May 24, 2009

Chief Justice Ronald M. George and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Re: ***Muller v. Fresno Community Hospital & Medical Center*, No. B196884 (filed March 27, 2009)**
Request for Depublication (Cal. Rules of Court, rule 8.1005(e)(2))

To the Chief Justice and Associate Justices:

The California Academy of Appellate Lawyers (Academy) requests depublication of *Muller v. Fresno Community Hospital & Medical Center*, No. B196684, filed March 27, 2009. In *Muller*, Division Eight of the Second Appellate District held that an interlocutory order was appealable under the "collateral final order" exception to the "one final judgment" rule, even though the order did not direct the payment of money or the performance of an act – a condition this court held, in *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119, is essential to appealability under the collateral order doctrine. *Muller* contradicts a decisive majority of cases that have followed *Sjoberg*. If the opinion remains published, it will revive prior uncertainty in the case law that has been resolved for more than a decade.

The Academy recognizes that depublication by this court has become increasingly rare, as it should be. The device should be reserved for extraordinary cases where publication of an opinion by the Court of Appeal would do harm to California's judicial process – and particularly where the damage caused by the Court of Appeal's decision can be rectified without granting review. *Muller* is such a case. Moreover, no party has filed a petition for review in *Muller*, which means depublication is the only remedy the Academy can pursue here.

Under the collateral order doctrine, courts have traditionally held that an interlocutory order is immediately appealable if the following three elements are present: (1) the order concerns a matter that is *collateral* to the general subject of the litigation; (2) the order is *final* as to the collateral matter; and (3) the order directs *the payment of money or the performance of an act*. (*Sjoberg v. Hastorf, supra,* 33 Cal.2d at p. 119.) In *Sjoberg v. Hastorf*, Justice Roger J. Traynor stated that the third element – directing the payment of money or the performance of an act – is essential to appealability: "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him." (*Id.* at p. 119.)

In the years since *Sjoberg v. Hastorf*, a few decisions have disregarded the third element of the collateral order doctrine, approving direct appeals even though the appealed order did not require payment of money or performance of an act. (See, e.g., *Trimble v. Steinfeldt* (1986) 178 Cal.App.3d 646, 649; *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 841.) Those decisions were an outgrowth of *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216-217, which allowed an appeal from an order on a motion to disqualify counsel without addressing the third element of the collateral order doctrine.

Other decisions, however, have consistently concluded that the court in *Meehan v. Hopps* did not intend to eliminate the third element of the collateral order doctrine. Over time, most courts have fallen in line with *Sjoberg v. Hastorf* and have said that, for an order to be directly appealable under the collateral order doctrine, it must require payment of money or performance of an act. (See, e.g., *I.J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331 [order awarding $250 sanctions "is appealable 'because it is a final order on a collateral matter directing the payment of money'"]; *Marriage of Skelley* (1976) 18 Cal.3d 365, 368 ["When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken."]; *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882-883 ["The general rule is that only those collateral orders which compel the payment of money or the doing of some act are appealable."]; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 562 ["The temporary custody orders here are not appealable under *Sjoberg* because they did not direct the payment of money or the performance of an act."]; *Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1237 ["We conclude that judicially compelled payment of money or performance of an act remains an essential prerequisite to the appealability of a

final order regarding a collateral matter."]; *Ponce-Bran v. Trustees of Calif. State Univ. & Colleges* (1996) 48 Cal.App.4th 1656, 1661, fn. 3 ["'[I]f the order does not direct payment of money or performance of an act, it is not appealable except after a judgment.'"]; *Samuel v. Stevedoring Services* (1994) 24 Cal.App.4th 414, 418 ["if the order does not direct payment of money or performance of an act, it is not appealable except after a judgment."]; *Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 155-156 ["there is nothing in the opinion in *Meehan* indicating an intent to delimit or overrule *Sjoberg* and its own decisions cited in *Sjoberg* to the effect that not only must the order of a collateral issue be final to be appealable, but that it must also direct the payment of money by appellant or the performance of an act by or against him"].)

The matter seemed to have been put to rest by *Conservatorship of Rich, supra,* 28 Cal.App.4th at page 1237, which reiterated Justice Traynor's admonition in *Sjoberg v. Hastorf* that appealability under the collateral order doctrine requires the element of payment of money or performance of an act: ""In the seminal case articulating the exception, *Sjoberg v. Hastorf* [citation], Justice Traynor could not have been more clear that such an order must pass two tests to be appealable: '*It is not sufficient that the order determine finality for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by the appellant or the performance of an act against him.* [Citations.]'" (*Ibid.,* original italics, quoting *Sjoberg v. Hastorf, supra,* 33 Cal.2d at p. 119.) The authors of California Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:80, page 2-47, state that this is now the "majority" view.

The opinion in *Muller*, however, breathes new life into the uncertainty that preceded *Conservatorship of Rich* by reviving the prior split of authority, holding that an order denying a motion for monetary sanctions was appealable under the collateral order doctrine. The Court of Appeal in *Muller* rejected the majority view, calling *Meehan v. Hopps* "authoritative" (opn. p. 25), and proclaimed that "the real test" of appealability under the collateral order doctrine "is whether the order is collateral and final as to the collateral matter, not whether the order has the effect of requiring payment of money or the performance of an act" (*id.* at p. 27).

Muller exacerbates the uncertainty it creates by restricting its finding of appealability to "these circumstances" (i.e., the circumstances of that particular case), saying "[w]e do not hold that generally all orders denying motions for sanctions are appealable as collateral orders." (Opn. p. 29.) Thus, *Muller* states that *some* orders will be appealable under the collateral order doctrine, without defining the parameters of that

approach.

Here is where the *Muller* court went astray: The court found it to be "surely of some significance" that the federal counterpart to the collateral order doctrine does not include the element of payment of money or performance of an act, and the court said "the collateral order doctrine has functioned in the federal courts without these limitations since its inception in 1949." (Opn. p. 27.) What *Muller* failed to consider is a significant difference between the California rule and its federal counterpart. In California, the failure to file an immediate appeal from an order made appealable by the collateral order doctrine precludes review of the order on a subsequent appeal from a final judgment. (See, e.g., *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.) Under federal law, in contrast, the rule is precisely the opposite: The failure to take an appeal from an interlocutory order does *not* preclude review of the order on appeal from a final judgment. (See, e.g., *United States v. Real Property Located at 475 Martin Lane* (9th Cir. 2008) 545 F.3d 1134, 1142; *Richardson v. United States* (9th Cir. 1988) 841 F.2d 993, 995, fn. 3; *Baldwin v. Redwood City* (9th Cir. 1976) 540 F.2d 1360, 1364.)

This means that, in federal court, any uncertainty as to whether an interlocutory order is appealable under the collateral order doctrine is of little or no consequence: If an aggrieved party guesses wrong and fails to take an immediate appeal from an order that is subsequently determined to have been immediately appealable, there's no harm done, because the party can always obtain review of the order on appeal from the final judgment. In California state court, however, guessing wrong *can be disastrous*, because the wrong guess can result in a waiver of appellate review. If counsel does not take an immediate appeal, and the Court of Appeal subsequently decides that the order was immediately appealable under the collateral order doctrine, appellate review is *waived*. That is why uncertainty with regard to potential appealability under the collateral order doctrine is so pernicious in the California state courts, though not in the federal courts. Moreover, any injustice caused in a particular case by a bright-line rule restricting appellate review of collateral orders in California can be rectified by a petition for an extraordinary writ, whereas in federal court such writ relief is much less available.

And that is why the *Muller* opinion should be depublished. It perpetuates uncertainty, indicating that *some* collateral orders not requiring payment of money or performance of an act may be immediately appealable, without drawing any bright line that defines the frontiers of its approach. The consequence is obvious to a knowledgeable appellate practitioner: If you want to challenge a collateral interlocutory order, you had

better play it safe and file an immediate appeal or risk a waiver. This is not good for the appellate process in the California state courts. Without depublication, the renewed uncertainty created by *Muller* will cause a proliferation of appeals taken out of an abundance of caution.

In the Academy's view, the element of payment of money or performance of an act is essential to avoid uncertainty in the collateral order doctrine, which avoidance is far more important in state court than in federal court. This element draws a bright line that makes clear when an order is or is not appealable under that doctrine. To blur that line would be unfortunate. Even worse than blurring that line, however, would be for this court to leave the Court of Appeal's opinion in *Muller* published, because of the uncertainty in the law of appellate procedure and the proliferation of precautionary interlocutory appeals that would ensue.

Respectfully submitted,

CALIFORNIA ACADEMY OF APPELLATE LAWYERS[1]

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By: Jon B. Eisenberg

Proof of service attached

[1] Two Academy members represented one of the parties in *Muller*. None of those members (or those of their law firm colleagues who are also Academy members) participated in the writing of this letter.