that the above is true and correct. Executed on July 1, 1986, at Oakland, California.

_____
Sarah Austin

---

[1] *Shoup* is not cited here as precedent, but only to demonstrate the conflict in the cases, confusion and erratic results that have been created in the First District.

[2] *Bertot* is also unpublished and, like *Shoup*, cited only to show the erratic and conflicting results that have been reached.

[3] These facts were called to the attention of the Court of Appeal in respondent Lilly's petition for rehearing. That petition for rehearing was, however, denied. (Exhibit B attached)

[4] Plaintiff opposed Melrose's motion without seriously disputing any of these facts. (CT 253) Instead, she argued that this Court's decision in Sindell made her otherwise stale claim timely by creating a new cause of action where none had previously existed. According to plaintiff, Sindell provided a "new definition of the relevant product," which somehow acted to retroactively toll the statute of limitations. (CT 253) Plaintiff's novel theory was wrong for at least two reasons. First, under well-established law, the statute of limitations ran on the undisputed facts of the case long before plaintiff filed her action. (CT 299-302) Second, *Sindell* made no attempt to redefine the "product" for purposes of product liability and instead operated merely to shift the burden of proof to the defendants. (CT 303-306) The Court of Appeal purported to reject plaintiff's argument. (Exh. A attached at 6, n. 5)

[1] After several demurrers, plaintiff filed an amended complaint on July 19, 1982.

[2] A stipulation was entered into so that other defendant drug companies, served and appearing later, could join the summary judgment motion. Judgment in their favor was entered on October 26, 1983.

[3] At least one pre-*Sindell* decision held that proof of the identity of the specific manufacturer was required to establish a viable cause of action. (See *McCreery v Eli Lilly & Co.* (1978) 87 Cal.App.3d 77.)

[4] This situation is factually distinguishable from that in *Gutierrez v Mofid* (1985) 39 C3d 892, where a woman's reproductive organs were wrongly removed during "exploratory" surgery. Although she immediately suspected wrongdoing, when she first consulted an attorney, he told her she had no suit. The Supreme Court concluded she knew of her "injury" and its legal cause, at least at the time she had been advised by another physician to sue for her injuries and so consulted the first attorney.
Plaintiff Hanks never consulted an attorney and was never advised by anyone else of defendants' wrongful conduct and her right to sue.

[5] We decline to interpret *Sindell*, as plaintiff proposes, as creating a new cause of action by defining generic DES as the *causation* element.

*Editor's Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. Names of parties and attorneys who have not contributed to this book have been changed for publication.

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Appendix D

Certificate of Interested Entities or Persons (Judicial Council Form APP-008)



TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	Superior Court Case Number: ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: RESPONDENT/REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☐ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): _____

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov
CEB

Comment: Every party must file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008) with its principal brief or its first application, motion, or opposition. Cal Rules of Ct 8.208(d). Failure to comply may subject that party to sanctions, including striking the document, dismissing the appeal, or deciding the appeal based on the record or appellant's filings. See §11.6A.

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Appendix E

Designation of Clerk's Record on Appeal (Superior Court Form) [Deleted]

This appendix has been deleted because the form is obsolete.

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Appendix F

Sixth District Teleconferencing Oral Argument Procedures

(a) ***Teleconference System.*** The Court of Appeal, Sixth Appellate District, has installed a telephone conference call system that enables attorneys to present oral arguments by telephone as an alternative to personal appearance in court. The court has determined that oral argument by telephone conference call will reduce cost to the parties and provide greater convenience to counsel.

All oral arguments by telephone conference call will be heard by the Justices on the bench in the courtroom which will be open to the public.

(b) ***Option of Counsel.*** In all cases, civil and criminal, in which a party has a right to present oral argument, counsel may elect to present oral argument either by personal appearance in the courtroom or by telephone conference call. The decision whether to present oral argument in person or by telephone conference call is within the sole discretion of counsel and the parties, except that the court may direct counsel to appear in person.

In deciding whether to present oral argument by personal appearance or by telephone conference call, counsel should consider the expense of a personal appearance to the parties and to the state and should determine whether the matters at issue can be satisfactorily argued by telephone conference call without incurring that expense.

(c) ***Notice to Other Counsel.*** Counsel shall notify all other parties in writing whether he or she requests oral argument. If oral argument is requested, counsel shall indicate whether he or she elects to present oral argument in person or by telephone conference call. The notice shall be given within the time allowed for requesting oral argument.

The court will hear oral argument where counsel for one party elects to argue by telephone conference call and counsel for the other party elects to argue in person. If one counsel elects to argue by telephone conference call and another elects to argue in person, the counsel who elected to argue by telephone conference call shall have the right to change his or her request and argue in person. Counsel also retains the right to change his or her request to argue by telephone conference call rather than in person. The request to change must be made in writing to the court, with service on opposing counsel, at least three working days before the oral argument date. The request shall include the information required in subsection (d).

(d) ***Written Request for Oral Argument.*** Counsel's request to present oral argument by telephone conference call shall be made in writing and shall contain the following information: (1) the number and title of the case; (2) the name of counsel who will present oral argument; (3) the name of the party counsel is representing; and (4) the telephone number to be used for the conference call. The request for argument may be made by completion of a "Request for Oral Argument" form which will be furnished by the clerk at the time notice is mailed to the parties.

(e) ***Notice of Time of Oral Argument.*** When a party requests oral argument the clerk shall notify counsel of the date and time the argument is scheduled.

(f) ***Procedure and Costs.*** Telephonic appearances for matters to be argued by telephone conference call will be arranged through COURTCALL, LLC. COURTCALL, LLC is an independent conference call company that arranges conference calls.

COURTCALL, LLC will contact each participant who has elected to argue by telephone conference call at least one day before the hearing to confirm arrangements for the conference call and to arrange a billing to the participant through the use of a major credit card. The cost for argument by conference call is $41.20 per party per case.

Participants may contact COURTCALL, LLC at 1-866-582-6878 to discuss procedures, confirm dates and times, etc. Participants must reference this court and the case name and number when calling COURTCALL, LLC.

At the time of the scheduled telephonic appearance COURTCALL, LLC will contact the attorney at the number provided. If the attorney is not available when called, the court may deem the unavailable attorney has waived argument and may proceed without the unavailable attorney.

Multiple telephone conference call appearances may be scheduled on oral argument calendars. In these situations the calls may be "stacked" by COURTCALL, LLC. The conference call operator will control and monitor the "stacked"

calls and connect them one at a time with the courtroom in a sequence coordinated with the courtroom clerk. In the event there are a large number of telephone conference call appearances on a particular calendar, COURTCALL, LLC will initiate calls to some participants on a delayed basis to minimize waiting time. All participants must be available when called.

When the Presiding Justice informs the participants that the hearing is completed, the participants will hang up. The conference call operator will then connect the next call to the courtroom.

(g) ***Recording of Oral Argument.*** The court may record oral arguments by telephone conference call. A request for oral argument by telephone will be deemed consent to such recording.

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Appendix G

Notice to Counsel Appearing for Oral Argument Before the Supreme Court of California

SUPREME COURT OF CALIFORNIA
Office of the Clerk

NOTICE TO COUNSEL APPEARING FOR ORAL ARGUMENT BEFORE THE SUPREME COURT OF CALIFORNIA (Cal. Rules of Court, rule 29.2)

Counsel who are scheduled to present oral argument are required to check in by presenting a business card to the Clerk in the courtroom 30 minutes prior to the convening of the court.

The Clerk will conduct a briefing for counsel which will include a review of the procedure to be followed in presenting oral argument. It will include the following:

1. Counsel who are scheduled to present oral argument before the Court are expected to be present and seated inside the bar of the courtroom for the call of the calendar. Once the Court is convened, the Clerk will call the calendar in its entirety. As each case is called, counsel for the respective parties will be introduced by name. When introduced to the Court, counsel should rise and answer, "Ready." At the conclusion of the calendar call, counsel in the first case should immediately proceed to the lectern.

2. The petitioner in cases where review has been granted, the petitioner in an original proceeding, or the appellant in an automatic appeal will commence the argument.

3. Counsel who desire to reserve some of their previously allocated time for "true" rebuttal should so indicate to the Clerk at the time of check-in or it shall be deemed waived.

4. Counsel who intend to cite additional authorities not contained in the papers and briefs on file must serve and file a list of such authorities no later than 10 days prior to the date or argument. In unusual circumstances and upon application and for good cause shown, the Chief Justice may grant leave to serve, file and cite additional authorities fewer than 10 days prior to argument. In either instance, an original and 8 copies, together with proof of service, is required. When appropriate, the Chief Justice may grant opposing counsel an opportunity to serve and file a reply to the newly cited authorities.

5. This court does not contemplate a waiver of oral argument after a case is placed on calendar.

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Appendix H

Application for Temporary Stay of Enforcement of Money Judgment; Memorandum of Points and Authorities; Declaration; Proposed Order*

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Christina J. Imre—96496
CROSBY, HEAFEY, ROACH & MAY
700 S. Flower Street, 22nd Floor
Los Angeles, California 90017
Telephone: (213) 896-8000
Facsimile: 896-8080
Attorneys for Defendant
Old Reliable Insurance Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

PQR, INC, an Arizona Corporation, Plaintiff(s)	)	**CASE NO. 98AS00549**
vs	)	**APPLICATION FOR TEMPORARY STAY OF ENFORCEMENT OF MONEY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES [CCP §§916, 918]; DECLARATION OF _ _ _ _; [PROPOSED] ORDER**
OLD RELIABLE INSURANCE COMPANY, et al., Defendant(s)	)	
_____	)	

Pursuant to Code of Civil Procedure §918, defendant Old Reliable Insurance Company (Old Reliable) requests this court stay enforcement of the money judgment entered against Old Reliable and in favor of plaintiff on July 21, 1999. Old Reliable requests the stay remain in effect until ten days after the last date on which a notice of appeal may be filed. Old Reliable further requests that this court order that any existing liens on Old Reliable's property placed there by the judgment creditor by virtue of this action be extinguished and that no new liens may be created during the pendency of this temporary stay.

This application is based upon the attached memorandum of points and authorities and the declaration of _ _ _ _ _ _.

DATED August _ _ _ _, 1999 CROSBY, HEAFEY, ROACH & MAY

By_____
Christina J. Imre

Attorney for Defendant
OLD RELIABLE INSURANCE COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES

THIS COURT SHOULD GRANT A TEMPORARY STAY OF ENFORCEMENT OP THE MONEY JUDGMENT ENTERED IN THIS CASE TO ALLOW OLD RELIABLE A REASONABLE TIME TO SECURE A BOND PROTECTING PLAINTIFF DURING THE PENDENCY OF THE APPEAL.

A. Code of Civil Procedure §918 Gives the Trial Court the Power to Grant a Temporary Stay of Enforcement of a Money Judgment.

Code of Civil Procedure §918 provides:[1]

"(a) Subject to subdivision (b), the trial court may stay the enforcement of any judgment or order.

"(b) If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court shall not have the power, without the consent of the adverse party, to stay the enforcement thereof pursuant to this section for a period which extends for more than ten days beyond the last date on *which* a notice of appeal could be filed.

"(c) This section applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed."

Under §918, "[t]he trial judge may stay enforcement of any judgment or order, whether or not an appeal will be taken and whether or not a notice of appeal has been filed." (9 Witkin, California Procedure, *Appeal* §229, p. 286) This court's power to stay enforcement of a money judgment extends to 10 days beyond the last date upon which a notice of appeal could be filed. (CCP §§917.1, 918(b)) In addition, this court may order that the temporary stay will act to extinguish existing liens and prevent the creation of liens by the judgment creditor on the judgment debtor's property. (CCP §697.040(b)) Once the judgment debtor files a bond, the money judgment is stayed pending resolution of the appeal, existing liens on the judgment debtor's property are extinguished, and new liens may not be created. (CCP §§697.040(a), 917.1)

B. This Court Should Grant a Temporary Stay of Enforcement of the Money Judgment.

The judgment entered in this action requires Old Reliable to pay money. Old Reliable his decided to appeal the judgment. Notice of entry of judgment was served on July 27, 1999, so the last day for Old Reliable to file its notice of appeal is Monday, September 27, 1999. (See Cal Rules of Court 8.104(a).)

Old Reliable asked counsel for plaintiff whether plaintiff would agree to waive the appeal bond, but plaintiff will not agree. (Declaration of _ _ _ _, ¶ _ _) Accordingly, to protect itself against enforcement of the judgment pending appeal, Old Reliable must obtain and file art appeal bond. Old Reliable is in the process of obtaining the necessary bond.

This court should grant a stay of enforcement of the money judgment, until October 7, 1999, 10 days after the last day on which Old Reliable's notice of appeal may be filed. A temporary stay will allow Old Reliable time to secure a bond to fully protect plaintiff's interests pending appeal. Without a temporary stay, Old Reliable will face significant hardships. In contrast, if a temporary stay is ordered, plaintiff's rights will be fully protected for the period of a temporary stay and thereafter Old Reliable's assets substantially exceed the amount of the judgment. (See Declaration of _ _ _ _) Old Reliable will not sell, transfer, or otherwise dispose of its assets during the period of this temporary stay, except during the ordinary course of business and to collateralize the bond; thereafter, the bond will fully protect plaintiffs interest to the money judgment. (See *id*.) In sum, a temporary stay of the money judgment protects the interests of all the parties.

CONCLUSION

For the foregoing reasons, this court should grant a temporary stay of enforcement of the money judgment in this action, the stay to remain in effect until October 7, 1999.

DATED: August _ _ _ _, 1999 **Respectfully Submitted,**

CROSBY, HEAFEY, ROACH & MAY

By_____
Christina J. Imre

Attorney for Defendant
OLD RELIABLE INSURANCE COMPANY

DECLARATION OF

I, _ _ _ _ _ _, declare.

1. I am an attorney licensed to practice in this state and am attorney of record for defendant Old Reliable Insurance Company in this action.

2. I have personal knowledge of the following facts and if called as a witness I could competently testify to the following facts.

a. Old Reliable has decided to appeal this court's judgment entered on July 21, 1999.

b. By letter dated August 11, 1999, I asked plaintiff's counsel whether plaintiff would agree to waive the appeal bond. On _ _ _ _ _ _, 1999, plaintiff's counsel advised me that plaintiff will not agree Accordingly, to protect itself against enforcement of the judgment pending appeal, Old Reliable must obtain and file an appeal bond. Old Reliable is currently to the process of obtaining the necessary bond.

c. Old Reliable has assured me and authorized me to represent to the court as its attorney that its will not sell, transfer, or otherwise dispose of its assets during the period of a temporary stay of the money judgment issued by this court, except during the ordinary course of business arid in the course of collateralizing the bond; thereafter, the bond will fully protect plaintiff's interest in the money judgment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August _ _, 1999, at Sacramento, California.

_____

[PROPOSED] ORDER

GOOD CAUSE APPEARING, enforcement of this court's judgment against defendant Old Reliable Insurance Company and in favor of plaintiff entered July 21, 1999 in this action is hereby stayed, such stay to remain in effect until the close of business on October 7, 1999. Any existing liens on Old Reliable's property placed there by the judgment creditor by virtue of this action are extinguished and no new liens may be created during the period of this temporary stay.

DATED: _ _ _ _ _ _ _ _

_____
Judge of the Superior Court

Christina J. Imre, Esq. (State Bar No. 96496)
Crosby, Heafey Roach & May
700 So Flower St., 22nd Floor
Los Angeles, California 90017
(213) 986-8000 FAX (213) 896-8080

Attorneys for Defendant, Cross-Complainant, and Cross-Defendant ABC HEALTHCARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

TERESA Plaintiff, individually and as successor in interest of deceased, DAVID Plaintiff, Plaintiff(s)	)	**CASE NO. _ _ _ _ _ _ _ _**
	)	[*Reassigned to the Hon. _ _ _ _, Dept._ _ - Central*]
vs	)	
	)	**STIPULATION RE: WAIVER**

ABC HEALTHCARE, INC., previously known as ABC OF SOUTHERN CALIFORNIA, INC. and DOES 1-100, Inclusive, Defendant(s)	)	**OF APPEAL BOND AND STAY OF ENFORCEMENT OF JUDGMENT PENDING APPEAL**
AND RELATED CROSS ACTIONS.	)	

Plaintiff; through her attorney of record, hereby stipulates:

1. to waive the appeal bond or undertaking otherwise required of defendant, cross-complainant, and cross-defendant ABC Healthcare, Inc. ("ABC") under Code of Civil Procedure §917.1, as provided by Code of Civil Procedure §995.230; and

2. to a stay of enforcement of the judgment in favor of Plaintiff and against defendant ABC until such time as the California Court of Appeal or California Supreme Court has issued its remittitur at the conclusion of the state appellate proceedings in this action, and until such time as all proceedings in the United States Supreme Court, if any, are concluded.

Defendant, cross-complainant and cross-defendant ABC, through its attorneys of record, hereby stipulates that Plaintiff shall have the right to withdraw from this stipulation and to demand an appeal bond or undertaking on thirty (30) days' notice, in writing, to defendant's counsel.

DATED: _ _ _ _ _ _ _ _, 1999 LAW FIRM

By: _____
Attorneys for Plaintiff

CROSBY, HEAFEY, ROACH
& MAY
Christina J. Imre

By_____
Christina J. Imre

Attorney for Defendant,
Cross-Complainant, and
Cross-Defendant ABC HEALTHCARE, INC.

Christina J. Imre, Esq. (State Bar No. 96496)
Crosby, Heafey, Roach & May
700 S. Flower St., 22nd Floor
Los Angeles, California 90017
(213) 896-8000 FAX (213) 896-8080

Attorneys for Defendant
ABC HEALTHCARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

TERESA Plaintiff, individually and as successor in interest of deceased, DAVID Plaintiff, Plaintiff(s)	)	**CASE NO. _ _ _ _ _ _ _ _**
	)	[*Reassigned to the Hon. _ _ _ _, Dept._ _*]
vs	)	
ABC HEALTHCARE, INC., and	)	**NOTICE OF UNDERTAKING ON APPEAL [CCP §917.1]**

DOES 1-100, Inclusive,)
Defendant(s))
_____)
AND RELATED CROSS)
ACTIONS.)

TO PLAINTIFF AND HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that defendant ABC HEALTHCARE, INC. and defendant ABC SERVICES, INC. hereby file with the court this bond (number __) in the amount of $_ _[*dollar amount*]_ _ pursuant to Code of Civil Procedure §917.1 as an undertaking to stay enforcement of the amended judgment in this case in favor of plaintiff TERESA Plaintiff.

Respectfully submitted,

DATED: _ _ _ _, 1999

CROSBY, HEAFEY, ROACH & MAY
Christina J. Imre
Judith E. Gordon

By_____
Christina J. Imre
Attorney for Defendant ABC HEALTHCARE, INC.

By_____
Attorney for Defendant ABC SERVICES, INC.

---

[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

*Editor's Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. Names of parties and attorneys who have not contributed to this book have been changed for publication.

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Appendix I

Notice of Intention to Move for New Trial*

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Christina J. Imre - 96496
Crosby, Heafey, Roach & May
700 S. Flower Street, 22nd Floor
Los Angeles, California 90017
Telephone: (213) 896-8000
Facsimile: 896-8080
Attorneys for Defendant

Attorneys for Defendant, Cross-Complainant, and Cross-Defendant ABC HEALTHCARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

TERESA Plaintiff, individually and as successor in interest of deceased, DAVID Plaintiff, Plaintiff(s)	**CASE NO.** _ _ _ _ _ _ _ _ _ [*Reassigned to the Hon.* _ _ _ _, *Dept.*_ _ *- Central*]
vs	
ABC HEALTHCARE, INC., previously known as ABC OF SOUTHERN CALIFORNIA, INC. and DOES 1-100, Inclusive, Defendant(s)	**NOTICE OF INTENTION TO MOVE FOR NEW TRIAL** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _
AND RELATED CROSS ACTIONS.	**Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

TO PLAINTIFF AND HER ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that, at a date and time to be announced, in Department _ _ _ of the above-entitled court, located at _ _[*address*]_ _ California, defendant, cross-complainant, and cross-defendant ABC will, and hereby does, move the court for an order granting defendant a new trial pursuant to Code of Civil Procedure §657 on all applicable grounds, including the following:

1. Irregularity in the proceedings of the court that prevented defendant from having a fair trial.

2. Irregularity in the proceedings of the jury that prevented defendant from having a fair trial.

3. Irregularity in the proceedings by plaintiff that prevented defendant from having a fair trial.

4. Improper orders of the court that prevented defendant from having a fair trial.

5. Abuses of discretion by the court that prevented defendant from having a fair trial.

6. Misconduct of the jury.

7. Accident that ordinary prudence could not have guarded against.

8. Surprise that ordinary prudence could not have guarded against.

9. Newly discovered material evidence that defendants could not, with reasonable diligence, have discovered and produced at trial.

10. Excessive damages.

11. Insufficiency of the evidence to justify the verdict

12. The verdict is against law.

13. Errors in law occurring at trial and excepted to by defendant.

The motion for new trial will be based on this notice; a supporting memorandum of points and authorities and declarations to be filed with the court on _ _[*date*]_ _ pursuant to this court's _ _[*date*]_ _ order; the minutes of this court; all pleadings, papers and records in this action; the evidence presented at trial; and such oral and documentary evidence and argument as may be submitted at the time of hearing.

DATED: _ _ _ _, 1999

Respectfully submitted,
CROSBY, HEAFEY, ROACH
& MAY
Christina J. Imre

By_____
Christina J. Imre
Attorney for Defendant,
Cross-Complainant, and
Cross-Defendant ABC HEALTHCARE

Christina J. Imre - 96496
Crosby, Heafey, Roach & May
700 S. Flower Street, 22nd Floor
Los Angeles, California 90017
Telephone: (213) 896-8000
Facsimile: 896-8080
Attorneys for Defendant

Attorneys for Defendant, Cross-Complainant, and
Cross-Defendant ABC HEALTHCARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

P.T. Plaintiff,	)	**CASE NO. _ _ _ _ _ _ _ _**
Plaintiff(s)	)	
	)	[*Reassigned to the*
vs	)	*Hon. _ _ _ _,*
	)	*Dept._ _ - Central*]
ABC HEALTHCARE, INC., and	)	
DOES 1-100,	)	**MEMORANDUM OF POINTS**
Inclusive,	)	**AND AUTHORITIES IN**
Defendant(s)	)	**SUPPORT OF DEFENDANT'S**
	)	**MOTIONS FOR PARTIAL**
	)	**JUDGMENT**
	)	**NOTWITHSTANDING THE**
	)	**VERDICT AND FOR A NEW**
	)	**TRIAL**

	)	
	)	**Per court order:**
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _
AND RELATED CROSS		**Action filed:** _ _[*date*]_ _
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MOTION FOR PARTIAL JUDGMENT NOTWITHSTANDING THE VERDICT

ABC IS ENTITLED TO JNOV ON THE WRONGFUL DEATH CAUSE OF ACTION FOR THREE INDEPENDENT REASONS.[1]

A. As a Matter of Law, ABC Did Not Owe a Legal Duty to Seek Out and Recommend Treatment to Prolong Mr. Plaintiffs Life.

The existence of a duty is a question of law for the court. (*Ballard v Uribe* (1986) 41 C3d 564, 572, fn. 6; *Koepke v Loo* (1993) 18 CA4th 1444, 1450.)

Mrs. Plaintiff's wrongful death cause of action rests on the faulty premise that ABC had a legal duty to seek out and recommend treatment to prolong her husband's life. But ABC did not owe such a duty. First, ….

Second, ….

Third, ….

B. The Wrongful Death Cause of Action Is Barred by the One-Year Statute of Limitations.

A wrongful death action must be filed within 2 years from the decedent's death. (CCP §335.1; *Larcher v Wanless* (1976) 18 C3d 646, 659.) Mr. Plaintiff died on March 15, 1995, but Mrs. Plaintiff did not file her complaint until March 18, 1996, 3 days after the limitations period expired. The wrongful death cause of action is therefore time-barred as a matter of law.

ABC raised this defense in a summary judgment motion. to opposition, Mrs. Plaintiff presented evidence that Friday. March 15, 1996, the day on which the limitations period expired, was a furlough day for courts in San Bernardino. She argued the furlough day was a "holiday" within the meaning of Code of Civil Procedure §12b, and that the statute of limitations was therefore extended to include the next day which was not a holiday, *i.e.,* Monday, March 18, the day she filed her complaint.

This argument fails for several reasons. First … Second … Third….

MOTION FOR NEW TRIAL

I.

THIS COURT HAS BROAD AUTHORITY TO GRANT A NEW TRIAL/REMITTITUR, AND A CONSTITUTIONAL DUTY TO DO SO WHEN A PUNITIVE AWARD IS EXCESSIVE.

Code of Civil Procedure §657 authorizes the court to grant a motion for a new trial on any of seven grounds, including excessive damages (§657(5)) and errors in law (§657(7)). (See California Judges Benchbook §2.36, pp. 69-70 (Cal CJER 1988).) The authority to grant a new trial is extremely broad. "So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 387; see Judges Benchbook §2.43, p. 74.)

A new trial may be granted on "all or part of the issues …" (CCP §657(1).) A partial new trial is appropriate only when the issues requiring relitigation are distinct and severable. (See *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 457; Judges Benchbook §2.49, pp. 78-79.)

In ruling on a motion for new trial based on excessive damages, the trial court "sits not in an appellate capacity but as an Independent trier of fact." (*Neal v Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 933, emphasis added; accord *Widener v PG&E* (1977) 75 CA3d 415, 440 [trial court is required to weigh evidence and in doing so may disbelieve witnesses and draw inferences contrary to those supporting the verdict] disapproved on other grounds in *McCoy v Hearst Corp.* (1986) 42 Cal.3d 835, 846, 24 fn. 9; 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§36-37, pp. 542-543.)

"The trial judge not only has the discretion to grant a new trial on the ground of excessive damages, but it is his duty to do so, or to provide for a reduction of the verdict, if under the evidence he believes it to be too large." (*Collins v Lucky Mkts., Inc*. (1969) 274 CA2d 645, 652, disapproved on other grounds in S*cala v Jerry Witt & Sons, Inc.* (1970) 3 C3d 359, 364-370 & fn. 6; accord *Thompson v John Strona & Sons* (1970) 5 CA3d 705, 711 [85 CR 350].)

In addition, when a putative damages award is attacked as excessive, careful post-trial review is mandated by the Due Process Clause of the United States Constitution. (*Honda Motor Co., Ltd. v Oberg* (1994) 512 US 415, 432 [129 L Ed 2d 336, 114 S Ct 2331]; see *id.* at p. 421 ["Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded"].)

If the trial court concludes the jury awarded excessive damages, it may grant a new trial on liability as well as damages. (*Collins v Lucky Mkts. Inc., supra*, 274 Cal.App.2d at p. 649; accord *Widener v PG&E, supra*, 75 Cal.App.3d at p. 443; see CCP §657(5); Judges Benchbook §2.43, p. 74.) Alternatively, if the court finds excessive damages, it *may* order a remittitur in an amount that "the court in its independent judgment determines from the evidence to be fair and reasonable." (CCP §662.5(b); Judges Benchbook §2.51, p. 80.) In that event, the court may condition denial of anew trial on plaintiff's acceptance of *x* reduced damages award. (CCP §662.5; see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §116, p. 622.)

II.

THE JURY'S PUNITIVE DAMAGES AWARD OF MORE THAN $X MILLION IS EXCESSIVE AS A MATTER OF LAW AND FACT.

A. The Punitive Award Is Out-Of-Line With California's Restrictions On Punitive Damages.

B. The Punitive Award of More than $X Million—Over Five Times ABC's Net Worth—Is Grossly Disproportionate.

C. The Punitive Award Is Excessive in Comparison to Compensatory Damages.

D. The Punitive Award Is Disproportionate to the Conduct Alleged.

E. The Punitive Award Is Larger than Necessary to Serve the Purposes of Deterrence.

F. The Amount of the Punitive Award Violates Due Process.

1. Reprehensibility of Defendant's Conduct.

2. Ratio of the Punitive Award to the Harm.

3. Difference Between Punitive Award and Civil or Criminal Penalties.

G. Because the Jury, in Returning the Punitive Award. Was Likely Inflamed by Evidence Presented on the Legally Invalid Wrongful Death Claim, This Court Should Grant a Complete New Trial.

III.

THE JURY'S AWARD OF MORE THAN $3.7 MILLION FOR WRONGFUL DEATH DAMAGES IS EXCESSIVE.

Should the court deny ABC's motion for partial judgment notwithstanding the verdict on the wrongful death claim, at a minimum ABC is entitled to a new trial on the wrongful death claim, or at the very least, a substantial remittitur of the more than $3.7 million the jury awarded on that claim.

[Discussion]

IV.

EVIDENTIARY AND INSTRUCTIONAL ERRORS ENTITLE ABC TO A NEW TRIAL ON ALL ISSUES.

A. The Jury Should Have Been Allowed To Consider Evidence Of Secondary Insurance, Which Was Critically Relevant To The Contract, Bad Faith, And Punitive Claims.

Depriving a party of the right to present critical evidence in its defense is a violation of due process and necessitates a new trial. (See *Kardly v State Farm Mut. Auto. Ins. Co.* (1995) 31 CA4th 1746, 1752-1753 [hereafter Kardly ll]; *Estate of Buchman* (1954) 123 CA2d 546, 559-561.)

Throughout trial, ABC was prohibited from introducing any evidence of—or even mentioning—evidence of ___

Here, the excluded evidence was not only relevant but central to ABC's defense. First, it was necessary to show that....

Second, the evidence was essential to show ABC did rot act oppressively or maliciously in denying coverage. Without this evidence, ABC was unable to show it....

B. Limiting the Contract to the Member Handbook, Coupled with Erroneous Instructions, Effectively Directed a Breach of Contract Verdict, and Compelled a Bad Faith Finding.

C. Several Erroneous Evidentiary and Instructional Rulings Occurred with Respect to Punitive Damages.

1. ABC Was Entitled to Present Mitigating Evidence During the Punitive Phase.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid C §351.) Because punitive damages are imposed to deter future misconduct by the defendant, evidence offered on the need for

deterrence is not just relevant; it is *central* to the issue before the jury in the punitive phase: what amount, if any, should be awarded 'to deter future misconduct?" (*Adams v Murakami, supra,* 54 Cal. 3d at p. 110, emphasis added.)

As a result, all mitigating evidence demonstrating there is little or no need to deter a defendant's future misconduct is admissible during the punitive damages phase. (*Stevens v Owens-Corning Fiberglass Corp., supra*, 49 CA4th at pp. 1662-1664; *Rosener v Sears, Roebuck & Co., supra*, 110 Cal.App.3d at pp. 753-754.)

In this case, during the punitive damages phase, the court ruled the only relevant evidence was evidence of ABC's financial condition. That is directly contrary to the law. Aside from the presentation of financial evidence, the main purpose of the punitive phase is to allow the defendant to mitigate damages and to show the jury why a punitive award is unnecessary or that only a minimal amount is needed to punish arid deter. (*Stevens v Owens-Corning Fiberglass Corp., supra,* 49 Cal.App.4th at pp. 1662-1664.)

ABC was prepared and should have been permitted to introduce any evidence tending to mitigate the amount of damages awarded, including steps it had taken to change its procedures at issue in this case and explanations for its conduct. (See, *e.g.,* ___ RT ___ pp. ___ [ABC's offer of proof].) Mrs. Plaintiff s counsel capitalized on the error. During closing arguments, he repeatedly told the jury ABC had failed to change its procedures or apologize for its conduct in this case. (See 1/13/99 RT pp. 3050, 3059; 1/20/99 RT pp. 3453, 3467.) ABC was prohibited from introducing evidence on these very points. The resulting prejudice is evident from the jury's award.

2. Several Other Instructional Errors Occurred with Respect to Punitive Damages.

The accumulation of other instructional errors regarding punitive damages resulted in the excessive award and prejudiced ABC.

V.

PROCEDURES FOR GRANTING A NEW TRIAL.

A. Statement of Grounds.

In listing the grounds for granting a new trial, the court should parallel the language of section 657 as closely as possible. (*Mercer v Perez* (1968) 68 C2d 104, 111; Judges Benchbook §2.46, p. 76.) The court must specify in writing the grounds for its decision to grant a new trial, either by minute order of by an order signed by the court and filed by the clerk. (CCP §§657, 660; Judges Benchbook §2.45, p. 75.)

B. Specification of Reasons.

In addition to specifying the grounds supporting its decision, the court must specify its reasons for granting a new trial on each of the grounds stated in its order. (CCP §657; *Mercer v Perez, supra*, 68 C2d at p. 111; Judges Benchbook §2.47, p. 77.)

1. The specification of reasons must be in writing; oral statements will not suffice. (*Stevens v Parke, Davis & Co.* (1973) 9 Cal.3d 51, 62; Judges Benchbook §2.44, p. 76.)

2. The court is not permitted to direct any attorney to prepare the specification (CCP §657; Judges Benchbook §2.47, p. 77), and may not adopt by reference the moving party's arguments in the points and authorities. (Judges Benchbook §2.47, 12 p. 77.) However, the court may burrow from the memorandum in support of new trial by quoting, paraphrasing, or summarizing the identical position asserted in the memorandum. (See *Eltolad Music, Inc. v April Music, Inc.* (1983) 139 CA3d 697, 707.)

3. The specification of reasons may appear in the order granting a new trial or in a separate document filed within 10 days after the order is filed. (CCP §657; *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 71-72; Judges Benchbook §2.47, p. 77.) These rules apply to conditional new trial orders as well, *i.e.,* to orders granting a new trial unless plaintiff accepts a remittitur. (*Greenfield v Spectrum Investment Corp.* (1985) 174 CA3d 111, 122.)

4. To satisfy the "specification of reasons" requirement, "it will be sufficient if the judge … furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him." (*Mercer v Perez, supra*, 68 C2d at p. 115; see Judges Benchbook §2.47, p. 77.) If the ground for new trial is excessive damages, the specification of reasons "must briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision.'" (*Stevens v Parke, Davis & Co., supra*, 9 C3d at p. 60.)

C. Time Limits.

The court's power to rule on a new trial motion expires 60 days after filing of the first notice of intention to move for a new trial or service of written notice of entry of judgment, whichever occurs first. (See CCP §660; Judges Benchbook §2.44, p. 74.)

Here, plaintiff served notice of entry of judgment on January 28, 1999. ABC filed its notice of intention to move for a new trial on February 9, 1999. Accordingly, the last day on which this court may rule is March 29, 2000.

If the court's specification of reasons is not contained in the order granting a new trial, the 10-day period for filing a separate specification of reasons runs from the date the minute order granting a new trial is entered (even if written order is later signed and filed). (CCP §657; Judges Benchbook §2.44, p. 75.) The 10-day period may extend beyond the 60-day period for ruling on a new trial motion. (Ibid.)

In addition, the time for plaintiff to act on a remittitur may extend for a reasonable time beyond the 60 days for ruling on the new trial motion. (*Schelbauer v Butler Mfg. Co., supra,* 35 Cal.3d at pp. 454-455, fn. 6.)

CONCLUSION

For the reasons set forth above, the court should grant a partial judgment notwithstanding the verdict on the cause of action for wrongful death and a new trial on the remaining causes of action. At the very least, there should be a substantial remittitur of the punitive damages award and the award for wrongful death.

DATED: _ _ _ _, 1999

Respectfully submitted,
CROSBY, HEAFEY, ROACH
& MAY
Christina J. Imre

By_____Christina J. Imre
Attorney for Defendant, Cross-Complainant, and
Cross-Defendant ABC

Christina J. Imre - 96496
Crosby, Heafey, Roach & May
700 S. Flower Street, 22nd Floor
Los Angeles, California 90017
Telephone: (213) 896-8000
Facsimile: 896-8080
Attorneys for Defendant

Attorneys for Defendant, Cross-Complainant,
and Cross-Defendant ABC HEALTHCARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

HENRY Q. INJURED,	**)**	**CASE NO. _ _ _ _ _ _ _ _**
Plaintiff(s)	**)**	
	)	**DEFENDANTS' EX PARTE**
vs	**)**	**APPLICATION FOR ORDER**
	)	**RE: TIME TO FILE POINTS**
BIGG, INC., BIGGER, INC.,	**)**	**AND AUTHORITIES IN**

WHITE COMPANY, a co-Partnership, and FIRST DOE) through ONE HUNDREDTH DOE, Inclusive, Defendant(s)	**SUPPORT OF MOTION FOR JNOV**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

[INSERT STANDARD EX PARTE INTRO AS APPROPRIATE]

MEMORANDUM OF POINTS AND AUTHORITIES

This Court Should Establish Filing Deadlines to Resolve the Statutory Ambiguity Concerning the Due Date for Filing Points and Authorities in Support of and in Opposition to the Motion for JNOV.

Code of Civil Procedure §629 authorizes this court to grant judgment notwithstanding the verdict (JNOV). Where motions for both new trial and JNOV have been filed, the court should rule on each at the same time. (CCP §629.) Here defendants intend to move for both JNOV and, in the alternative, a new trial.

There is an ambiguity concerning the date on which points and authorities in support of a JNOV motion must be filed. The statute governing JNOV motions does not specify deadlines for filing moving (or opposition) papers. Consequently, if a notice of motion for JNOV is timely filed (within 15 days after service of entry of judgment) and the court sets a hearing date for the motion, it is arguable that the time limits provided on moving papers generally may apply (normally 16 court days before the hearing; see CCP §1005(b)).

At the same time, however, the court is required to rule on JNOV and new trial motions at the same time (which means they will normally be heard at the same time). (CCP §629.) Thus, by analogy, the supporting papers on JNOV motions should be served and filed within the same time limits required on new trial motions: *i.e., within 10 days* after filing the notice of intention to move for new trial and JNOV. (See CCP §659a; Cal Rules of Court 3.1600.)

Defendants submit that the better practice is for the parties to file points and authorities in support of and in opposition to JNOV concurrently with those filed in connection with the motion for new trial. This court has inherent power to set and extend deadlines for the filing of these papers. (See CCP §§1005(b), 1054.) Accordingly, defendants request that this court treat the motions for new trial and JNOV as procedural parallels, with supporting points and authorities to be filed at the same time, *i.e.,* within 10 days after filing of the notice of intention to move for new trial and notice of motion for JNOV.

DATED: _ _ _ _, 2007

CROSBY, HEAFEY, ROACH & MAY

By_____
Christina J. Imre
Attorney for Defendants
BIGG, INC., BIGGER. INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Address of Service or Surety
145 Courthouse Square,
Suite 240
Brea, Georgia

Address of Service for Principal
ABC Healthcare
Crosby, Heafey, Roach & May
700 S. Flower St., 22nd floor
Los Angeles, California 90017

Address of Service for
Principal ABC Services, Inc.
John Q. Lawyer
333 S. Litigation Avenue

Los Angeles, California 90071

Mrs. T. Plaintiff, individually and as successor in interest of deceased.	**Case No. _ _ _ _ _ _**
Mr. T. Plaintiff	**Undertaking Under CCP §917.1**
vs	
ABC Healthcare, et al.	

WHEREAS defendant ABC Services, Inc. and defendant ABC Healthcare desire to give an undertaking for Appeal in the above referenced case as provided by CCP §917.1.

NOW, THEREFORE, the undersigned surety, HONEST CASUALTY AND SURETY COMPANY OF AMERICA, a corporation duty organized and existing under the laws of the State of ___, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise, on the part of defendant ABC Services, Inc. and Defendant ABC Healthcare and does acknowledge itself justly bound to the plaintiff under said statutory obligations in the sum of _____ ($180,000,000) Dollars, being one and one-half the amount named in the amended judgment in this case.

In Testimony Whereof, the said Surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officer at ___ on the ___ day of ___, 1999. The undersigned certifies under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that he is a duly authorized Attorney-in-fact for said Surety acting under the attached unrevoked power of attorney.

Bond No. **Honest CASUALTY AND SURETY COMPANY OF AMERICA**

By_____
Attorney-in-Fact
State of _____
County of _____

On the ___ day of ___, 2007, before me, Notary Public personally appeared _____ to me personally known, who being by me duly sworn, did say that he is the Attorney-in-fact for the Honest Casualty and Surety Company of America, that the seal affixed to the foregoing instrument is the corporate seal of the Corporation, and that said instrument was executed in behalf of the Corporation by authority of its Board of Directors and they acknowledge said instrument to be the free act and deed of the Corporation.

Notary Public State at Large:

---

[1] A trial court may grant partial JNOV as to particular issues or causes of action (*Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 327; *Reynolds v Wilson* (1958) 51 C2d 94, 99.) The court's power to grant JNOV expires at the same time as its power to grant a new trial. (CCP §629; see Cal. Judges Benchbook: Civil Proceedings After Trial (1998) §2.60, p. 88; §2.63, p. 89 [hereafter "Judges Benchbook"].)

*Editor's Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. Names of parties and attorneys who have not contributed to this book have been changed for publication.

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American Friends Serv. Comm. v Procunier (1973) 33 CA3d 252, 109 CR 22, disapproved on other grounds in Englemann v State Bd. of Educ. (1991) 2 CA4th 47, 3 CR2d 264: §1.37
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6 C4th 644, 25 CR2d 109: §2A.4
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Table of References

Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007): §§3.1, 6.1
Black's Law Dictionary. St. Paul, Minn., West Publishing, 7th ed 1999: §14.1
Bogen, Deborah, Mark Thompson & Elizabeth Smith. California Courts and Judges. Costa Mesa, Cal., James Publishing, 2005: §16.26
California Attorney Fee Awards (3d ed Cal CEB 2010): §§20.13, 20.15, 20.18, 20.33
California Civil Litigation Forms Manual (Cal CEB 1980): §6.54
California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§2A.11-2A.13, 4.3, 4.5, 7.26, 11.96, 14.67, 17.85
California Civil Writ Practice (4th ed Cal CEB 2008): §§1.1-1.2, 1.8, 1.11, 1.35-1.36, 1.39, 1.42-1.45, 3.1-3.2, 3.10, 3A.17, 3.23, 10.2, 10.144, 11.82, 16.2, 18.3, 21.2
California Decedent Estate Practice (2d ed Cal CEB 2009): §4.5
California Judges Benchbook: Civil Proceedings After Trial (Cal CJER 1988): §2.34, App I
California Judicial Council Forms Manual (Cal CEB 1981): §§15.35-15.36, 20.8
California Trial Objections (Cal CEB Annual): §§5.39, 5.45
California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995): §§2.1, 2.17, 2A.18-2A.19, 2A.22-2A.23, 2A.25, 2.46, 3.2, 4.4, 5.9, 5.43, 7.90, 7.97, 17.13, 20.6, 20.13
Cardozo, Benjamin N. The Nature of the Judicial Process. New Haven, Conn., Yale University Press, 1921: §16.26
Jefferson's California Evidence Benchbook (4th ed CJA-CEB 2009): §5.5
Jessen, Edward W. California Style Manual: A Handbook of Legal Style for California Courts and Lawyers. San Francisco, West Group, 4th ed 2000: §§12.26, 12.40, 21.1, 21.13
Judicial Profiles (California: Northern) and Judicial Profiles (California: Southern). Los Angeles, Daily Journal Corp., 1995: §16.26
Mellinkoff, David. Legal Writing: Sense and Nonsense. St. Paul, Minn., West Publishing, 1982: §13.24
Moskovitz, Myron. Winning an Appeal. Charlottesville, Va., Michie, 2d ed 1995: §§12.53, 13.20
Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual): §17.35
Prosser, William L. & W. Page Keeton. Handbook of the Law of Torts. St. Paul, Minn., West Publishing, 5th ed 1984: App A
SmartLaser (Cal CEB Software): §20.8
Stern, Robert L. Appellate Practice in the United States. Washington, D.C., Bureau of National Affairs, 1988: §13.24
Strunk, William, Jr. & E. B. White. The Elements of Style. Boston, Allyn & Bacon, 4th ed 2000: §13.24
Toulmin, Stephan E. The Uses of Argument. Cambridge, Mass., University Press, rev ed 2003: §12.68
Uniform System of Citation. Harvard Law Review Associations, 18th ed 2005: §12.40
West Group. Restatement (Second) of Torts. Eagan, Minn., 1971: App B
Witkin, Bernard E. California Procedure. Multivolume. San Francisco, Bancroft-Whitney, 5th ed 2008: §§1.56, 2.34, 2.58, 2A.4, 2A.29, 3.13, 3.19, 5.18-5.19, 5.27, 5.32, 5.44, 5.48-5.49, 6.30, 6.51-6.52, 6.68-6.69, 6.84, 7.58, 7.90, 10.126, 11.52, 11.94, 11.113-11.114, 12.85, 13.2, 13.9, 13.13-13.14, 14.3, 16.20, 17.4, 17.7, 17.10, 17.12, 17.19, 17.89, 18.6, 19.6, 20.7, 20.33, 21.2, 21.4, 21.18-21.19, 22.2, 22.17, Apps B, H-I
———. Manual on Appellate Court Opinions. St. Paul, Minn., West Publishing Co., 1977: §22.57
———. Summary of California Law. Multivolume. San Francisco, Bancroft-Whitney, 10th ed 2005: §§5.63, 12.86, App B
Wydick, Richard C. Plain English for Lawyers. Durham, N.C., Carolina Academic Press, 4th ed 1998: §13.24

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