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Judith Posner
BENEDON & SERLIN, LLP

Gerald Serlin
BENEDON & SERLIN, LLP

State appellate court motions, applications, and requests

USING THEM TO ACHIEVE STRATEGIC ADVANTAGE ON APPEAL

We might think of appellate attorneys as "one-trick ponies" because, seemingly, the only thing they ever do is write briefs. But, harkening back to the words of the long-time popular Gershwin brothers' song, "it ain't necessarily so." Over the life of an appeal, appellate attorneys often prepare and oppose motions, applications, and requests. Through these procedural vehicles, attorneys, among other things, can streamline an appeal, obtain dismissal of an appeal, resurrect a dismissed appeal, extend or accelerate the time to accomplish matters on appeal, or present certain facts to the appellate court. In this article, focusing on state appellate court procedure, we explore some of the available motions, applications, and requests on appeal, identify their potential benefits, and alert attorneys to scenarios that just might call for preparation of something other than a brief.

Appellate motions, applications, and requests – similar but different

Appellate courts grant relief through motions, applications, or requests. Each procedural vehicle effectively accomplishes the same purpose, but which one you bring turns on whether the matter is "routine," the controlling California Rules of Court (all citations to the California Rules of Court are identified as "Rule"), and the relevant appellate court practices.

Formal, written "motions" are presented to a three-judge panel and require a statement of the grounds, relief requested, and documents on which the motion is based. (Rule 8.54(a)(1).) A memorandum must be filed in support and, if based on matters outside the record, along with declarations or other supporting evidence. (Rule 8.54(a)(2).) Any opposition must be served and filed within 15 days (Rule 8.54(a)(3)), and failure to oppose a motion may be deemed a consent to its granting. (Rule 8.54(c); *Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [challenge to judicial notice motion forfeited by failure to file opposition].) Motions are required when non-routine orders are being sought, for example, the dismissal of an appeal. (See, e.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2022) ¶ 5:44).)

In contrast, routine "applications" are presented to the presiding justice. (Rule 8.50(a).) Applications to extend the time to file records, briefs, or other documents require little more than a showing of good cause and the identification of any previous applications granted or denied to any party. (Rule 8.50(b).) Applications to extend time have additional requirements. (Rule 8.63.) Because the appellate court can rule immediately on an application without waiting for opposition, a party planning to oppose an application should notify the court clerk immediately by phone and act promptly. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶ 5:270.1.)

Finally, "requests" are made as directed by the Rules of Court or court practice. For example, if an appellate court declines to certify an opinion for publication, any person, whether a party or not, can request publication. (Rule 8.1120(a)(1).) Or, because oral argument is a matter of right on appeal (*Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871-872; Cal. Const., art. VI, § 3), a party and/or its attorney need only make a timely request for oral argument, most typically through a court-provided form. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶¶ 10:35-10:48.)

Circumstances arising before the appellate record is filed

Many motions/applications/requests relate to circumstances arising even before the appellate record is filed.

Applications to extend time for designating the record

Within 10 days after filing a notice of appeal, the appellant must file and serve a designation of record, which identifies the documents filed or lodged in the trial court, the oral proceedings, and the exhibits received in evidence or rejected by the trial court upon which the Court of Appeal will base its review. (Rules 8.120(a)-(b), 8.121(a), 8.122(a)(3), 8.224.) Ten days can be insufficient, however, if the trial court record is extensive, the parties are engaged in settlement discussions, the appellant is facing a large outlay of funds for the reporter's transcript (see Rule 8.130(1)(b)(i) ["$325 per fraction of the day's proceedings that did not exceed three hours, or $650 per day or fraction that exceeded three hours"]), or recently retained appellate counsel has yet to identify all necessary components of the appellate record.

To create breathing room, the appellant can apply to extend the time to file the designation upon a showing of "good cause." (Rules 8.50(b), 8.60(b), 8.63, 8.130(f)(1); cf. *Hoyt v. San Francisco & N.P.R. Co.* (1891) 87 Cal. 610, 613 ["court has been, and possibly ought to be, liberal in the matter of extending time for the filing of transcripts"].) Although the designation is filed in the trial court (Rule 8.121(a)), trial judges may not extend the time "to do any act to prepare the appellate record" (Rule 8.60(e)). Accordingly, an application is filed in the Court of Appeal and typically ruled on by the presiding justice. (Rule 8.130(f)(1).)

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Motions to consolidate appeals

"[O]n motion of one party, related appeals can be consolidated by order of the appellate court. So long as the individual appeals share at least *one common issue*, they can be consolidated . . . ." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 5:209, citing *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 165, fn. 3.) Consolidation is an appropriate discretionary act when appeals are "so related as to make it advisable to consolidate" and "consideration of the appeals will be expedited by the consolidation." (*Sampson v. Sapoznik* (1953) 117 Cal.App.2d 607, 609; see also *Primo Team, Inc. v. Blake Construction Co.* (1992) 3 Cal.App.4th 801, 803, fn. 1 [consolidation of appeals with "common issues of law and fact"].) Consolidation thus works when a party appeals from related matters such as an order granting an anti-SLAPP motion and an associated attorney fees award. (See, e.g., *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1123; *Santa Monica Rent Control Bd. v. Pearl Street* (2003) 109 Cal.App.4th 1308, 1320.)

A party moving to consolidate appeals should consider whether consolidation will be for all purposes, i.e., record preparation, briefing, oral argument, and opinion. If related appeals have been assigned to separate divisions within a district, the moving party should seek the transfer of one appeal so that the same division hears both. (See Rules 10.1000 [administrative presiding justice may transfer causes between divisions], 10.1008 [appellate courts with more than one division authorized to assign and transfer matters between divisions].)

Motions for calendar preference

Most trial attorneys know that "trial setting" preference is available under specified circumstances. Not as many are aware that calendar preference sometimes may be available on appeal.

Various procedural statutes provide for appellate preference, for example, in matters of arbitration (Code Civ. Proc., §§ 1291.2, 1294.4, subd. (a); statutory references are to the Code of Civil Procedure unless otherwise specified), recovery of real property (§ 1179a), and declaratory relief regarding medical malpractice insurance (§ 1062.5). Preference is also available "in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign. . . ." (§ 44.) Likewise, preference is available in "[a]n appeal from a judgment freeing a minor who is a dependent child of the juvenile court from parental custody and control, or denying a recommendation to free a minor from parental custody or control." (§ 45; see also Welf. & Inst. Code, § 395; Rule 8.416; Fam. Code, § 3023.)

Other substantive statutes create the availability of preference in cases regarding (1) environmental impact (Pub. Resources Code, § 21167.1), (2) general plans (Gov. Code, § 65752), (3) property taxation or assessment (Rev. & Tax. Code, §§ 4808, 5149), (3) the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, § 3454), (4) appeals from specified labor relations disputes (Rule 10.660(d)), and (5) release of budget and management information (Rule 10.803(d)).

Further, appellate courts have discretion to grant calendar preference when a party is (1) over age 70 with a "substantial interest in the action as a whole" and his/her health compels participation (§ 36, subd. (a)), (2) suffering from illness or condition raising "substantial medical doubt of survival" beyond six months (§ 36, subd. (d)), (3) under age 14 and involved in a personal injury or wrongful death action (§ 36, subd. (b)), (4) seeking damages caused by a defendant during the commission of a felony for which the defendant was convicted (§ 37), and (5) involved in eminent domain proceedings (§ 1260.010). (See, e.g., *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1199 (*Warren*); *Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 681, fn. 2.)

Finally, appellate courts have inherent power to implement the proceedings necessary to effect the "spirit" of the Code of Civil Procedure. (§ 187; *Warren, supra,* 57 Cal.App.4th at p. 1199.) Thus, even absent a statutory basis, courts of appeal may grant calendar preference under exigent or other compelling circumstances. (See *Gold v. Gold* (2003) 114 Cal.App.4th 791, 803; *Arden Group, Inc. v. Burk* (1996) 45 Cal.App.4th 1409, 1411.)

Motions to abandon and/or dismiss appeals

Motions to abandon/dismiss appeals come in two flavors, voluntary and involuntary. Voluntary abandonment/dismissal occurs when an appellant chooses not to pursue an appeal. Appellants electing to end an appeal before the appellate record is filed simply files an "abandonment" in the trial court. (Rule 8.244(b)(1)-(2).) If the appellate record already has been filed, however, the appellant files a "dismissal" in the Court of Appeal. (Rule 8.244(c)(1).) Although appellate courts have discretion in addressing post-record dismissals (Rule 8.244(c)(2)), they rarely are denied, perhaps only when the appellant has engaged in extreme brinksmanship and bad faith (see *Brown v. Wells Fargo Bank, N.A.* (2012) 204 Cal.App.4th 1353, 1357 ["Eleventh hour" request to dismiss frivolous appeal denied; judgment affirmed with instructions to send opinion to State Bar for consideration of discipline]; *Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 449), or when the appeal raises issues of continuing public interest (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 993, fn. 5; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1014, fn. 3).

In contrast, involuntary dismissal requires a motion and can arise, for example, when:

- The notice of appeal is untimely. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667.) A failure to file a timely notice of appeal is a jurisdictional error that cannot be

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remedied. (*K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, 881.)

- The judgment or order is not appealable. (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 301-302; *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.)
- The appellant lacks standing. (§ 902; *Eggert v. Pacific States Savings & Loan Co.* (1942) 20 Cal.2d 199, 200-201; *In re D.M.* (2012) 205 Cal.App.4th 283, 293-295.)
- The appeal is from a stipulated judgment. (*Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387.)
- The appeal is moot. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 864-865.) A matter may become moot, for example, when a party dies and the cause of action does not survive (*In re Henry's Estate* (1960) 181 Cal.App.2d 173, 178), the parties to the appeal settle the matter (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1344), temporary relief ordered by the trial court expires before the appeal is heard (*Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 144), or the act sought to be enjoined is performed (*City of Cerritos v. State of California* (2015) 239 Cal.App.4th 1020, 1031).
- The appellant waived the right to appeal. (*Hibernia Sav. & Loan Soc. v. Waymire* (1907) 152 Cal. 286, 287-288 [appeal dismissed from consent judgment in which defendant stipulated to waive appellate rights].)
- The appellant defies trial court orders or the judgment. "An appellate court has the inherent power, under the 'disentitlement doctrine,' to dismiss an appeal by a party that refuses to comply with a lower court order." (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1229; see also *In re Marriage of Cohen* (2023) 89 Cal.App.5th 574, 580.) The "disentitlement doctrine 'is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed.' [Citation.]" (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265; see *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.)
- The court lacks jurisdiction. (See, e.g., *In re M.M.* (2007) 154 Cal.App.4th 897, 913-914.)

Motions to vacate dismissal

Sometimes, for explicable or inexplicable reasons, an attorney misses an appellate deadline, resulting in the dismissal of a party's appeal. This could happen, for example, when the appellant fails to timely designate the record (*Rosenau v. Heimann* (1990) 218 Cal.App.3d 74, 77) or pay a transcript fee (*McGinnis v. Monjoy* (1959) 169 Cal.App.2d 519, 522-523). The dismissal news might not be entirely bleak, however, because the appellant can move to vacate the dismissal (*In re Jacqueline H.* (1978) 21 Cal.3d 170, 179), and, for good cause, an appellate court should grant relief *except* when it lacks jurisdiction due to an untimely notice of appeal (Rule 8.60(d)). Typically, appellate courts are forgiving, largely based on "the strong public policy in favor of hearing appeals on their merits and not depriving a party of the right because of technical noncompliance . . . with the rules . . . ." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1256.)

Motions for stipulated reversals of the judgment

Public policy decidedly favors the settlement of disputes, even post-judgment, for, among other reasons, to conserve judicial resources, reduce litigation expenses, and save taxpayer dollars. (*Neary v. Regents of California* (1992) 3 Cal.4th 273, 277-278.) When the losing party does not want the adverse judgment to remain in the trial court record – for example, due to potential collateral estoppel consequences – a settlement may be conditioned on reversal of the judgment.

Proceed with caution here. The appellate court's power in this area is restricted by section 128, subdivision (a)(8), which precludes a court from reversing or vacating a judgment per agreement or stipulation unless:

> (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.
> (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

Appellate courts thus treat stipulated reversal motions on a case-by-case basis (*Hardisty v. Hinton & Alfert* (2004) 124 Cal.App.4th 999, 1007), and are more likely to accept a stipulated reversal when reversible error is conceded or evident (*Union Bank of California v. Braille Institute of America* (2001) 92 Cal.App.4th 1324, 1330-1331). Regardless, parties cannot move for a stipulated reversal after the matter has been submitted and/or the opinion has been filed (*Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 502), or after the Supreme Court has granted review (*State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 60-62).

Motions for summary reversal or affirmance

Courts of appeal have inherent authority to grant a motion for summary reversal or affirmance (*Melancon v. Walt Disney Productions* (1954) 127 Cal.App.2d 213, 215) or, conceivably, without any briefing (see Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶¶ 5:82-5:84). But summary reversal or affirmance is a pretty rare bird.

For example, a motion for summary reversal might be appropriate when the trial court lacked subject matter jurisdiction, which is never waived (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339) and can be raised at any time, directly or collaterally (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 73; see *David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 149). Lack of trial court subject matter jurisdiction must be addressed if raised by a party. (*Consolidated Theatres, Inc. v. Theatrical Stage Emp. Union, Local 16*

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(1968) 69 Cal.2d 713, 721; *Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1246.) A motion for summary reversal also might be appropriate for an order awarding attorney fees when the appellate court has reversed the underlying judgment. (E.g., *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 220.)

In theory, appellate courts also have the power to summarily affirm a judgment or order but, in practice, are exceedingly reluctant to do so. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra,* ¶ 5:84.) A motion for summary affirmance might be appropriate when the appellant has failed to designate or procure necessary components of the appellate record. This is so because of the fundamental rule of appellate review that a judgment is presumed correct; error and prejudice must be demonstrated with an adequate appellate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *State Farm Fire v. Pietak* (2001) 90 Cal.App.4th 600, 610; Cal. Const., art. VI, § 13; § 475.) Nevertheless, a motion to dismiss an appeal is the more common vehicle for this type of relief, although a motion for summary affirmance would be similar in fashion. (See, e.g., *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.)

The briefing stage of an appeal

Other motions/applications/requests come during the briefing stage of an appeal.

Applications to extend time for brief preparation

It's an odds-on guess that any attorney who has conducted an appeal has likewise filed at least one application to extend the time to file a brief or perform some other required act. (Rule 8.50.) Applications for an extension of time are "routine" and granted by the presiding justice upon an attorney's showing of "good cause," and the inability to obtain a stipulated extension. (Rules 8.60(b), 8.63, 8.212(b).) Extensions of time for brief preparation are usually granted in 30-day increments, and most courts will grant at least one such extension. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra,* ¶ 5:101.) Indeed, on fairness principles, courts of appeal even grant extensions "when the technical requirements of the request are not fully satisfied, especially when the opposing party registers no objection." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 292.)

Motions to stay briefing

Sometimes a 60- or 90-day extension of time for brief preparation is simply not enough. In such cases, for example when the parties have scheduled a mediation that won't take place for several months or a settlement is conditioned on an outside event, the parties might consider a joint motion to stay briefing. Appellate courts have inherent authority to issue a stay "to insure the orderly administration of justice," affect control of their own calendars, and "adopt any suitable method of practice . . . if the procedure is not specified by statute or by rules adopted by the Judicial Council. [Citation.] [Citation.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.)

Motions to augment

Whether by design or accident, on occasion a key document or transcript is not designated for inclusion in the appellate record. Fortunately, the appellant or respondent can correct such omission by a motion to augment the record. (Rule 8.155(a)(1).) Augmentation supplements an incomplete but existing record with matters that were before the trial court and is liberally allowed. (*People v. Brooks* (1980) 26 Cal.3d 471, 484; *In re K.M.* (2015) 242 Cal.App.4th 450, 456; see also *People v. Gaston* (1978) 20 Cal.3d 476, 482-483 ["Shortly after the rules were promulgated, B. E. Witkin, the Judicial Council's draftsperson of the Rules on Appeal, wrote that 'the [augmentation] rules impliedly call for great liberality in [their] exercise'"].) It also furthers the public policy favoring resolution of appeals on their merits. (E.g., *Francis v. Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 539.)

Motions for judicial notice

"Matters that cannot be brought before the appellate court through the record on appeal (initially or by augmentation) may still be considered on appeal by judicial notice. [Citation.]" (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193.) Appellate courts have the same power as trial courts to take judicial notice. (Evid. Code, § 459.) Thus, for example, legislative materials, including enactments, and their history are judicially noticeable. (See, e.g., Evid. Code, § 452, subds. (b)-(c); *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4; *In re H.C.* (2017) 17 Cal.App.5th 1261, 1268, fn. 4; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 950.) Under exceptional circumstances, appellate courts can judicially notice matters that were not before the trial court (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2) or of which the trial court refused to take judicial notice (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1380). Although judicial notice previously could be obtained by request, either separately filed or in a footnote to a brief, a motion is now required. (Rules 8.54, 8.252(a), 8.809(a); see *Ming-Hsiang Kao v. Holiday* (2020) 58 Cal.App.5th 199, 204, fn. 3.)

Motions for additional evidence on appeal

Perhaps surprising, appellate courts have limited authority to take additional evidence on appeal and make independent factual findings – only in cases without the right to a jury trial or a jury trial was waived. (*Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 123; *Hasso v. Hasso* (2007) 148 Cal.App.4th 329, 333, fn. 3; *Ford v. Pacific Gas and Elec. Co.* (1997) 60 Cal.App.4th 696, 706; § 909; Rule 8.252(b).) These Hail Mary motions are disfavored, granted only in exceptional circumstances (*Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 605), and typically when the evidence

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facilitates an affirmance (*Tupman v. Haberkern* (1929) 208 Cal. 256, 270 [statute primarily designed to enable "reviewing courts to make contrary or additional findings . . . to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated"]; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090).

That said, when "there is only one issue of fact which is material to the decision, and on that issue the evidence will support only one result," appellate courts have authority under section 909 to make "new findings as the basis of a reversal with directions to enter judgment for appellant." (*Lockheed Aircraft Corp. v. Los Angeles County* (1962) 207 Cal.App.2d 119, 132; see also *People v. Benford* (1959) 53 Cal.2d 1, 6; *Berkeley Federation of Teachers v. Berkeley Unified School Dist.* (1986) 178 Cal.App.3d 775, 777-778; *Boyle v. Hawkins* (1969) 71 Cal.2d 229, 232, fn. 3.)

Motions to strike defective briefing

When a brief or a part thereof fails to comply with the Rules of Court, the opposing party can move to strike, or partially strike, it, or the appellate court can do so on its own motion. (Rule 8.204(e)(2).) A motion to strike might be appropriate when, for example, a brief fails to (1) cite the record to support factual assertions (Rule 8.204(a)(1)(C)); *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835), (2) cite legal authority (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117 (*Berger*); *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979), or (3) "articulate any pertinent or intelligible legal argument" (*Berger,* at p. 1119).

More specifically, in a summary judgment appeal, an appellant must include in its factual statement record citations to the supporting evidence. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4 (*Jackson*); *State of California ex rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc.* (2011) 197 Cal.App.4th 963, 968, fn. 1.) Indeed, neither a party's separate statement nor its memorandum of points and authorities is evidence. (See *Jackson*, at p. 178, fn. 4.) As such, an appellant's factual statement that exclusively cites to the separate statement or points and authorities should be disregarded as failing to point out any evidence establishing the existence of a disputed material fact, making it impossible for the appellant to demonstrate error. (*WFG National Title Insurance Company v. Wells Fargo Bank, N. A. as Trustee* (2020) 51 Cal.App.5th 881, 894; *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 683-684; *Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

Motions for frivolous appeal

We've all seen 'em – an opening brief that is so meritless, so disingenuous, so clearly interposed for an improper purpose that opposing counsel's bad faith and/or delay tactics are obvious. A remedy exists: Appellate courts are authorized to dismiss an appeal or impose sanctions against a party and/or his attorneys for prosecuting wholly or partially frivolous appeals. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 658; *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1431-1432 (*Pollock*).)

Frivolous means an appeal indisputably lacks merit or was filed for an improper motive. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*) [frivolous means "prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit"]; *Pollock, supra*, 112 Cal.App.4th at pp. 1431-1433; see also § 907 [monetary sanctions when appeal frivolous or taken solely for delay].)

Whether an appeal indisputably lacks merit is measured objectively. (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516 (*Gong*); see also, e.g., *Malek Media Group LLC v. AXQG Corp.* (2020) 58 Cal.App.5th 817, 834-835 (*Malek*); *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 191 (*Rand*).) The question is "not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous." (*Flaherty, supra,* 31 Cal.3d at p. 649.)

Whether an appeal was prosecuted for an improper motive is measured subjectively. (*Gong, supra*, 163 Cal.App.4th at p. 516; see also *Malek, supra,* 58 Cal.App.5th at p. 836; *Rand, supra*, 205 Cal.App.4th at p. 191.) The focus is on the good faith of the appellant and his counsel. The subjective standard evaluates the motives driving the appeal, and whether the appeal was taken primarily to delay enforcement of a judgment. (*Gong,* at p. 516; see also *Flaherty, supra,* 31 Cal.3d at pp. 649-650.)

Absence of merit *or* improper motive can support a sanctions award. (*Hersch v. Citizens Sav. & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1012.) Yet, in practice, the two are complementary, often used together and "with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Flaherty, supra,* 31 Cal.3d at p. 649; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra,* ¶ 11:104.)

After oral argument and disposition

Certain motions/applications/requests even come after oral argument and disposition.

Motions to file supplemental briefs

The Rules of Court provide only for an opening brief, a respondent's brief, and a reply brief. (Rule 8.200(a)(1)-(3).) But what if that doesn't seem sufficient? Circumstances could arise when another brief might be beneficial, such as the court's revelation at oral argument that an unbriefed legal issue is undermining your argument, and you'd like an opportunity to research and address the issue in writing. Then, adhering to Yogi Berra's aphorism – "it ain't over till it's over" – you might consider requesting permission to file a supplemental brief. (Rule 8.200(a)(4).) You would attach your

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proposed supplemental brief to the request for permission.

Requests for publication

You've dazzled the Court of Appeal with a brilliant analysis on an uncharted legal issue and the opinion ineluctably has adhered to your thinking. The only problem is that the opinion is unpublished and cannot be cited by similarly situated parties. The remedy is a request for publication. (Rule 8.1120(a)(1).) This is done by letter, in which you explain why the opinion meets a standard for publication. (Rule 8.1120(a)(2); see also Rule 8.1105(c) [standards for publication].) The request must be filed within 20 days after the opinion is issued. (Rule 8.1120(a)(3).)

Motions for awards of costs and attorney fees

To the victor go the spoils. After the remittitur issues, transferring jurisdiction back to the trial court (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1500-1501; §§ 43, 912; Rules 8.272(b) & 8.540(b)(2)), generally, the prevailing party is entitled to recover specified costs on appeal (Rule 8.278(a)(1); see *Stratton v. Beck* (2018) 30 Cal.App.5th 901, 910). Appellate costs must be sought within 40 days after issuance of the remittitur. (Rule 8.278(c)(1).)

Even more, when the prevailing party was entitled to an attorney fees award in the trial court on the basis of contract or statute, attorney fees on appeal also are recoverable. (§ 1033.5, subd. (a)(10)(A)-(C); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) Typically, a fee motion is brought in the trial court. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶ 14:112-14:118.) In an unlimited case, a fee motion – other than fees for services on appeal before rendition of the trial court judgment – must be served and filed within the time for serving and filing the memorandum of costs under Rule 8.278(c)(1).

Conclusion

Go ahead. Keep writing those briefs. But, when the appropriate time comes, use motions, applications, and/or requests to your advantage on appeal so that you don't miss an opportunity to make life easier or, perhaps, even obtain a victory in the appellate court.

Judith Posner and Gerald Serlin are partners at Benedon & Serlin, LLP, *a boutique appellate law firm in Woodland Hills. Both are appellate law specialists certified by the State Bar of California, Board of Legal Specialization.*