

# Attacking and Defending Summary Judgments on Appeal

## Speakers

**Justice Peter Siggins**

California Court of Appeal

**Justice Therese Stewart**

California Court of Appeal

**Deborah Quick**

Morgan, Lewis & Bockius LLP

**Michael von Loewenfeldt**

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## Speakers Bios

### Justice Peter Siggins



Justice Siggins was appointed presiding justice of Division Three of the Court of Appeal by Governor Brown in July 2018, and first joined the court as an associate justice in 2006. Prior to becoming an appellate justice, he served as the Legal Affairs Secretary to Governor Arnold Schwarzenegger (2003-2005) and the Governor's Interim Chief of Staff (September to November 2005). Before going to work for Governor Schwarzenegger, Justice Siggins was employed in the Attorney General's Office of the California Department of Justice from 1988 until 2003.

Justice Siggins began his career in the Attorney General's Office as a deputy attorney general responsible for the defense of correctional officials and agencies in trials and appeals challenging state correctional policies, practices and conditions of confinement. In 1995 he became a Senior Assistant Attorney General, and in 1999, Justice Siggins was named Chief Deputy Attorney General for Legal Affairs by Attorney General Bill Lockyer. As Chief Deputy Attorney General, he was responsible for the oversight and operation of the California Attorney General's Office. He remained Chief Deputy until he left the Department of Justice to join the Governor's Office in 2003.

Prior to joining the Attorney General's Office, Justice Siggins practiced general civil litigation and maritime law in San Francisco with the firm of Acret & Perrochet (1980-1983), as a sole practitioner (1983-1985), and in the two lawyer firm of German & Siggins (1985-1988).

Justice Siggins serves on several advisory committees to the Judicial Council of California in the areas of criminal jury instructions, audit reviews of the state trial courts, and the use and implementation of information technology in the courts. He is also a member of the Executive Board of the California Judges Association. He was retained in office by the voters in 2006 and 2010.

## Justice Therese Stewart



Justice Stewart was appointed to the First Appellate District in June 2014 by Governor Edmund G. Brown, Jr. She serves as an Associate Justice in Division Two.

Before joining the Court, Justice Stewart served for 12 years as the Chief Deputy City Attorney for the City and County of San Francisco where she oversaw the City's diverse litigation practice. In that capacity, she managed, under the City Attorney, a law office of about 300 employees, including about 200 attorneys. During her tenure as Chief Deputy, she also litigated a number of groundbreaking cases on behalf of the City, including *In re Marriage Cases* and *Perry v. Brown*.

Justice Stewart began her career as an associate at the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, where she litigated a wide range of business cases at the trial and appellate level. She spent the first 20 years of her career at Howard, Rice, becoming a partner in 1988.

Justice Stewart also served on the Board and ultimately as President of the Bar Association of San Francisco in the 1990s, co-founding the School-To-College program, which mentors San Francisco youth with the goal of enabling them to obtain a college education. She has served as well on the Board of Directors of the Legal Aid Society-Employment Law Center, Bay Area Lawyers for Individual Freedom, the Historical Society of the U.S. District Court for the Northern District of California, the American Bar Association's Sexual Orientation and Gender Identity Commission, the Northern District of California Delegation to the Ninth Circuit, and various Bar Association of San Francisco and California State Bar Committees. From 2007 through 2009, she served on the Public Information and Education Task Force of the Judicial Council's Commission on Impartial Courts.

The professional and community activities Justice Stewart has engaged in since joining the bench including serving as a member of the CJER Appellate Practice Curriculum Committee, and chair of its Appellate Justice Orientation (AJO) workgroup; an AJO faculty member; co-chair of the California Judges Association's LGBT Judges Committee, aiding the Governor's appointments secretary in identifying and vetting LGBT candidates for judicial office; a liaison for the First Appellate District to the American Bar Association's Judicial Intern Opportunity Program; a liaison for the First Appellate District to the Bar Association of San Francisco Appellate Practice Committee, organizing and serving as faculty for educational and bench-bar events. Justice Stewart has also been a speaker at events sponsored by the California Judges Association, the Litigation Section of the American Bar Association, the California Academy of Appellate Lawyers, the Bar Association of San Francisco and the Alameda County Bar Association.

Justice Stewart received her B.A. with distinction from Cornell University in 1978, and graduated Order of the Coif at Boalt, U.C. Berkeley School of Law in 1981. She clerked for Judge Phyllis A. Kravitch on the Eleventh Circuit from 1981 to 1982. Justice Stewart is a third generation San Franciscan and lives with her wife Carole Scagnetti in San Francisco. Their daughter, Natasha, is a public relations professional and independent filmmaker.

## Deborah Quick



Deborah E. Quick represents clients in complex civil appeals, and in trial court litigation conducted in anticipation of possible appellate review. She also represents clients seeking land-use entitlements, compliance with environmental statutes like the California Environmental Quality Act and the National Environmental Policy Act, and in defending litigation entitlements that have been granted. Deborah's appellate experience encompasses analysis and arguments across many different issues for clients on matters involving banking, retail, energy, manufacturing, insurance, patents, and the environment.

## Michael von Loewenfeldt



Michael von Loewenfeldt is a partner at Wagstaffe, von Loewenfeldt, Busch & Radwick LLP (WVBR) and is certified as a specialist in Appellate Law by the State Bar of California Board of Legal Specialization. Michael regularly appears in both federal and state appellate courts, as well as handling complex civil matters in the trial courts. Michael received his J.D. from the University of California, Berkeley (Boalt Hall) in 1995. He served as a law clerk to the Honorable Sandra B. Armstrong in United States District Court for the Northern District of California. Upon completion of his clerkship, he worked as an associate at the San Francisco office of Sonnenschein Nath & Rosenthal, and then was a partner at Kerr & Wagstaffe until 2018, when he co-founded WVBR.

# Attacking And Defending Summary Judgments On Appeal

Justice Peter Siggins & Justice Therese Stewart  
First District Court of Appeal

Michael von Loewenfeldt  
Wagstaffe, von Loewenfeldt, Busch & Radwick, LLP

Deborah Quick  
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*BASF Appellate Section*

# Roadmap

- Appeal v. Writ Review
  - Record Issues
- Evidentiary Objections

# Appeal v. Writ Review

- Summary judgment disposing of one cause of action and thereby rendering all other causes of action moot, treated as a final, appealable order. *Swain v. California Cas. Ins. Co.* (2002) 99 Cal. App. 4th 1, 6.
- How does this affect cross-complaint?
- Waiver issues.

# Appeal v. Writ Review

- Summary judgment disposing of less than all causes of action, or summary judgment denied – to seek a writ or not?
- CCP section 437c(m)(1)
- Is undergoing a trial an “irreparable harm”?
- How about the risk of two trials?

# Record Issues

- What to include in the CT or Appendix?
- How to discuss the facts?
- How to cite the facts?
- What about the argument transcript?

# What to include?

- All items “necessary for proper consideration of the issues” (CRC 8.124)
- Separate Statements of Facts
- Evidence submitted by both sides
  - Automatic? (CRC 8.124(b)(4))
  - Court of Appeal needs copies (CRC 8.224)
- Underlying briefs?

# How to discuss the facts:

## What is the standard?

- Court's task is to "independently determine whether an issue of material fact exists..."
  - *Wright v. Cty. of San Mateo* (2019) 33 Cal. App. 5th 931, 937.
- View the evidence "in the light most favorable" to the nonmovant, "liberally construe" the nonmovant's evidence and "strictly scrutinize" the movant's evidence
  - *Turley v. Familian Corp.* (2017) 18 Cal. App. 5th 969, 978.



# How to discuss the facts: What about inferences?

- “[T]he court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party.”
  - *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843

# **How to discuss the facts:** How does they affect briefing?

- Parties should discuss the facts in a manner consistent with the standard of review.
- Is defending summary judgment similar to challenging a jury verdict?

# How to discuss the facts:

## Risk of waiver

- On a substantial evidence appeal:
  - Appellant must state version of facts most favorable to respondent
  - Must set forth all material evidence, not just their evidence
  - Failure to do so waives the claimed error.
  - *Pope v. Babick* (2014) 229 Cal. App. 4th 1238, 1246



# **How to discuss the facts:**

## Should the waiver rule apply to summary judgment?

- Court's review is essentially the inverse of a substantial evidence review.
- Policy reasons for substantial evidence rule apply equally here.
- Any policy reason not to apply the same rule?

# How to cite the facts:

## Role of the SSUF

- In the trial court parties must submit a separate statement of material undisputed or disputed facts:
  - Code Civ. Proc. § 437c, subd. (b)
  - CRC 3.1350
- These documents have a major impact on the motion.

# How to cite the facts:

## Role of the SSUF

- Summary judgment may be granted or denied solely based on failure to comply.
  - Code Civ. Proc. § 437c, subd. (b).
- Facts discussed in the points and authorities are no substitute for the separate statement
  - Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-96.
  - Security Pacific Nat. Bank v. Bradley (1992) 4 Cal. App. 4th 89, 95-96.

# How to cite the facts:

## Cite to SSUF on appeal?

- No clear appellate rule analogous to CRC 3.1350.
- Should parties cite to the SSUF or to the underlying evidence? Or both?
- How should argued inferences be discussed and cited?
- Does the Court of Appeal review the SSUF and counter-statement?

# Deference if motion decided based on deficient SSUF?

- Trial court's decision is *discretionary*.
  - Code Civ. Proc. § 437c, subd. (b)
- But review of summary judgment is *de novo*
  - *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860
- And the Court of Appeal reviews the result, not the reason.
  - *In re Auto. Antitrust Cases I & II* (2016) 1 Cal. App. 5th 127, 150-51



# Case law is inconsistent on failure to oppose

- Court has discretion to affirm on alternate ground of failure to comply with SSUF
  - *Fong v. East West Bank* (2018) 19 Cal.App.5th 224, 234
- “The quality of Plaintiff’s opposition evidence and any failure to expressly contest ... are of no moment.”
- *Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal. App. 5th 232, 241 n.6 (lack of opposition is not a ground to grant summary judgment where the moving papers show triable issues of fact)

# What about the argument transcript?

- Do the trial court's reasons matter on de novo review?
- Is the transcript useful to show presentation or waiver of issues below?
- Are the trial court's rulings all reflected in a written order?



# Substantial evidence challenge to jury verdict

- “Under the substantial evidence standard of review, ‘we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings].”
  - *Schwan v. Permann* (2018) 28 Cal. App. 5th 678, 693

# Review of evidentiary decisions

## **Standard of Review**

- “[W]e need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo.” *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.
- 9 years later, still a split in authority.

# Review of evidentiary decisions

## **De novo standard**

- The Sixth District applies a de novo standard
- *Pipitone v. Williams* (2016) 244 Cal. App. 4th 1437, 1450-52

# Review of evidentiary decisions

## **Abuse of discretion standard**

- Other courts continue to apply the traditional abuse of discretion standard.
- *Alexander v. Scripps Mem'l Hosp. La Jolla* (2018) 23 Cal. App. 5th 206, 226.

# Review of evidentiary decisions

## **Many cases avoid the question**

- The most frequent result seems to be making the same ruling under either standard
- *Foglia v. Moore Dry Dock Co.* (Mar. 8, 2018, No. A142125) 2018 Cal. App. Unpub. LEXIS 1607.
- *Said v. Regents of the Univ. of Cal.* (Mar 10, 2017 No. G049994) 2017 Cal. App. Unpub. LEXIS 1827

# Review of evidentiary decisions

## **How to address excluded evidence?**

- Does an Opening Brief have to address the exclusion of any evidence Appellant seeks to rely on?
- What about blunderbuss objections?

# Review of evidentiary decisions

## **Another split in authority**

- *Pipitone* requires the Court of Appeal to consider all evidence “except to that which objections have been made and *properly* sustained.”
- Appellant “should” denote which evidence was excluded, but failing to do so does not waive review.
- *Pipitone*, 244 Cal.App.4th at p. 913-914.

# Review of evidentiary decisions

## **Another split in authority**

- Evidentiary ruling not challenged in Opening Brief is waived
  - *Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal. App. 5th 343, 368.
  - *Magnum Builders v. Preferred Bank* (July 16, 2014 No. B248595) 2014 Cal. App. Unpub. LEXIS 5054, at \*29-32.

# Review of evidentiary decisions

## **Blunderbuss objections?**

“We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with “innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become.” *Reid v. Google, Inc.*, 50 Cal.4th 512, 532.

# Review of evidentiary decisions

## **Blunderbuss objections?**

- “Defendants' reply included 764 objections, set forth in 324 pages.”
- “Defendants' evidentiary objection No. 27 is **OVERRULED**, and the remainder of the Defendants' evidentiary objections are **SUSTAINED**.”
- “This is hardly a ruling, as it could not provide any meaningful basis for review.”
- “[W]e have no hesitancy in holding that the sustaining of all but one of defendants' 764 objections was an abuse of discretion.”

*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 254-255.

# Review of evidentiary decisions

## **Blunderbuss objections?**

“Given the number of objections and the fact that some were sustained in error, we follow *Nazir* and hold that the trial court abused its discretion by issuing a blanket ruling on Defendants' objections.”

*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 857.