

# Appeals, Writs and Post-Trial Motions

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As in past years, practitioners saw a number of developments in appellate law and procedure during late 2003 and 2004. We highlight the most noteworthy of these developments and discuss some pitfalls to avoid. Given the publication date of this issue, we have expanded our discussion to include changes to the California Rules of Court effective January 1, 2005.

## ■ Appealable Judgments and Orders

The California Supreme Court and Courts of Appeal issued some notable decisions during 2004 that further clarify the scope and nature of an appealable judgment or order.

### Supreme Court—Interpreting the Notice of Appeal

An order denying a new trial is not appealable. See *Neumann v. Melgar*, 121 Cal.App.4th 152, 161 (2004). Such an order, however, may be reviewed on appeal from the underlying judgment. Code Civ. Proc. § 906. In *Walker v. Los Angeles Metropolitan Trans. Authority*, 35 Cal.4th 15, 22 (2005), the California Supreme Court held that a “reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment when it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced.”

### Courts of Appeal

#### Appealability of Anti-SLAPP Orders

While orders granting or denying a CCP § 425.16 anti-SLAPP motion are ordinarily appealable, the Second Appellate District has held that no direct appeal lies from denial of an anti-SLAPP motion based on the CCP § 425.17 exemption from the anti-SLAPP statute. *Goldstein v. Ralphs Grocery Co.*, 122 Cal.App.4th 229, 233 (2004). In *Goldstein*, defendant filed a special motion to strike various complaints filed in a class action lawsuit. The trial court denied the motion, ruling that the litigation qualified as a class

action lawsuit exempt from anti-SLAPP motions under CCP § 427.17(b). *Id.* at 231. The Court of Appeal dismissed defendant’s appeal from the trial court’s denial order. The court recognized the grant or denial of a special motion to strike is generally appealable. However, CCP § 425.17(e) carves out an exception to this general rule. Under this provision, if a trial court denies a special motion to strike because the challenged cause of action is exempt under CCP 425.17, no direct appeal lies from the denial of the motion. *Id.* at 232.

#### Standing to Appeal

In *A.I. Credit Corp. v. Aguilar & Sebastinelli*, 113 Cal.App.4th 1072 (2003), the First Appellate District, Division Four carved out an exemption to the general rule that individuals who are not (and never were) parties of record in the trial court lack standing to appeal an appealable judgment or order issued in the trial court. In *A.I.*, the Court of Appeal held that an attorney disqualification from continuing representation in a case has standing to challenge the disqualification order. *Id.* at 1077.

## ■ Timing and Filing of Notices, Briefs, and Motions

This past year, the Courts of Appeal issued two noteworthy opinions that illustrate how difficult it can be, at times, to navigate the terrain of appellate procedure.

### Unsigned Minute Orders

The Fourth Appellate District, Division Three published its opinion in *Quest International Inc. v. Icode Corp.*, 122 Cal.App.4th 745 (2004), “in order to alert the bench and bar to a particularly well-camouflaged trap for the unwary.” This trap, according to the court, is created by the statutory gatekeeper to the appellate courts, CCP § 904.1. Under this section, *unsigned* minute orders granting motions to dismiss for inconvenient forum are directly appealable. Hence, the time for filing a notice of appeal begins to

run after the issuance of the unsigned minute order, and not from a subsequent entry of a formal dismissal of the case. On January 19, 2005, the California Supreme Court granted review of this case. Hence, we will have to wait and see whether this “trap for the unwary” remains.

### Bankruptcy Stays

In *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass’n*, 118 Cal.App.4th 1031, 1038 (2004), the Second Appellate District, Division One held that the automatic stay associated with the filing of a bankruptcy petition extends the time for filing a notice of appeal after denial of a new trial motion. Ordinarily, a new trial motion is denied by operation of law if the trial court does not rule on it within 60 days after service of notice of entry of judgment. Code Civ. Proc. § 660. However, a provision in the bankruptcy code provides: “if applicable nonbankruptcy law...fixes a period for commencing or continuing a civil action...then such period does not expire until...30 days after notice of the termination or expiration of the stay.” 11 U.S.C. § 108 (c)(2). In turn, therefore, the time to appeal pursuant to Cal. Rules of Court, rule 3(a), is extended as well. (Under Rule 3(a), the time for filing a notice of appeal is extended by the filing of post-trial motions, so that the notice is due 30 days after service of notice of entry of the denial of the motions.) *Id.* at 1039.

### Rule Changes

Practitioners should also be aware of the following rule changes:

Effective July 1, 2004 – In cases where a statute or rule of court requires service of a brief on a nonparty public officer, the brief’s cover must contain the following statement: “Service on [insert name of officer or agency] required by [insert citation to the statute or rule].” Cal. Rules of Court, rule 44.5(c). Parties must serve the Attorney General with any brief that challenges the constitutionality of a state statute. Cal. Rules of Court, rule 44.5(a)(1).

Effective January 1, 2005 – In addition to service on each party represented by counsel and each unrepresented party, an appealing

party must now serve a copy of its notice of appeal on “any other person or entity when required by statute or rule.” Cal. Rules of Court, rule 40.1(a)(1). Service under this amended rule may be “by any method permitted by the Code of Civil Procedure.” *Ibid.* A notice designating the clerk’s transcript, or a notice of election to proceed by rule 5.1 appendix, must also state the date the notice of appeal was filed. Cal. Rules of Court, rule 5(a)(4) and rule 5.1(a)(1).

### ■ Writs

#### Timing of writ petitions

A noteworthy development in the timing of writ petitions occurred in 2004.

In *Bensimon v. Superior Court*, 113 Cal.App.4th 1257, 1259 (2003), the Second Appellate District, Division One, held that a motion for reconsideration does not extend the time for writ relief following the denial of summary judgment. In *Bensimon*, plaintiff moved for summary judgment and the trial court denied the motion. The plaintiff then unsuccessfully moved for reconsideration. *Id.* at 1258. More than 20 days after the trial court denied the summary judgment motion and mailed notice of its order, the plaintiff petitioned the Court of Appeal for writ relief. The Court of Appeal denied plaintiff’s writ petition as untimely. Under CCP § 437c, subdivision (m)(1), a party must petition for writ relief within 20 days after service of written notice of entry of an order denying summary judgment. According to the court, this rule is jurisdictional and a party cannot extend the time limit by filing a motion for reconsideration. *Id.* at 1259.

#### Rules Changes

Practitioners should be aware of the following related rule changes.

Effective January 1, 2005 - Writ petitions must now be accompanied by a certificate of word count verifying that the petition does not exceed 14,000 words. Cal. Rules of Court, rules 56(a)(1) & (b)(6). While the petition’s supporting points and authorities count toward the word limit, the tables, certificate, verification and supporting

documents do not. Cal. Rules of Court, rule 56(b)(6). The rules now provide an express timetable for filing a reply to a preliminary opposition or return to a writ petition. A petitioning party must now file its reply to a preliminary opposition within 10 days after the opposition is filed, or within 15 days after the return is filed. Cal. Rules of Court, rules 56(g)(3) & (h)(3).

### ■ Post-appellate Matters—Peremptory Challenges

CCP § 170.6(a)(2) permits a party to make a peremptory challenge when the same trial judge is assigned to conduct a “new trial” after a reversal on appeal. During this past year, two courts of appeal have issued decisions that further develop the definition of a “new trial” in this context.

In *Paterno v. Superior Court*, 123 Cal.App.4th 548 (2004), plaintiffs sued for damages stemming from a flood disaster. The complaint named two defendants, the Water District and the State. *Id.* at 552. The action was bifurcated and after the issue of liability was tried, the trial court issued a judgment for both defendants. Plaintiffs appealed, and the Third Appellate District affirmed the judgment in favor of the District but reversed as to the State. It remanded the case to the same trial judge with directions to determine the damages owed by the State to plaintiffs. Plaintiffs attempted to disqualify the judge by peremptory challenge. After the trial court denied their challenge, plaintiffs sought writ relief. The Court of Appeal denied plaintiffs’ petition. The court recognized that the term “new trial” has been broadly construed to achieve the legislature’s purpose of minimizing a party’s chances of encountering a judge biased by reversal on appeal. *Id.* at 558. Despite this broad construction, however, the Court of Appeal held that a “new trial” must at the very least consist of a “reexamination” of a factual or legal issue that was previously determined. *Id.* at 560. Here, the issue of liability was fully settled and the trial judge’s sole task was to conduct a trial to determine the amount of damages owed by the State and enter judgment

accordingly. This did not require the trial judge “to go back and revisit any factual or legal terrain that [had] thus far been traversed.” *Id.* at 560-561.) Therefore, the damages trial did not constitute a “new trial” under CCP § 170.6(a)(2).

The Second Appellate District, Division One, took a somewhat different approach in *State Farm Mutual Automobile Ins. Co. v. Superior Court*, 121 Cal.App.4th 490 (2004). In *State Farm*, the trial court issued an order resolving a conflict of laws issue well before the start of trial. *Id.* at 494. The Court of Appeal reversed the trial court’s ruling on the conflict of laws issue and remanded for a continuation of the underlying proceedings. Defendant attempted to disqualify the trial judge under CCP § 170.6(a)(2), but was unsuccessful. The Court of Appeal upheld the denial of the peremptory challenge. Quoting a recent Supreme Court case (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245), the Court of Appeal cautioned that courts “cannot permit a device intended for spare and protective use (*i.e.*, the peremptory challenge) to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration.” After reviewing the legislative history, pertinent case law, and CCP § 656 (which defines a “new trial” as the “re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee”), the Court of Appeal announced the following test: “[A] peremptory challenge is permitted under section 170.6(a)(2) where (1) a trial court’s decision or final judgment is made in conjunction with a ‘trial’ and (2) a subsequent reversal of that decision results in a ‘new trial.’” *Id.* at 499. In other words, according to the court, CCP § 170.6(a)(2) contemplates two “trials.” In this case, the trial court’s ruling on the applicable law necessarily preceded any “trial.” Regardless of what law governed, the determination of applicable law had to be made before any of plaintiffs’ causes of action could be adjudicated. Moreover, the Court of Appeal’s reversal on the conflict of laws ruling did not result in a “new trial.” The Court of Appeal noted that the trial court had yet to “try” any of plaintiffs’ causes of

action; it merely decided (albeit incorrectly) which state's law will apply when the case is tried or otherwise adjudicated.

### ■ **New Forms Approved by the Judicial Council**

The Judicial Council has approved some *optional* forms that a party may use to facilitate navigation through the appellate courts:

- a) "Notice of Appeal/Cross-Appeal (Unlimited Civil Cases)" APP-002, <http://www.courtinfo.ca.gov/forms/documents/app002.pdf>
- b) "Abandonment of Appeal" APP-005, <http://www.courtinfo.ca.gov/forms/documents/app005.pdf>
- c) "Application for Extension of Time to File Brief (Civil Case) " APP-006, <http://www.courtinfo.ca.gov/forms/documents/app006.pdf>
- d) "Request for Dismissal of Appeal" APP-007, <http://www.courtinfo.ca.gov/forms/documents/app007.pdf>