Appeals, Writs, & Post-Trial Motions

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■ Developments—2009 through early 2010

The following are some of the most noteworthy developments in appellate, writ, and posttrial law and procedure in 2009 and early 2010.

The rule concerning sealed records has been renumbered.

Rule 8.46 of the California Rules of Court

The procedure for sealed records and records proposed to be sealed on appeal and in original proceedings is now covered under rule 8.46. The rule is otherwise unchanged.

The time to appeal may now commence through the use of electronic service.

Rule 8.104 of the California Rules of Court & *Insyst, Ltd. v. Applied Materials, Inc.*, 170 Cal. App. 4th 1129 (2009)

Prior to the most recent amendments to the California Rules of Court, under rule 8.104(a)(1), a superior court clerk's electronic service of a "triggering document"—either a notice of entry of judgment or a file-stamped copy of the judgment —did not trigger the period for filing a notice of appeal. In *Insyst*, the Court of Appeal reexamined this rule and held that when rule 8.104(a)(1) was harmonized with Code of Civil Procedure section 1010.6, which authorizes the adoption of local rules permitting the use of electronic service, the time for filing a notice of appeal commenced when a superior court clerk electronically served a triggering document.[1] Additionally, the court held that electronic notice of the filing of a triggering document and the means to obtain that document did not qualify as service of a triggering document. The actual triggering document must be electronically served. The holding in *Insyst* has now been formalized in the California Rules of Court.[2] As of January 1, 2010, electronic service of a triggering document by the court clerk is now expressly authorized by rule 8.104(a)(1) and (4).

A petitioner for a writ of supersedeas must now provide specific records of oral proceedings in support of its petition.

Rule 8.112 of the California Rules of Court

The rules of court now provide greater specificity as to what oral materials are required in support of a petition for writ of supersedeas. As of January 1, 2010, a petitioner must provide a reporter's transcript of the oral statements by the lower court regarding the issues on appeal, or a declaration summarizing such statements if a transcript is unavailable. A petitioner must also file a reporter's transcript, or declaration in lieu of a transcript when the transcript is unavailable, of any oral proceedings concerning an application for a stay filed in the trial court.

The party in possession of an exhibit designated to be part of the clerk's transcript has a finite time to deliver the exhibit.

Rule 8.122 of the California Rules of Court

Effective January 1, 2010, if the superior court has returned an exhibit to a party that later is designated for inclusion in the clerk's transcript, the party in possession of the exhibit must deliver the exhibit to the superior court clerk within 10 days after service of the notice designating the exhibit.

An appendix in lieu of a clerk's transcript may now incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case.

Rule 8.124 of the California Rules of Court

A number of changes have been made to the rule governing the election and use of an appendix in lieu of a clerk's transcript, effective January 1, 2010.

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1. *Insyst*, 170 Cal. App. 4th at 1134-39.
2. See *id.* at 1139-40.

First, the use of an appendix instead of a clerk's transcript will govern if: (1) the appellant elects an appendix in the designation of the record; or, (2) the respondent elects an appendix within 10 days after the notice of appeal is filed and no waiver of the clerk's transcript fee is granted to the appellant. The superior court may overrule these elections on a motion served and filed within 10 days after the notice of election is served.

An appendix may now incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case, provided that the incorporation is properly identified and labeled as provided in subsection (b)(2) of the rule. Additionally, a party preparing an appendix may request a copy of any **document** as well as any exhibit in the possession of another party as provided in subsection (c) of the rule.

Parties seeking to incorporate by reference the prior record in multiple or later appeals in the same case must now provide further specificity.

Rule 8.147 of the California Rules of Court

In an appeal in which the parties are using either a clerk's transcript or a reporter's transcript, a party seeking to incorporate by reference all or part of a record in a prior appeal in the same case may do so, but must now provide greater detail in identifying and referencing that prior record as provided in subsections (b)(1)(A) to (C) and (b)(2). Some of the new requirements include, but are not limited to, the following. As to the reporter's transcript, the volume and page numbers of the material to be incorporated by reference must be separately identified in a separate section at the end of the designation of record. The designating party must also provide a copy of the incorporated materials if requested by the reviewing court or any party. As to the clerk's transcript, the cost of copying and including the prior materials into the clerk's transcript must be included in the clerk's estimate. The materials incorporated into the clerk's transcript must also be placed in a separate section at the end of the transcript and separately identified.

Time to file appellant's opening brief has been extended.

Rule 8.212 of the California Rules of Court

As of January 1, 2010, an appellant now has 40 days after the record is filed in the reviewing court, or 40 days after the reporter's transcript is filed in the reviewing court in a case where there is an election to proceed by appendix in lieu of clerk's transcript, in which to serve and file the opening brief.

Motion for sanctions is appealable under the collateral order doctrine where there is no judgment in the underlying action.

***Muller v. Fresno Community Hospital & Medical Center*, 172 Cal. App. 4th 887 (2009)**

The denial of a motion for sanctions is arguably appealable, either as a collateral order or pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2), which authorizes an appeal from an order made after an appealable judgment. However, the question remains unsettled. *Wells Properties v. Popkin*[3] holds the denial is not appealable, while *Shelton v. Rancho Mortage & Investment Corp.*[4] and *In re Marriage of Dupre*[5] hold it is appealable.

In *Muller*, the Court of Appeal had reversed a jury verdict in favor of the defendants. The case was tried again and resulted in another jury verdict in favor of the defendants. The trial court granted plaintiffs' motion for new trial. The plaintiffs then filed a motion for sanctions based on alleged discovery abuses by the defendants. The trial court denied the motion and the plaintiffs appealed that order.[6]

To determine whether the order denying sanctions was appealable, the Second District examined the collateral order doctrine, concluding that application of the doctrine depends on: (1) whether the

3. 9 Cal. App. 4th 1053, 1055-56 (1992).
4. 94 Cal. App. 4th 1337, 1345 (2002).
5. 127 Cal. App. 4th 1517, 1525 (2005).
6. See *Muller*, 172 Cal. App. 4th at 890.

matter concluded by the order is distinct and severable from the general subject of the litigation; and (2) whether the issues raised by the order can be expeditiously reviewed on appeal without implicating the merits of the underlying controversy. Applying these principles, the Court of Appeal held the order was appealable. First, the order was distinct and severable because whether to award sanctions for the defendants' alleged misconduct was of no relevance to the proceedings that would take place upon remand of the case. Second, review of the order did not implicate the underlying merits because there was a very real question whether the order denying sanctions would be reviewable from a judgment following a third trial, because the order would not be part of the proceedings in a third trial.[7]

A trial court does not have authority to reexamine factual findings after a judgment has been entered once the time period for ruling on a motion for new trial has expired, regardless of how the reexamination is described.

***In re Marriage of Herr*, 174 Cal.App.4th 1463 (2009)**

In *Le Francois v. Goel*,[8] the Supreme Court held that although a trial court has inherent authority to correct an erroneous ruling or order on its own motion, a trial court may not grant an unauthorized motion for reconsideration. The Third District applied the reasoning of *Le Francois* in *Herr*. There, in a child support proceeding, after the parties entered into a written stipulation, the parties each separately moved to modify child support and other payments. All of the matters were tried together, after which the court announced its ruling from the bench.[9]

Fifty-six days after the entry of judgment—after the time authorized for requesting a new trial—one of the parties filed a motion for reconsideration pursuant to Code of Civil Procedure section 1008, or, in the alternative, for a new trial. At the hearing on that motion, the court granted reconsideration on its "own motion" and set the matter for further hearing.[10]

The Court of Appeal held that the trial court's grant of "reconsideration" was for the express purpose of conducting a further hearing or trial, which was in actuality the grant of a new trial beyond the court's power.[11] The Court of Appeal concluded that while a trial court does have the inherent power to reexamine and correct its own erroneous rulings, a trial court's power to reexamine the facts of an already entered judgment, i.e., a new trial, is governed by statute; and the trial court exceeded the authority conferred by that statute in granting "reconsideration."[12]

Authority continues to build that an aggrieved party that is not a party to the underlying litigation has standing to appeal the judgment.

***In re FairWageLaw*, 176 Cal. App. 4th 279 (2009)**

In *County of Alameda v. Carleson*,[13] the California Supreme Court held that, in general, only parties of record may appeal, and that consequently, anyone who is denied the right to intervene in a case ordinarily may not appeal from a judgment subsequently entered in that case. The Supreme Court recognized that anyone legally aggrieved by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section 663.[14] Recently, however, some lower courts have held that aggrieved non-parties may appeal without moving to vacate the judgment, relying on a line of authority originating with *In re Colton's Estate*,[15] where the California Supreme Court held that "any person having an interest recognized by law in the subject matter of the judgment, which

7. Id. at 904-05.
8. 35 Cal. 4th 1094, 1107-09 (2005).
9. *Herr*, 174 Cal. App. 4th at 1466.
10. *Id.* at 1466-67.
11. *Id.* at 1470.
12. *Id.* at 1471.
13. 5 Cal. 3d 730 (1971).
14. *Id.* at 736.
15. 164 Cal. 1 (1912).

interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard on appeal."[16]

In re FairWageLaw is the most recent of this new line of cases. The case involved the dissolution of a corporation by two of the corporation's three shareholders. Following a bench trial, the trial court entered a judgment of dissolution and assessed the dissolution litigation expenses against the interest of the third, non-party shareholder. The non-party shareholder appealed without moving to vacate the judgment or intervene in the case.[17] The Fourth District, following the *Colton's Estate* line of cases, found in favor of the non-party shareholder, holding that where a person, although a non-party, has an immediate, pecuniary and substantial interest in the subject matter of a judgment, and that interest is adversely affected by the judgment, that person is an aggrieved party and is entitled to be heard on appeal.[18]

A continuance is not an appealable order.

***Century 21 Chamberlain & Associates v. Haberman*, 173 Cal. App. 4th 1 (2009)**

A reviewing court has jurisdiction over a direct appeal only when there is: (1) an appealable order; or (2) an appealable judgment.[19] In *Century 21*, the plaintiff appealed an order continuing for a further evidentiary hearing a motion to compel arbitration. In its order, the trial court did not rule on the motion.[20] The Fourth District held that no statute authorizes an appeal from an order continuing a hearing, and that no persuasive authority supported the plaintiff's claim that by continuing the hearing, the trial court effectively issued an appealable order enjoining the arbitration.[21] As a result, the Court of Appeal dismissed the plaintiff's appeal.

A subsequent correction to an improperly filed motion to reconsider an appealable order does not correct the defect for purposes of calculating the time in which to appeal from the appealable order.

***Branner v. Regents of University of California*, 175 Cal. App. 4th 1043 (2009)**

Under California Rules of Court, rule 8.108(e), "[i]f any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties . . . ." In *Branner*, the plaintiff filed a motion to reconsider a trial court's order granting the defendant's anti-SLAPP motion to strike the complaint pursuant to Code of Civil Procedure section 425.16. The motion to reconsider did not include an affidavit or declaration of counsel as required by statute; however, the trial court accepted a subsequently filed declaration and found the motion to reconsider timely. The trial court ultimately denied the motion in part and granted it in part, and both parties appealed the order.[22]

The Third District concluded that both appeals were untimely. First, the court observed that, pursuant to Code of Civil Procedure section 1008, the filing of a motion to reconsider only extends the time in which to appeal the underlying order if the motion to reconsider is valid, meaning in compliance with all of the procedural requirements of section 1008, subdivision (a). Because the plaintiff's motion did not attach an affidavit or declaration, it was not valid and did not extend the time to appeal from the order granting the anti-SLAPP motion. Second, the trial court could not accept a late affidavit or declaration so as to correct the procedural defect and extend the time to appeal because that would undermine the jurisdictional nature of the appellate time period

16. *Id.* at 5.
17. *FairWageLaw*, 176 Cal. App. 4th at 282-84.
18. *Id.* at 285.
19. *Griset v. Fair Political Practices Com.*, 25 Cal. 4th 688, 696 (2001).
20. *Century 21*, 173 Cal. App. 4th at 11.
21. *Id.*
22. *Branner*, 175 Cal. App. 4th at 1045-46.

by permitting extension of that time period based on the mistake or inadvertence of counsel. Lastly, the defendant's appeal was untimely because the time for the defendant to appeal was also based on the plaintiff's filing of the invalid motion to reconsider.[23]

A party is not barred from pursuing a second appeal where the first appeal was dismissed due to the party's mistaken belief.

***Etheridge v. Reins Internat. California, Inc.*, 172 Cal. App. 4th 908 (2009)**

The trial court sustained a demurrer and dismissed the entire action with prejudice. The plaintiff filed two notices of appeal. After the first notice was filed, the Second District indicated that the appeal was in default for failure to pay the filing fee. In the apparent belief that the first notice of appeal was premature in the absence of a judgment, the plaintiff chose not to pursue the first appeal and it was dismissed. Instead, the plaintiff returned to the trial court, obtained a judgment and appealed from it. The defendant filed a motion to dismiss the second appeal, on the basis that a second appeal could not be taken from the same appealable order. The Second District denied the motion without prejudice.[24]

The second notice of appeal was timely, even as to the trial court's initial order sustaining the demurrer and dismissing the action. As a result, the issue addressed by the Court of Appeal was whether dismissal of the first appeal for failing to pay the filing fee bars the plaintiff from pursuing a second appeal from the same appealable order or judgment. The Court of Appeal held it does not, reasoning that the plaintiff should not be deprived of the right to appeal because of a harmless error. The court went so far as to state that, if it had been necessary to do so, it would have issued an order, nunc pro tunc, vacating dismissal of the first appeal.[25]

A postjudgment order confirming an arbitration award is not appealable if it contemplates subsequent judicial proceedings.

***In re Marriage of Corona*, 172 Cal. App. 4th 1205 (2009)**

Under Code of Civil Procedure section 904.1, an order made after an appealable judgment is itself appealable. However, to be appealable under section 904.1, a postjudgment order must not be preliminary or preparatory to later proceedings.[26]

In *Corona*, the Fourth District confronted a motion to dismiss an appeal from a trial court's postjudgment order confirming an arbitration award.[27] Ordinarily, such orders are appealable. However, in this instance, the order did not simply confirm the arbitration award. Instead, it also appointed a special referee to select an accountant to perform the accounting required by the arbitration award. The order also contemplated further judicial proceedings to adopt the referee's findings following the accounting. Because the order was preliminary to further proceedings, the motion to dismiss was granted.[28]

Prison-delivery rule applies to notices of appeal filed by pro se prisoners in civil cases.

***Silverbrand v. County of Los Angeles*, 46 Cal. 4th 106 (2009)**

The prison-delivery rule, also known as the prison mailbox rule, provides that a self-represented prisoner's notice of appeal in a criminal case is deemed timely filed if, within the relevant period set forth in the California Rules of Court, the notice is delivered to prison authorities pursuant to the procedures established for prisoner mail. The rule ensures that an unrepresented defendant, confined during the period allowed for the filing of an appeal, is accorded an opportunity to comply with the filing requirements fully comparable to that provided to a defendant who is represented by counsel or who is not confined. The rule also establishes a bright line permitting courts to avoid the administrative burden of determining on a

23. *Id.* at 1046-50.
24. *Etheridge*, 172 Cal. App. 4th at 912-13.
25. *Id.*
26. *In re Marriage of Levine*, 28 Cal. App. 4th 585, 589 (1994).
27. 172 Cal. App. 4th at 1215.
28. *Id.* at 1217-19.

case-by-case basis whether a particular prisoner's notice of appeal was timely delivered to prison authorities to permit timely filing with the county clerk's office.[29]

In *Silverbrand*, the California Supreme Court found no basis for having one rule in the context of criminal appeals and another for civil appeals.[30] As a result, the prison delivery rule now applies to notices of appeal filed by pro se prisoners in both criminal and civil cases.[31]

29. See *In re Jordan*, 4 Cal. 4th 116, 118-19 (1992).
30. 46 Cal. 4th at 110.
31. *Id.*