



*The Los Angeles County Bar Association
Appellate Courts Section Presents*

Dispositions: Getting What You Really Want

Tuesday, November 14, 2017

Program - 4:30 p.m. - 6:00 p.m.

California Court of Appeals , Los Angeles

1.5 CLE Hours (INCLUDES 1.5 HRS OF APPELLATE COURTS SPECIALIZATION CREDIT)



Provider #36

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Dispositions: Getting What You Really Want

Panelists:

Justice Martin Tangeman, Court of
Appeal, 2nd District, Div. 6

Katy Graham, Senior Appellate Court
Attorney, 2nd District, Div. 6



Division Six: Associate Justice Martin J. Tangeman

Judicial Background:

Associate Justice, California Court of Appeal, Second Appellate District, Division Six

On February 22, 2016, he was unanimously confirmed by the Commission on Judicial Appointments, after receiving an “exceptionally well qualified” rating from the Judicial Nominees Evaluation Committee

Judge of the Superior Court, County of San Luis Obispo

July 2001 - February 2016

Presiding Judge (2008-2009)

Assistant Presiding Judge (2006-2007; 2014-2015)

Supervising Judge of the Civil Departments (2005, 2006, 2010, 2011, 2013)

Attorney at Law, private practice for 23 years

Lawyer, Sinsheimer Scheibelhut & Baggett, San Luis Obispo, CA (associate, 1982-1984; partner, 1984-2001)

Lawyer, Ogle, Gallo & Merzon, Morro Bay, CA (associate, 1978-1982)

General civil practice, with an emphasis on business and real property litigation.

Professional Membership and Participation:

San Luis Obispo County Bar Association
(President, 1989; Vice-President, 1988; Secretary, 1985 & 1987; Member 1979-2001)

San Luis Obispo County Land Conservancy
(President, 2001; Vice-President, 2000; Member Board of Trustees, 1996-2001)

San Luis Obispo Mozart Festival Board of Directors
(President, 1998; Member, 1995-1998)

He served on the following local, statewide and national court-related committees:

Judicial Council of California

Member, Judicial Council of California (2014-2016)
Vice-Chair, Trial Court Presiding Judges Advisory Committee Executive
Committee (2008-2009)
Member, Trial Court Budget Working Group (2008-2009)
Civil Jury Instructions Advisory Committee (Chair, 2014-present;
Member, 2006-present)

Teaching Experience

Visiting Professor, Università degli Studi di Trento, Italy
Spring Semester 2013, on American Constitutional Law and Common Law

Lecturer, Università degli Studi di Trento, Italy
2011-2012, on American Civil Procedure and Constitutional Law

Faculty, Civil Law Institute, 2015

Faculty/Facilitator, Presiding Judges and CEO Management Program, 2012-2015

Faculty/Facilitator, Supervising Judges Institute, 2010, 2011, 2013, 2014

Education

J.D., University of California, San Francisco (Hastings), 1978, Order of the Coif

B.A., California State University, Fullerton, 1975



Katy Graham is a Senior Research Attorney for Division Six of the Second District of the California Court of Appeal and lead staff attorney for Associate Justice Martin J. Tangeman. After she earned her JD in 1994, she practiced as a trial lawyer with Howarth & Smith in Los Angeles. She then returned to her hometown, Santa Barbara, as a partner with Zilinskas & Jacobs. She left private practice to work as a research attorney for the Santa Barbara Superior Court for six years before joining the Court of Appeal in 2006 where she also served as staff for Associate Justice Paul H. Coffee (retired) and Presiding Justice Arthur Gilbert. Katy Graham serves as a member of the State Bar Advisory Committee on Appellate Courts and the Appellate Judicial Attorney Institute and is a delegate to the Conference of California Bar Associations. She served as a director and as Chief Financial Officer of the Santa Barbara County Bar Association. She has taught Advanced Legal Writing, Statutory Interpretation, and other courses at the Santa Barbara and Ventura Colleges of Law for ten years, is former chair of the College of Law's Curriculum Development Committee, and served on its Academic Standards Committee and its WASC Accreditation Committee. She is President of the Montecito Education Foundation.

Dispositions
 Hon. Martin J. Tangeman ♦ Katy Graham

Getting What You Really Want

- "The disposition constitutes the rendition of the judgment of appeal, and is the part of the opinion where we, in popular parlance, deliver the goods."
- "A disposition is not intended to be a riddle, and the directions in the dispositional language, as conveyed by the remittitur, are to be followed by the trial court on remand."
- "The appellate court need not expressly comment on every matter intended to be covered by the dispositions. . . . 'It is unnecessary and inappropriate for an appellate court to attempt to envision and set forth in detail the entire universe of matters prohibited by its directions on remand.'"

Ducoing Management, Inc. v. Superior Court (2015) 234 Cal.App.4th 306, 312-313.

Use Precise Dispositional Language

- Maximize Wins
- Control Losses
- Minimize Time and Expense After Remand
 - Avoid Confusion in Trial Court
 - Avoid Successive Appeals

Request It In The AOB/RB

“Before [an appellate court] renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.” (Gov. Code, § 68081.)

And, note due process concerns where relief not timely requested

Correcting the Disposition

A petition for rehearing or review is the vehicle for correcting a troublesome disposition

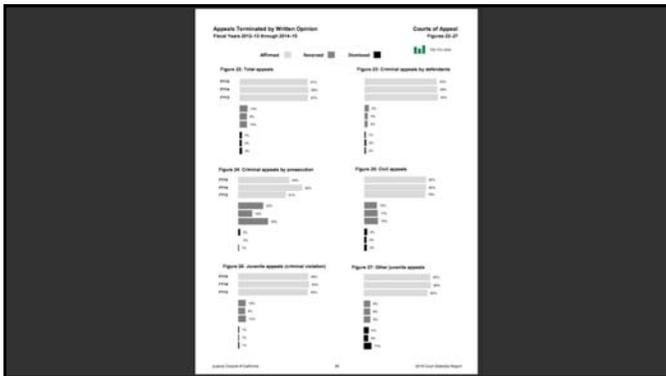
(Ducoing Management, Inc. v. Superior Court (2015) 234 Cal.App.4th 306, 314.)

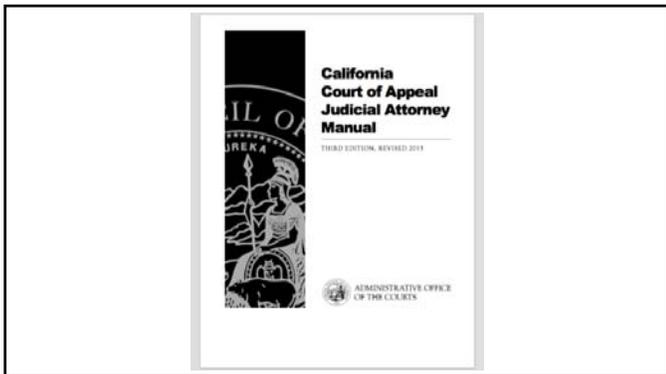
Possible Dispositions

- Affirm
- Reverse
 - Unqualified Reversal
 - Partial Reversal
 - Reversal With Directions
- Modify
- Dismiss
- ... or combination?

In 2014-2015 . . .

- Of the cases disposed of by written opinion, 7,939 were affirmed, 924 were reversed, and 263 were dismissed.
- Of those cases affirmed by the Courts of Appeal, 6,383 received full affirmance, while 1,556 received affirmance with modification.





Possible Dispositions

E. [§ 5.11] DISPOSITION

There must be a disposition for every judgment or order appealed, even if already discussed in the body of the opinion. Dispositions include affirmance, reversal, modification, and dismissal, and various combinations of these. Rulings on motions may also be noted. When remand is ordered, the disposition should provide specific directions if necessary to avoid confusion in the trial court, a petition for rehearing or review, or a new appeal.

Possible Dispositions - Civil

Code of Civil Procedure section 43:

The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. In giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.

Possible Dispositions - Criminal

Penal Code section 1260:

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

What Happens in the Trial Court?

- The remittitur order defines the scope of jurisdiction in trial court to which the matter is returned.

Griset v. Fair Political Practices Com. (2001) 25 Cal.4th 688, 701.

Directions

An unqualified reversal results in a new trial.

A reversal with directions empowers the trial court to act only in accordance with the directions. (*Hampton v. Superior Court of Los Angeles* (1952) 38 Cal.2d 652.)

“Any material variance from the directions is unauthorized and void.” (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)

“A failure to follow appellate directions can be challenged by an immediate petition for writ of prohibition or writ of mandate.” (*ibid.*)

What Happens in the Trial Court?

Generally . . .

- Affirmance
 - Housekeeping
- Reversal
 - New trial – unless COA directs otherwise
- Modification
 - Trial court enters judgment as modified
- Dismissal
 - By COA or trial court?

How To Request It . . .

A Typical Disposition Request:

CONCLUSION

“For the foregoing reasons, the judgment should be reversed and remanded for new trial.”

A More Effective Disposition Request:

CONCLUSION

“For the reasons argued above, the judgment should be reversed and the matter remanded so that the first, second, and fourth causes of action of the [Appellants’] complaint can proceed to trial.”

The Resulting Disposition:

DISPOSITION

The portion of the judgment summarily adjudicating appellants' first, second and fourth causes of action in respondents' favor is reversed and the matter is remanded for trial on those claims. The portion of the judgment sustaining respondents' demurrer to the third cause of action is affirmed. Appellants shall recover their costs on appeal.

Horizontal lines for notes or comments.

An Ineffective Request:

On appeal from an order denying MSJ . . .

"[Appellant] respectfully requests that the court order that [Bank] return the funds seized from [Appellant's] account and require [third party] to obtain a California judgment under the Sister State Money Judgment Act and follow California collection procedure if it wishes to levy that account."

Horizontal lines for notes or comments.

AFFIRMANCE

Horizontal lines for notes or comments.

Affirmance

- Affirmance ends litigation - except costs, enforcement
- Trial court has no jurisdiction to reopen or retry case. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.)

Civil

Affirm With Directions - Example

DISPOSITION

The judgment is affirmed, except as to the award of costs to Sutter. As to that award, the matter is remanded to the trial court as specified in part IV. of the Discussion. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (5).)

(*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 89.)

IV. Remand Is Necessary Regarding the Trial Court's Cost Award

Just prior to oral argument, plaintiff alerted us to a recent decision from the California Supreme Court, *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, which may affect the trial court's cost award to Sutter. Disapproving prior decisions on the award of costs in a FEHA action, *Williams* concluded (1) that "section 12965, subdivision (b), governs cost awards in FEHA actions, allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties"; and (2) "that in awarding attorney fees and costs, the trial court's discretion is bounded by the rule of *Christiansburg* [citation]; an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit." . . .

We will remand this matter to the trial court for it to consider, in light of *Williams*, the award of costs to Sutter.

(*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 88.)

REVERSAL
With or Without Directions

Reversal

- New Trial
- Unless Disposition Directs Otherwise

Reversal – Law of the Case

Law of the case applies in a new trial.
Puritan Leasing Co. v. Superior Court (1977) 76 Cal.App.3d 140, 146
People v. Barrigan (2004) 32 Cal.4th 236, 246

Trial court interprets opinion to determine law of the case.
Barrigan, supra, at p. 247

Law of the case does not apply to determinations of questions of fact based on new or different evidence in a new trial following reversal on appeal
Id. at p. 246

- But . . . double jeopardy applies if reversal was based on insufficiency of the evidence

Effect on Nonappealing Parties

Where nonappealing parties so similarly affected by erroneous order reversal may be required as to all parties

Eby v. Chaskin (1996) 47 Cal.App.4th 1045, 1049 [reversed as to nonappealing party]
cf. *Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 57 [opposite result]

Example: apportionment of a fixed fund

Reversal

“Reversed for further proceedings consistent with this opinion.”

- Does the COA intend for trial court to conduct a new hearing/trial? (Reversal)
- Does it intend the trial court to enter judgment/order in favor of appellant? (Reversal Directing Final Disposition)
- Does it intend for trial court to exercise discretion or find facts? (Reversal Directing Limited Remand)

Reversal Directing Final Disposition

Civil
Reversal Directing Final Disposition

Reversal for insufficiency of evidence—direct entry for prevailing party? or new trial for full and fair opportunity to try case?

Viner v. Sweet (2004) 117 Cal.App.4th 1218 [majority modifies judgment; dissent would remand for new trial]
McCoy v. Hearst Corp. (1991) 227 Cal.App.3d 1657 [directing entry of judgment]

Civil
Reversal Directing Final Disposition

JNOV rule: on reversing order denying JNOV, COA *must* order entry of judgment that should have been granted.

Code Civ. Proc., § 629; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 369-370

Criminal
Reversal Directing Final Disposition

COA may “direct[] final disposition of the action in defendant’s favor” (Pen. Code, § 1262) . . . if so, it must direct that the defendant be discharged, fines refunded, etc.

see § 1262; *Gonzales v. California* (1977) 68 Cal.App.3d 621

Criminal
Reversal Directing Final Disposition

Example: COA reverses an order granting a motion for new trial . . . does the COA intend the trial court to have jurisdiction to hear a new motion for new trial on other grounds? (*People v. Taylor* (1993) 19 Cal.App.4th 836, 842.)

If so, reversal w/o directions
If not, an option: Reverse with directions to deny the motion for new trial and enter judgment against respondent.

Civil
Reversal

- Reversal of judgment automatically vacates cost awards without express statement. (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.)
- Rule applies when affirmed in part and reversed "in all other respects" (*Ducong Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 314.)

NOTE: one case holds COA cannot reverse fee/cost order not separately appealed—TC must do so

- *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284 [COA must remand to TC]
- *Contra: Ulkarim v. Westfield, LLC* (2014) 227 Cal.App.4th 1266, 1283

Civil
Partial Reversal

- Partial Reversal—where issues/parties severable
- Examples:

Behr v. Redmond (2011) 193 Cal.App.4th 517, 538-539 [reversed as to 6th C/A; damages reduced; cost award partially reversed]

Singh v. Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 369- 370 [affirmed as to 2 "counts"; reversed as to 2 counts; remanded for new trial as to several remaining counts]

Civil
Partial Reversal - Example

IV. DISPOSITION

The judgment is reversed as to the sixth cause of action for fraud by misrepresentation. The award of future medical expenses is reduced to \$72,000, and the total compensatory damages award is reduced to \$1,575,600. The court's order denying Redmond's motion to strike or tax costs is modified, such that the motion to strike costs associated with expert witness fees is granted. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

(*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538-539.)

Civil
Partial Reversal - Example

DISPOSITION

The judgment is affirmed as to the denial of relief on the count for breach of contract and the award of damages on the count for unpaid wages. The judgment is reversed in all other respects and the matter is remanded with directions to the trial court to (1) conduct a new trial on the counts for promissory estoppel, misrepresentation to induce relocation for employment, false promise, intentional misrepresentation, and concealment, and (2) enter a judgment in favor of defendants on the count for breach of the implied covenant of good faith and fair dealing at the conclusion of the trial court proceedings. The denial of defendants' motion for judgment notwithstanding the verdict is reversed as to the count for intentional infliction of emotional distress with directions to enter a judgment in favor of defendants on that count at the conclusion of the trial court proceedings, and is otherwise affirmed. Each party shall bear its own costs on appeal.

(*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 369-370.)

Criminal
Reversal

- Judgment against defendant reversed results in a new trial, unless COA directs otherwise. (Pen. Code, § 1262.)
 - Double Jeopardy?
- Retrial within 60 days, or trial court dismisses the case. (*Id.*, § 1382, subd. (a).)

Criminal
Retrial - Double Jeopardy

Bars retrial after reversal for insufficiency of evidence

- (*Burks v. United States* (1978) 437 U.S. 1, 14-15.)
- Includes conduct enhancements (*People v. Seel* (2004) 34 Cal.4th 535)
 - Not recidivism enhancements (*People v. Barragan* (2004) 32 Cal.4th 236, 259.)

Does not bar retrial after reversal for trial error

- (*People v. Hernandez* (2003) 30 Cal.4th 1, 10.)
- Because disposition does not reflect guilt or innocence
- Ex:
- Prejudicial instructional error
 - Prejudicial evidentiary error
 - Improper admission of evidence
 - Erroneous dismissal of single juror
 - Invalid guilty plea (DJ attaches only to valid plea)

Reversal

What Happens in Trial Court?

- “The true findings on the street gang enhancements are reversed. The judgment of conviction is otherwise affirmed.”

Reversal

W/ Directions for Limited Remand

- For Exercise of Discretion
- For Fact Finding

Reversal With Directions - Criminal Example

- Correcting a Sentencing Error
When to modify and when to remand for resentencing?
 - If correction requires exercise of discretion . . . Reverse with directions for limited remand
 - If correction requires no exercise of discretion . . . Modify
 - Ex:
 - Failure to impose mandatory enhancement
 - Imposition of an improper enhancement
 - Failure to stay a 654 term

Upon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term

People v. Burbine (2003) 106 Cal.App.4th 1250, 1259.

Reversal with Directions – Civil Example

Reversal with directions empowers the trial court to act only as directed.

Puritan Leasing Co. v. Superior Court (1977) 76 Cal.App.3d 140, 147

Civil Reversal with Directions

- Consider directing entry of judgment where appropriate
- Consider remand for limited retrial, where issues severable without confusion or uncertainty. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1341-1342 [medical expenses].)

Civil
**Reversal Directing Limited Remand
 Common Scenarios**

1. To enter proper judgment/order
(Singh v. Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 369-370.)

Civil
Reversal w/Directions, Partial Reversal - Example

DISPOSITION

The judgment is affirmed as to the denial of relief on the count for breach of contract and the award of damages on the count for unpaid wages. The judgment is reversed in all other respects and the matter is remanded with directions to the trial court to (1) conduct a new trial on the counts for promissory estoppel, misrepresentation to induce relocation for employment, false promise, intentional misrepresentation, and concealment, and (2) enter a judgment in favor of defendants on the count for breach of the implied covenant of good faith and fair dealing at the conclusion of the trial court proceedings. The denial of defendants' motion for judgment notwithstanding the verdict is reversed as to the count for intentional infliction of emotional distress with directions to enter a judgment in favor of defendants on that count at the conclusion of the trial court proceedings, and is otherwise affirmed. Each party shall bear its own costs on appeal.

(Singh v. Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 369-370.)

2. To enter specific judgment depending on outcome of retrial
(Springmeyer v. Ford Motor Co. (1998) 60 Cal.App.4th 1541, 1575-1576.)

If the trier of fact concludes that the sale did occur, then a judgment must be entered against Ford and Schwitzer holding them jointly and severally liable for the full amount of the damages found at the first trial.

If the trier of fact rejects Avis's claim that it had sold the vehicle by that time . . . the original judgment must be reinstated, with one modification: The 50 percent and 30 percent allocations of fault to Ford and Schwitzer, respectively, must be replaced by a single 80 percent allocation to Ford and Schwitzer jointly.
(Springmeyer v. Ford Motor Co. (1998) 60 Cal.App.4th 1541, 1575-1576.)

III. DISPOSITION

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

(Springmeyer v. Ford Motor Co. (1998) 60 Cal.App.4th 1541, 1576.)

3. To reconsider evidence in existing record
(Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal.App.4th 882, 895.)

DISPOSITION

The order is reversed. On remand, the trial court shall conduct a de novo review of the evidence to determine whether plaintiff violated the Real Estate Law (Bus. & Prof. Code, § 10000 et seq.) and shall apply the finder's exception to that law on a transaction-by-transaction basis in ruling on the petition to confirm the arbitration award. The parties are to bear their own costs on appeal.

(Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal.App.4th 882, 895.)

4. To receive and consider new evidence or allow discovery after reversal of order granting MSJ (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 101.)

Note: COA can leave decision whether to receive new evidence on remand to the TC's discretion (*City of Los Angeles v. Shell Oil Co.* (1971) 4 Cal.3d 108, 128.)

DISPOSITION

The judgment is reversed. The case is remanded for the trial court to consider the additional grounds urged for the grant of summary judgment and to determine whether the parties should be afforded an opportunity to present additional evidence and conduct discovery in connection therewith. Appellants are awarded costs on appeal.

(*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 101.)

5. To consider fee award

(*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 894, fn. 9.)

Because we are reversing the trial court’s order and remanding the case for further proceedings, we do not decide whether either party is entitled to attorney fees on appeal. The resolution of that issue must necessarily await the outcome of the proceedings on remand since, at this point, there is no “prevailing party” in the case. At an appropriate time after remand, the trial court should determine if either party is entitled to fees for this appeal and, if so, the amount of the award.

(*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 894, fn. 9.)

6. To dismiss moot action

Note: Operates as affirmance. To avoid affirmance, can reverse with directions to dismiss.

(see *Coalition For a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 947.)

DISPOSITION

The judgment is reversed as moot. This reversal does not imply that the judgment was erroneous on the merits, but is solely for the purpose of returning jurisdiction over the case to the superior court by vacating the otherwise final judgment solely on the ground of mootness. The superior court is directed to dismiss the underlying action as moot.

(*Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 947-948.)

Criminal
Reversal Directing Limited Remand
Common Scenarios

1. *Batson/Wheeler*

DISPOSITION

The judgment is reversed and the case remanded for further proceedings on defendant's *Batson/Wheeler* motion as directed in this opinion. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised her peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised her peremptory challenges in a permissible fashion, it should reinstate the judgment.

(*People v. Placencia* (Feb. 9, 2009, No. C056595) ___ Cal.App.4th ___ [2009 Cal. App. Unpub. LEXIS 1044, at *19].)

2. Motion to Suppress

Reversal for Motion to Suppress - Example

DISPOSITION

Our prior opinion in this cause filed on June 6, 2002, is vacated. The judgment is reversed and remanded to the superior court with directions to conduct a hearing on appellant's motion to suppress filed November 28, 2000. If the court grants the motion to suppress, it shall vacate the judgment and afford appellant an opportunity to withdraw his plea. If the superior court denies the motion to suppress, it shall reinstate the judgment. (See *People v. Torres* (1992) 6 Cal.App.4th 1324, 1335.)

(*People v. Lazalde* (2004) 120 Cal.App.4th 858, 866.)

3. Retrospective Competency Hearing

Reversal for Competency Hearing - Example

DISPOSITION

The judgment is reversed. The case is remanded to the trial court with instructions to hold a retrospective competency hearing, to be calendared forthwith. Counsel shall be appointed to represent defendant at such hearing. In the event defendant is found to have been competent to stand trial, the judgment shall be reinstated. In the event defendant is found to have been incompetent to stand trial, defendant shall receive a new trial.

(*People v. Robinson* (2007) 151 Cal.App.4th 606, 619.)

4. *Pitchess* Motion

Reversal for *Pitchess* Hearing - Example

DISPOSITION

The judgment is reversed with directions. On remand, the trial court must conduct an in camera inspection of the requested personnel records for relevance. If the trial court's inspection on remand reveals no relevant information, the trial court must reinstate the judgment of conviction. If the inspection reveals relevant information, the trial court must order disclosure, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.

(*People v. Johnson* (2004) 118 Cal.App.4th 292, 306-307.)

5. *Marsden* Motion

Reversal for *Marsden* Hearing - Example

DISPOSITION

The judgment is reversed and the matter remanded with the following directions: (1) the court shall hold a hearing on Eastman's *Marsden* motion concerning Mr. Garcia; (2) if Eastman makes a prima facie showing of ineffective assistance of counsel, the court shall appoint new counsel to assist him for this purpose and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel does not make any motions, any motions made are denied, or Eastman's *Marsden* motion is denied, the court shall reinstate the judgment.

(*People v. Eastman* (2007) 146 Cal.App.4th 688, 699.)

Reversal for *Marsden* Hearing - Example

III. Disposition

The judgment is reversed with directions to the trial court to make further inquiry into Reed's claim of ineffective assistance of counsel. If, after further inquiry, the court determines good cause exists for appointment of new counsel to fully investigate and present defendant's motion for new trial, the court shall appoint new counsel for that purpose and conduct further proceedings as necessary. If, on the other hand, the court determines after further inquiry that good cause does not exist for appointment of new counsel to fully investigate and present defendant's new trial motion, the court shall rule on the motion as presented by Reed. If the court denies the motion for new trial, the court shall reinstate the judgment.

(*People v. Reed* (2010) 183 Cal.App.4th 1137, 1149-1150.)

Consider Deadlines on Remand

If there is a concern about the case languishing . . .

- Civil – provide when/whether 90 day rule starts to run
- Criminal – consider a deadline for hearing on remand - defendant has state constitutional right to timely hearing on remand, but must show prejudice.

MODIFICATION

Criminal
Modification – Common Scenarios
1. Correcting Sentence

Criminal
Modification Correcting Sentence
If correction requires no exercise of discretion . . . Modify
(Failure to impose mandatory enhancement, imposition of an improper enhancement, failure to stay a section 654 term)
But remand if trial court would have any discretion.
(*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)
Reason: A prison term is "made up of interdependent components. The invalidity of some of those components necessarily infects the entire sentence."
(*People v. Savala* (1983) 147 Cal.App.3d 63, 69.)

Modification Correcting Sentence

The judgment is modified; execution of the sentence imposed in count two (assault by means of force likely to produce great bodily injury) is stayed pending the finality of this judgment and service of the sentence in count one (Pen. Code, § 654); the stay is to become permanent upon completion of the term imposed in count one. The prison term of 12 years remains the same.

The trial court is directed to correct the abstract of judgment as indicated above and to forward a corrected certified copy to the Department of Corrections; the department will modify its records accordingly. As modified, the judgment is affirmed.

(*People v. Flowers* (1982) 132 Cal.App.3d 584, 593.)

Modification Correcting Sentence - Example

IV. DISPOSITION

The matter is remanded to the trial court for the purpose of imposing sentence on the gang enhancement allegation attached to count 2. In addition, the trial court is directed to stay the sentence for count 1 under section 654 and to amend the abstract of judgment accordingly, and to reduce defendant's sentence for the gang enhancement as to count 4 to one year. In all other respects, the judgment is affirmed.

(*People v. Williams* (2009) 170 Cal.App.4th 587, 647.)

2. Reducing to Lesser Degree or Lesser Offense

Criminal
Authority to Reduce

When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed.
(Pen. Code, § 1181, subd. (6).)

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed
(Pen. Code, § 1260.)

Modification to Reduce to Lesser Degree

DISPOSITION

The judgment of the trial court is modified by reducing it to murder of the second degree and as so modified is affirmed. The cause is remanded to that court with directions to pronounce judgment upon defendant sentencing him to be imprisoned in a state prison for the term prescribed by law for murder of the second degree.

People v. Holt (1944) 25 Cal.2d 59, 93.

Modification to Reduce to Lesser Offense

DISPOSITION

The judgment is reversed. The trial court is ordered to modify the verdict to provide that defendant is found guilty of one count of possession of heroin in violation of section 11350 of the Health and Safety Code, and to then proceed with resentencing in accordance with the views herein expressed.

(People v. Ruiz (1975) 14 Cal.3d 163, 168.)

The COA may not modify judgment after conviction on a single greater conviction to reflect multiple convictions for lesser offenses.

Choose the lesser with the longest term to effectuate apparent intent to convict of most serious offense possible.

People v. Navarro (2007) 40 Cal.4th 668, 674.

While an appellate court has the power to modify the sentence (§ 1260) we exercise this power sparingly for . . . the trial court's articulated discretion is, generally speaking, controlling

People v. Humphrey (1997) 58 Cal.App.4th 809, 813.

Modification

- Modify and Remand?

- Modify and Affirm?

Civil
Modification – Common Scenarios

- Damages
- Causes of Action
- Parties

Civil
Modify and Affirm

Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination. . . .

Sagadin v. Ripper (1985) 175 Cal.App.3d 1141, 1170 [record sufficiently definite where comparative fault of all the parties determined by the jury]

Civil
Modify and Affirm - Example

DISPOSITION

The judgment is reversed insofar as it awards punitive damages of \$1.7 million. The matter is remanded to the trial court with directions to modify the judgment by reducing the award of punitive damages to \$500,000. In all other respects, the judgment is affirmed. Each party to bear its own costs on appeal.

(Amerigraphics, Inc. v. Mercury Casualty Co. (2010) 182 Cal.App.4th 1538, 1567.)

Civil
Modify and Remand - Example

DISPOSITION

The judgment is reversed and the matter remanded to the trial court, with directions to enter a new judgment apportioning liability 9 percent to Lucilla and 91 percent to Woodward.

(Munoz v. City of Union City (2007) 148 Cal.App.4th 173, 186.)

Civil
Modification

Consider Interest Calculations

– New Judgment vs Modified Judgment

Snapp v. State Farm Fire & Casualty Co. (1964) 60 Cal.2d 816, 822
[interest on modified judgment runs from date of original judgment]

DISMISSAL

- Dismissal upon settlement, abandonment, request. (Rule 8.244.)
- Dismissal is with prejudice to another appeal, unless otherwise stated. (Code Civ. Proc., § 913.)
- Criminal - Dismissal if "irregular in any substantial particular, but not otherwise." (Pen. Code, § 1248.)

HYBRID DISPOSITIONS

Civil
Conditional Affirmance

COA can order increase/reduction in damages if parties file written consent within 30 days (Rule 8.264(d))

Civil
Conditional Affirmance - Example

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to \$50 million, provided Boeken files a timely consent to such reduction in accordance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed with regard to the amount of punitive damages only, and remanded for a new trial solely upon that issue. Each side is to bear its own costs on appeal.

(*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1704.)

NOTE: COA can modify to reduce punitive damages exceeding constitutional limits (no 7th Amendment issue) without plaintiff's consent

(*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 719-720.)

or can direct TC to do so

(*Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1567.)

Criminal
Conditional Reversal/Modification

- Reversal for failure to instruct on lesser included offense

Consider giving prosecution option on remand to
(1) retry greater offense with proper instructions, or
(2) accept modification reducing to lesser offense

(*People v. Edwards* (1985) 39 Cal.3d 107, 110.)

Criminal

Conditional Reversal/Modification - Example

Disposition:

The judgment is reversed with directions as follows: If the People do not bring defendant to trial within 60 days after the filing of the remittitur in the trial court pursuant to Penal Code section 1382, subdivision 2, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of involuntary manslaughter (Pen. Code, § 192) and unlawful use of heroin (Health & Saf. Code, § 11550) and shall resentence defendant accordingly.

(*People v. Edwards* (1985) 39 Cal.3d 107, 110.)

Civil
Restitution

- COA “may order restitution . . . of all property and rights lost by the erroneous judgment or order . . . and may direct the entry of a money judgment sufficient to compensate for property or rights not restored.” (Code Civ. Proc., § 908.)
- COA can take evidence and make findings, or direct trial court to do so. (*Beach Break Equities, LLC v. Lowell* (2016) 6 Cal.App.5th 847, 855.)

Civil
Restitution - Example

DISPOSITION

The judgment is reversed. The court is ordered to conduct a restitution hearing under section 908. The reversal of the judgment is without prejudice to Beach Break’s right to renew the claims it attempted to dismiss. Lowell is awarded costs on appeal.

(*Beach Break Equities, LLC v. Lowell* (2016) 6 Cal.App.5th 847, 855.)

Costs

- Civil Appeals and Writs, not criminal case, juvenile case, or habeas petitions. (Rules 8.278(a), (b) & 1.6(3).)
- Prevailing party entitled to, unless contrary order in interest of justice
- Specify when consolidated appeals, several appeals from same judgment, one order affirmed another denied, etc.

Complete Disposition

- Directions?
- Restitution?
- Rulings on Outstanding Motions/Requests?
- Costs?
- Sanctions?

Resources

- California Court of Appeal Judicial Attorney Manual (3d Ed. 2013)
- Rutter Appeals and Writs in Civil Cases
- Rutter Appeals and Writs in Criminal Cases § § 5.16-5.32
- Serranus: *Dispositions* Hon. Stephen Krance (5th Dist) & Ms. Donna Hecht (4th Dist.) Sacramento AJAI 2008
- Final Steps in the Appellate Process: Issuance of the Opinion, the Remittitur and Transitioning Back to the Trial Court (California Appellate Project Feb. 22, 2016) http://www.capcentral.org/procedures/case_manag/finalsteps.asp
- Court Statistics Report , Statewide Caseload Trends (2016, Judicial Council of California)
