Appeals And Writs

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■ California Supreme Court Practice and Procedure

Supreme Court Workload and Statistics

The California Supreme Court underwent marked transition last year as newly minted Justices Leondra R. Kruger and Mariano-Florentino Cuéllar, appointees of Democratic Governor Edmund G. Brown Jr., replaced Justices Joyce L. Kennard and Marvin R. Baxter, both appointees of Republican Governor C. George Deukmejian.

According to an article published in the recently defunct California Lawyer magazine, the court's productivity suffered an understandable decline because of the transition. (Uelmen & Graham, *A Shifting Balance at the California Supreme Court?* (September 2015) California Lawyer, http://www.callawyer.com/2015/09/a-shifting-balance-at-the-california-supreme-court/.) The court issued 73 signed majority opinions between July 2014 and July 2015, substantially fewer than the court's average of 92 during each year since Chief Justice Tani G. Cantil-Sakauye joined the court in 2011. (*Id.*) Indeed, the court issued the lowest number of opinions since 1987-88, which was shortly after Chief Justice Rose E. Bird and Associate Justices Joseph Grodin and Cruz Reynoso lost retention elections and left the court. And, as a result of transitions, more than two thirds of the court's decisions this term included a Court of Appeal justice sitting pro tem. (*Id.*) The court's decisions were, for the most part, unanimous. Dissents were rare; Justice Kathryn M. Werdegar dissented most often (eight times), followed closely by Justice Goodwin H. Liu (seven times). (*Id.*) In stark contrast to the ideologically split U.S. Supreme Court, only four of the California Supreme Court's opinions in the July 2014-July 2015 period were divided 4-3.

One decision that may come out a different way with Justices Kruger and Cuéllar on the court is *People v. Grimes* (2015) 60 Cal.4th 729, which, in January 2015, affirmed a sentence of death. The court granted rehearing of the case in March, immediately after Justices Kruger and Cuéllar joined the court, and the case is awaiting reargument. An order granting rehearing is exceptionally rare. The last time the court granted rehearing came in an oddly similar but reverse circumstance: shortly before the three justices lost retention elections in 1987, the court reversed a capital sentence, only to have the decision reheard, to the opposite result, by a newly composed court a few months later. (See Uelmen & Graham, *supra.*)

Death penalty cases may continue to shake up the court's docket in 2016. Not only does the court now have several more left-leaning justices than it did a few years back, but a voter initiative proposed for inclusion on the 2016 ballot could eliminate the state's capital punishment statute entirely. The initiative, dubbed "The Justice That Works Act of 2016," would retroactively replace capital punishment in California with life sentences without the possibility of parole and a restitution requirement.[1] A similar electoral attempt lost 52-48 in 2012, but a September 2014 poll by Field Research Corporation found the lowest support for capital punishment in California in more than 50 years, with ten percent less support than in a similar poll in 2011. Even though California has not executed an inmate since 2006, death penalty cases make up an outsized portion of the California Supreme Court's docket because all such cases can be automatically appealed to the court. The court decided 13 capital cases in the June 2014-2015 period (affirming 11 capital sentences and reversing two), but the number of cases does not capture the time commitment they require, given the generally lengthy records and briefing, along with couldn't-be-higher stakes. If California voters remove death penalty cases from the Supreme Court's docket, the court will have a good deal more time with which to consider other issues. On the other hand, a competing initiative, the "Death Penalty Reform and Savings Act of 2016," may also appear on the ballot.[2] If passed, that law would expedite the appeals process in

1. For the full text of the initiative, see Office of Atty. Gen., 2016 Initiatives-Active, Initiative No. 15-0066 (Sept. 15, 2015), http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf?

2. For the text of this initiative see Office of Atty. Gen., 2016 Initiatives-Active, Initiative No. 15-0096 (Oct. 16, 2015), http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf?

death penalty cases and could increase the California Supreme Court's capital caseload.

A Rare Written Dissent From Denial of Petition for Review

The United States Supreme Court occasionally publishes individual justices' written dissents from denials of petitions for writs of certiorari. These dissents can provide a powerful signal to court-watchers about issues that may have a chance of going up in the near future, particularly when more than one justice joins the dissent (four justices must vote to grant a certiorari writ petition for the court to take the case). A justice will sometimes use a dissent from denial to draw attention to an issue of personal importance. Chief Justice John G. Roberts did this shortly after ascending to the court, when he authored a 2008 dissent from denial on a question of probable cause for an arrest in a style that paid homage to Micky Spillane and Raymond Chandler more than anything in the pages of the Federal Reporter. (*Pennsylvania v. Dunlap* (2008) 555 U.S. 964, 964 (dis. opn. of Roberts, C.J., and Kennedy, J.) ["Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak."].)

The California Supreme Court has no similar practice. The court denies about 96% of petitions for review, but, until Justice Goodwin H. Liu issued a written dissent from denial of a petition for review this year in *In re Joseph H.* (2015) 237 Cal.App.4th 517, no such dissents had been written since the late 1950s (though, from time to time, justices have recorded the fact of a dissent without a written explanation). Justice Liu's dissent took issue with the Court of Appeal's affirmance of a trial court's conviction of a 10-year-old boy for shooting his father to death. Justice Liu argued the court should have reviewed the case since the juvenile's purported waiver of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 failed to meet constitutional standards for a person of that age. Yet this written dissent, which Justice Cuéllar joined, will not be published in the official reports bound volumes. Instead, it is currently consigned to a very long minute entry in the Supreme Court's docket (*In re Joseph H.* (Oct 16, 2015, No. S227929); 2015 Cal. LEXIS 8950.), although the court is considering whether to begin publishing similar dissents in the future.

Interestingly, the two justices who joined in the written dissent are both appointees of Governor Edmund G. Brown Jr., and the third of Brown's appointees, Justice Kruger, also noted a dissenting vote (although she did not join in Justice Liu's explanation of the dissent). Justices Liu and Kruger themselves clerked at the United States Supreme Court. Should Governor Brown have an opportunity to appoint another justice to the court with a similar perspective on dissents from denials of petitions for review, the court's practice might well change to include more of those dissents, as well as provide for their publication.

Practice of Depublishing Court of Appeal Opinions Immediately When a Petition for Review Is Granted

After a court of last resort indicates it will take a case, what happens to the generally published precedent under review between that point and an eventual decision? In the United States Supreme Court, a grant of a petition for writ of certiorari is a bright red flag, but it does not render the decision non-precedential; lower courts are still bound to follow the precedent unless proceedings are stayed pending Supreme Court review. California is the only state in the nation that does not follow a similar rule. Instead, California Rules of Court, rules 8.1105(e)(1) and 8.1115, currently provide that the moment the court grants a petition for review, the lower court's opinion is automatically depublished, nonprecedential, and noncitable. Thus, California trial courts – which are generally required to follow any California Court of Appeal opinion that does not conflict with another Court of Appeal opinion – are not bound by a decision for which a petition for review has been granted unless the Supreme Court specifically orders the case republished.

This is important because in California years can pass between the grant of a petition for review by the Supreme Court and a final disposition. The rule of law in place during that time could have a substantial impact on the way cases are decided. Currently, a party who petitions for review from an appellate court opinion that raises an issue that the California Supreme Court has taken under review but not yet decided will receive a "grant and hold," and then a remand following issuance of the decision.

The court has considered changing the depublication rule, at the urging of the bar, four times since the late 1970s, rejecting the request each time. But, perhaps due to the U.S. Supreme Court experience of some of the new California Supreme Court justices,

the court has taken a renewed interest in the rule. In July 2015, it asked for public comment on the idea of changing the rule. (See Cal. Supreme Court's Invitation to Comment on Publication of Appellate Opinions, SP15-05, http://www.courts.ca.gov/documents/SP15-05.pdf.) The comment period closed in September, and the court received a report of the comments in November. If adopted, the rule was initially slated to go into effect on January 1, 2016, but the court extended that potential effective date to July 1 because of "the extensive comments received." The court has already been more active than previous years in ordering cases republished that were automatically depublished under the current rules.

What Happens When the Court of Appeal Really, Really Doesn't Want the Supreme Court to Depublish an Opinion

Anyone who's appeared in Division Two of the California Court of Appeal, First District, knows that Presiding Justice J. Anthony Kline is certainly no potted plant. In August 2015, Justice Kline filed a seven-page letter with the Supreme Court of California, on behalf of himself and Justices James A. Richman and Marla J. Miller, in opposition to a request to depublish the opinion he authored on behalf of the trio in *In re Elias V.* (2015) 237 Cal.App.4th 568.

In *Elias*, the trial court had declared a 13-year-old juvenile a ward of the court. The Court of Appeal reversed this determination, holding that inculpatory statements the juvenile made to the police regarding alleged sexual contact with his friend's 3-year-old sister were obtained involuntarily and under duress in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. The *Elias* opinion is remarkable for its scholarly approach: The Court of Appeal cited a half-dozen books and law journal articles, and its conclusions relied in no small part on empirical research conducted by law professors concerning the behavior and mental processes of adolescents in interrogation and other high-stress settings.

The District Attorneys of San Diego and Alameda Counties requested depublication of the *Elias* opinion, partially because of its reliance on "social science research." Generally, when depublication requests are made to the California Supreme Court, appellate justices are content to let the opinions they work so hard on speak for themselves. But here, perhaps because the opinion did not address the propriety of using these sources, Justice Kline penned a defense of the court's reliance on law review research that would that would do leading judicial empiricist Richard A. Posner proud.

Of interest to Supreme Court practitioners is whether letters to the court in defense of an opinion's publication will become more common among the appellate justices. Probably not. The justices are busy enough as it is, and an attack on the conceptual basis for an opinion's reasoning, rather than the reasoning itself, is exceedingly uncommon (though Justice Kline's letter also addressed the district attorneys' other arguments for depublication). The Supreme Court denied the depublication request.

Doing Its Best to Repair the Mistakes of California's Past

In *In re Hong Yen Chang* (2015) 60 Cal.4th 1169, the Supreme Court posthumously granted the bar admission application of Hong Yen Chang, a native of China who immigrated to the United States in 1872. In 1888, after attending Yale University and Columbia Law School, Chang joined the New York Bar Association, becoming "the only regularly admitted Chinese lawyer in this country." (*Id.* at p. 1170.) When Chang moved west and sought admission to the California Bar Association, however, his application was rejected by the California Supreme Court. The court ruled that the federal Chinese Exclusion Act of 1882 constitutionally prohibited naturalization of citizens of Chinese ethnicity, and thus Chang could not meet the citizenship requirement of bar admission. (*In re Hong Yen Chang* (1890) 84 Cal. 163.) The ruling came near the apogee of anti-Chinese sentiment in California; the state's 1879 Constitution included an entire article that directed the Legislature to combat "the burdens and evils" of Chinese immigrants.

Modern constitutional theory has long disclaimed the sort of overtly racial discrimination that underlay the Chinese Exclusion Act and the first *Hong Yen Chang* decision. When Chang's descendants, assisted by law students from the University of California, Davis School of Law, petitioned the court last year to abrogate its prior decision and right a 125-year wrong, the court properly found a way to do so.

■ Practice and Procedures in the Court of Appeal

Judicial Notice Can't Be Used to Alter the Theory of the Case

Most appellate attorneys have had the experience of conceiving a brilliant new argument they wish had been made earlier in the proceedings – and most have spent some time trying to come up with creative ways to present that new argument. Division Three of the Fourth District recently made clear that judicial notice is not an effective way to get around the rule that an appellant can't change theories on appeal. In *Bermudez v. Ciolek* (2015) 237 Cal. App.4th 1311, one defendant in a car accident suit was apportioned 100% of the fault. On appeal, that defendant sought to have the court of appeal notice "the laws of physics, specifically the law of conservation of momentum" to argue that her co-defendant had necessarily caused some of the accident. (*Id.* at p. 1322.) While the laws of physics may be a proper subject for judicial notice, the court rejected the attempt to use those laws as a basis for offering a new argument to attack the verdict, holding that a litigant may not present an entirely new argument on appeal even when that new argument is based on fundamental truths.

An Administrative Agency's Construction of a Statute May Receive De Novo Appellate Review

Courts usually give substantial deference to an administrative agency's longstanding, careful interpretation of the statutes it is charged with overseeing, particularly when that interpretation is contained in a duly promulgated regulation. But what about an agency's less formal interpretation of a statute that only tangentially touches upon the matters it generally oversees? In *Lanquist v. Ventura County Employees' Retirement Association* (2015) 235 Cal. App.4th 186, 192-193, Division Six of the Second District found that such a statutory interpretation may be entitled to nothing more than "due consideration." (*Id.* at p. 193.) In *Lanquist*, the pensions agency for Ventura County interpreted the federal military statutes to conclude that "active military service" under the state's County Employees Retirement Law, Government Code section 31450 et seq., did not include time spent as a naval midshipman. (*Id.* at p. 190.) Finding that the agency had no particular experience interpreting military statutes, and that the agency based its interpretation on a 1979 opinion letter prepared by county counsel, rather than on a regulation adopted after a formal notice and comment process, the court announced it would give almost no weight to the agency's interpretation of the military laws. In doing so, it reached the opposite conclusion about naval midshipmen, finding that such experience is indeed "active military service" within the meaning of the relevant statutes.

Reporter's Transcripts Are VERY Important

In one of the first signs that budgetary health is returning to the California court system – and one that will cheer the hearts of trial attorneys who represent indigent or low-budget clients in civil cases that raise important appellate issues – the Los Angeles County Superior Court is hiring court reporters again. The trial courts for California's most populated county stopped providing court reporters for civil matters in 2012, when California's budget crisis hit its Great Recession peak. With any luck, the hiring is a sign that the days of "bring your own court reporter" will come to an end in all California trial courtrooms.

But that change won't come quickly enough for some defendants. In *Jameson v. Desta* (2015) 241 Cal.App.4th 491 Division One of the Fourth District held the lack of a reporter's transcript doomed the appellate arguments of a plaintiff in a prisoner civil rights case. Most striking was that the plaintiff had been declared indigent and was granted a fee waiver for the litigation, yet was still penalized for failing to obtain a court reporter at his own expense. The court noted that the fee waiver only applied if there was an official court reporter, and plaintiff had been notified that none would be present at his trial. Since the plaintiff had not arranged for a court reporter, the record on appeal did not contain a reporter's transcript, precluding the plaintiff from raising any evidentiary issues. The California Supreme Court has granted review in *Jameson* on the issue of whether, where a litigant has been granted a fee waiver, a superior court can "employ a policy that has the practical effect of denying the services of an official court reporter to civil litigants who have been granted such a fee waiver, if the result is to preclude those litigants from procuring and providing a verbatim transcript for appellate review." (*Jameson v. Desta*, review granted January 27, 2016, S230899.) The Supreme Court will likely grapple with the obvious equal protection issues raised by rejecting an appeal based on the lack

of a transcript an indigent plaintiff could not afford.

Courts Criticize Abuse of SLAPP Appeals

California's anti-SLAPP law has always been a source of controversy. In one recent case, two major law firms representing two major tech companies became embroiled in an anti-SLAPP dispute the Sixth District found to be so meritless that it ultimately offered suggestions to the Legislature on how to amend the statute to avoid similar litigation abuses in the future.

After nearly two years of litigation in *Hewlett-Packard Company v. Oracle Corporation* (2015) 239 Cal.App.4th 1174, Oracle filed an anti-SLAPP motion shortly before trial challenging one aspect of HP's proof of damages. When the trial court denied the motion as untimely, Oracle filed a notice of appeal which, by statute, automatically stayed all proceedings below. The Court of Appeal found Oracle's motion to be untimely, improper, and "wholly lack[ing in] merit," – and yet one whose denial was immediately appealable under the statute. (*Id.* at p. 1185.) In the course of the opinion, the court identified other instances of anti-SLAPP appeals filed solely as a tool for delay, rather than for the valid purpose of raising a colorable argument that the legal process is being used to stifle speech. The court raised the possibility that the anti-SLAPP statute's propensity for litigation abuse could cause more harm than the problem the statute is designed to correct. The court suggested a "simple fix" that might reduce the number of entirely meritless anti-SLAPP appeals would be to limit the right to immediate appeal to only cases where the motion is timely filed and would dispose of the entire action. (*Id.* at p. 1196.)

No word yet whether the suggestion has any legislative support.

Important Procedural Doctrines Reaffirmed

The Court of Appeal sent published reminders to the bar on a few longstanding procedural doctrines that remain good law.

In *Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 841, fn.5, Division Four of the Second District reminded everyone that just because the Court of Appeal summarily denies a motion to dismiss does not mean that it won't dismiss the appeal at the merits stage.

In *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, Division Eight of the Second District reminded appellants that disobeying a trial court order while an appeal of that order is pending could lead to dismissal of the appeal under the disentitlement doctrine. The parties in *Ironridge* settled a debt, and the settlement agreement required the defendant, after a certain condition was met, to transfer shares of stock to plaintiff. The condition occurred, defendant failed to transfer the stock, and plaintiff obtained an order from the trial court compelling defendant to go through with the transfer and restraining defendant from transferring shares to third parties until defendant complied with the order. Defendant appealed the order and, while the appeal was pending, transferred stock to third parties. The Court of Appeal granted plaintiff's request to dismiss the appeal under the disentitlement doctrine, which penalizes appellants who consciously choose to disregard trial court orders during an appeal.

An appellate court usually indulges all inferences in favor of a trial court's ruling on a request for attorney fees– but it does not necessarily do so when the trial court has explicitly set out the basis for its order. In *McKenzie v. Ford Motor Company* (2015) 238 Cal. App.4th 695, a car buyer sued Ford under California's "Lemon Law" alleging problems with his newly purchased Ford Fiesta. Ford offered to settle; the plaintiff initially rejected that offer, and then accepted a new settlement proposal after his attorneys had billed another 42 hours on the case. The trial court found that the settlement offers were effectively similar, and denied all attorney fees that plaintiff had incurred after the first offer, finding that the plaintiff "unreasonably delayed settlement for the sole purpose of ginning up his fee award." (*Id.* at p. 698.) Division Three of the Fourth District reversed, finding the trial court's "comparative assessment of [the] two settlement offers" erroneous as a matter of law. (*Ibid.*) The appellate court conducted its own comparison of the two settlement agreements and found the first one contained numerous broad clauses and releases that were absent from the second, and thus the plaintiff had not acted unreasonably in refusing the first offer but accepting the second. At least some portion of the work his counsel did between the two offers was necessary, and the court remanded for a specific determination of the fees allowed during that period.

Statute and Rule Changes Relevant to Appellate Practitioners

This year, the California Legislature passed Senate Bill 470, which modified Code of Civil Procedure section 437c concerning summary judgment motions

and codified the Supreme Court's 2013 ruling in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 530. In *Reid*, the Supreme Court abrogated longstanding summary judgment practice requiring trial court rulings on objections to evidence submitted as part of a motion for summary judgment in order to preserve those objections for appeal. Objections on which the trial court failed to rule were, prior to *Reid*, deemed waived– even if the party could do nothing to cause the trial court to issue a ruling on its evidentiary objections beyond filing those objections and raising them during oral arguments. *Reid* and the revisions to Code of Civil Procedure section 437c made a commonsense change.

In other administrative changes, the California Courts of Appeal for the Third and Sixth Districts have joined the First District and Fifth Districts in eliminating paper filing and requiring mandatory electronic filing of briefs, records, and motions. Given that we are midway through the second decade of the twenty-first century, it is long past time for all California courts to require and accept only electronic filings.

Finally, the California Supreme Court and all California Courts of Appeal now allow practitioners to use laptops or tablets during oral argument. The devices can only be used to assist the advocate (for example, in place of a binder or written notes), and cannot be used to display demonstrative evidence or slides to the court. The devices must be silenced and must remain in airplane mode at all times. Mobile phones are still prohibited in the state's appellate courtrooms

■ Procedures for Writ Review

Amici Briefs Can Be Very Useful When Seeking Discretionary Review

Everyone knows amici briefs can be useful in seeking discretionary review. Not only do they present a fresh perspective and provide additional arguments in support of the petition, but they can also serve a critical signaling function by showing the court that others care enough about the issue to spend time and money preparing a brief.

A more surprising benefit of the amicus brief is the help it may provide in forestalling a claim of mootness. In *McMillin Albany LLC v. Superior Court* (2015) 239 Cal.App.4th 1132, review granted November 24, 2015, S229762, the petitioner filed a writ petition seeking a stay until the defendant complied with special prelitigation procedures applicable to certain construction defect cases. The real party in interest offered to stipulate to a stay until those procedures could be completed, and argued that the petition was accordingly moot. Even though a stay was the very relief the petitioner sought, the Fifth District nevertheless found the controversy was still live based in part on "the presentations of amici curiae indicating the issues are of widespread interest in the building industry." (*Id.* at p. 1138.) The California Supreme Court granted review, thereby depublishing the opinion, but indications suggest the court intends to address the merits. In all likelihood, amici support will figure prominently in the Supreme Court proceeding.

CCP § 166.1 Certification Increases the Chance of Writ Review

In *Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 488, fn.4, Division Three of the Second District reminded litigants that Code of Civil Procedure section 166.1 provides a mechanism by which litigants may encourage appellate review of interlocutory orders. Section 166.1 allows a trial judge to "indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (C.C.P. § 166.1.) A court's certification under section 166.1 is not binding on the Court of Appeal, but is designed to encourage interlocutory review where a losing party petitions for extraordinary relief. In *Audio Visual Services Group*, the trial court overruled a demurrer to a class UCL claim, finding that the class audio-visual technicians were "hotel workers" protected by a hotel service charge ordinance. The court certified that its ruling presented a "controlling issue of law suitable for early appellate review" under section 166.1. (*Id.* at p. 488.) Although orders overruling demurrers are not directly appealable, the Court of Appeal took its cue from the trial court's section 166.1 certification and found writ review appropriate. The court ruled that the technicians were not "hotel workers," granted the petition, and directed the trial court to issue a new order sustaining the demurrer. (*Id.* at p. 494-495.)

■ Trial Court Procedures Relevant to Appeal

Parties Can't Pull a Bait And Switch With the "Limited" Status of Case

Courts generally dislike attempts to hide behind procedural technicalities. And they particularly dislike attempts to entirely switch positions when things don't go your way. In *AP-Colton LLC v. Ohaeri* (2015) 240 Cal.App.4th 500, 507, a commercial landlord filed suit against a delinquent tenant, but chose to bring the case as a limited civil action where the damages would be capped at $25,000. The tenants filed a cross-complaint seeking $1,000,000 in damages, explicitly labeling their complaint as an "unlimited civil action" where the damages cap did not apply. That strategy proved unwise. The landlord filed an amended "unlimited" complaint seeking additional damages, and after a bench trial the judge rejected all the tenants' claims and awarded the landlord more than $100,000. The tenants appealed, arguing that since neither side had ever paid the $140 fee required to reclassify the case from limited to unlimited, damages should be capped at $25,000.

Division Two of the Fourth District rejected the attempt. Because the tenants chose to bring their cross-complaint as an "unlimited" action, the court found they were judicially estopped from seeking to cap the damages the other side received. The court did, however, require the landlord to pay the $140 reclassification fee as a condition of receiving the full award, noting that otherwise parties could collusively avoid paying the reclassification fee.

A Trial Court Can't "Clarify" a Mistaken Dismissal

What happens when a court issues an order dismissing an entire case, but later realizes that only part of the case should have been dismissed? Attempting to issue a later "clarification" of the order won't fix the problem, the Third District held in *Conservatorship of Christopher B.* (2015) 240 Cal.App.4th 809. The criminal defendant there was ordered into a one-year civil conservatorship designed for defendants deemed incompetent to stand trial while under indictment for certain serious felonies. Both a complaint and an indictment had been pending against the defendant, and the court granted the prosecution's motion to dismiss all "charges," remarking that the defendant would now be dealt with by the conservator. (*Id.* at p. 813.) The next day the prosecutor alerted the court that the conservatorship was only valid if there was a pending felony indictment, and sought to have the court "clarify" that it had only dismissed the complaint, not the indictment. The trial court agreed and corrected its earlier order. The Court of Appeal, however, reversed and rejected the attempted clarification, explaining that even though "a trial court retains jurisdiction to correct clerical error (i.e., an error in the recording of a judgment) at any time, it does not have jurisdiction to correct judicial error in an entered judgment (i.e., an error in rendering a deliberate 'exercise of judicial discretion')." (*Id.* at p. 816.)

Trial Court Judges Have Limited Discretion to Reconsider Another Judge's Ruling

Trial judges usually have broad power to reconsider their own interim decisions before entry of final judgment. Not so the power to reconsider another trial judge's ruling. "Generally, one trial court judge may not reconsider and overrule the interim ruling of another trial judge." (*In re Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1248.) In *Marriage of Oliverez*, the Sixth District stressed the risks of forum shopping if a party could seek to transfer its case to a more receptive judge. The court also noted the importance of not making the second judge "a one-judge appellate court." (*Id.* at p. 1248, citation omitted.) Because of these dangers, reconsideration is generally not appropriate simply because a matter was transferred to another judge, absent a change in facts or law or a finding that the revisited decision was based on inadvertence, mistake, or fraud.

No Prop 47 Resentencing While Direct Appeal Is Pending

The filing of a notice of appeal generally divests the trial court of jurisdiction over all issues affecting the appeal. If a criminal defendant appeals a sentence, for instance, the trial court has no authority to issue new orders altering that sentence while the appeal is pending. That general principle applies even in the face of a statute allowing the defendant to seek recall and resentencing, the Third District held in *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 920.

Voters approved Proposition 47 in 2014, allowing defendants convicted of certain crimes to seek resentencing in the trial court for three years after conviction. The defendant in *Scarbrough* appealed her sentence, but while that appeal was pending sought resentencing under the newly-enacted Prop

47. The trial court granted her motion and reduced her sentence, but the Court of Appeal held the resentencing void since the trial court did not have concurrent authority while the appeal was pending. Parsing the language of Prop 47, the court found nothing to clearly indicate the voters intended to displace the standard rule that filing of a notice of appeal divests the trial court of jurisdiction.

Egregious Repeated Violations of Trial Court Orders May Warrant Reversal

"The law, like boxing, prohibits hitting below the belt," wrote Justice William W. Bedsworth in *Martinez v. State of California* (2015) 238 Cal.App.4th 559, 566. But the trial version of hitting below the belt– pandering to the prejudices of the jury and flouting in limine rulings– rarely results in a severe penalty. Judges are often rightly hesitant to declare a mistrial for any individual act of misconduct; it can be hard to identify a single act as the straw that breaks the camel's back even for cumulative acts of misconduct. But, the defense counsel in *Martinez* threw one too many jabs after the bell: Even though the trial court denied the plaintiff's requests for a mistrial or new trial, Division Three of the Fourth District reversed that ruling based on defense counsel's "egregious" misconduct. (*Id.* at p. 567.) The court tallied up more than a dozen times defense counsel had made flagrant appeals to prejudice and the jurors' self-interests in violation of prior in limine rulings, plus a few times defense counsel gratuitously compared the plaintiff to a "Nazi" for good measure. (*Ibid.*) And, that wasn't even the full extent of the misconduct; the court noted several other troubling items, but declined to address them because "we found enough to establish attorney misconduct at least five pages ago." (*Id.* at p. 568.) Not only did the court reverse the verdict, it referred the matter to the State Bar for potential disciplinary proceedings. Ouch.

A New Trial Motion Can't Be Based on Evidence Available Prior to Judgment

A new trial motion must be based on evidence that is actually new, and evidence doesn't qualify as "new" if you had it before and just didn't bother to look at it. In *Shiffer v. CBS Corporation* (2015) 240 Cal.App.4th 246, 255, the trial court granted summary judgment to the defendant in an asbestos case. A few days later, plaintiff's expert focused for the first time on a new theory and the evidence to support that theory—evidence that had been previously available to the plaintiff—to form a new opinion regarding plaintiff's injuries. Plaintiff then moved for a new trial under Code of Civil Procedure section 657.[3] Division One of the First District applied the standard rule that a new trial motion may not be granted based on newly discovered material evidence where the evidence was not "new." The evidence upon which the plaintiff's expert relied in forming the new opinion had been available to the plaintiff and the expert prior to the summary judgment hearing. The court therefore affirmed the trial court's grant of summary judgment.

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Attorneys focused on appellate practice can expect the rate of change to increase in 2016, as new justices find their footing and begin to leave their marks on the bench. Because many of the justices who recently joined the California appellate bench have significant federal practice behind them, these changes may bring California appellate practice more and more in line with federal appellate practice.

3. The plaintiff also moved for reconsideration under Code of Civil Procedure section 1008.