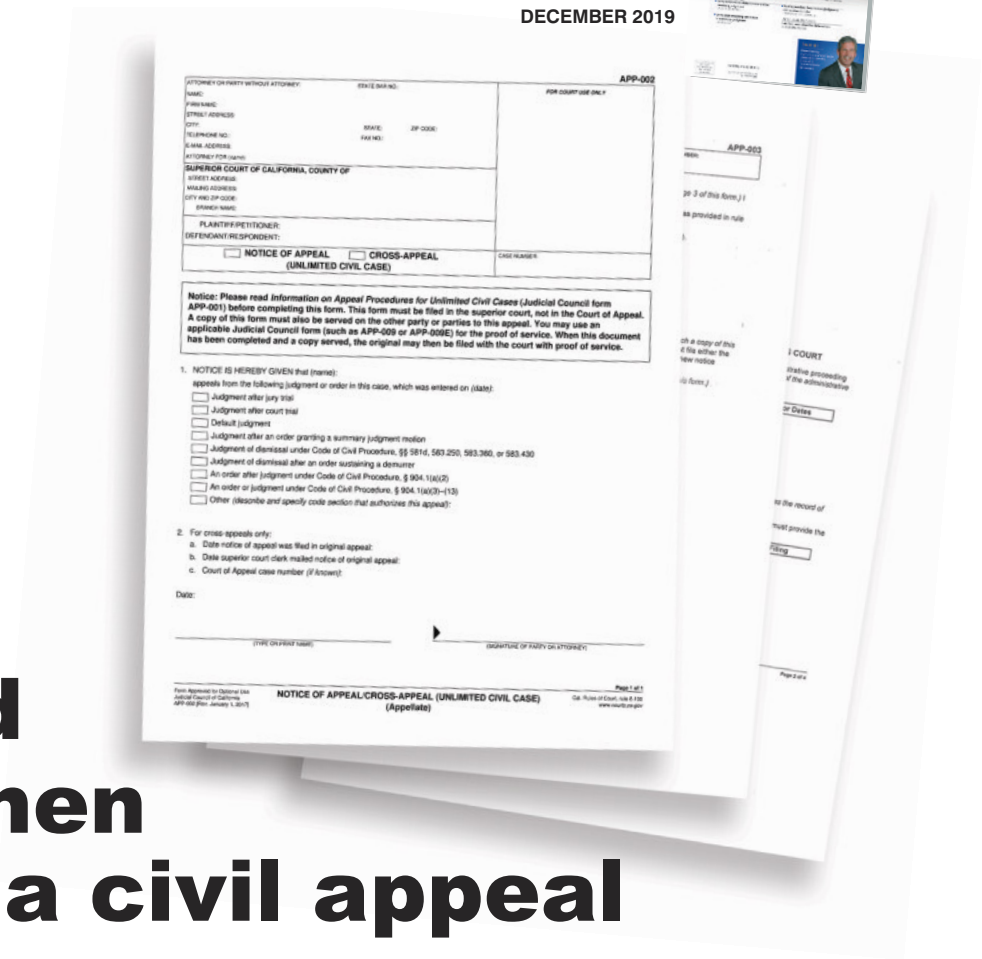

Pitfalls and hazards when perfecting a civil appeal

Filing a notice of appeal is a seemingly simple task, but determining whether and when to appeal can be daunting

By Judith Posner and Gerald Serlin

A notice of appeal, in the California state courts, is a one-page Judicial Council form. You check off a few boxes, fill in a date or two, sign it, pay a few bucks, file it, and you're good to go. Right? Well, not exactly. Byzantine statutes and court rules, not to mention opposing counsel who might attempt to snooker you, turn this deceptively simple task into a trap for the unwary. In this article, we acknowledge but a few of the pitfalls and unexpected hazards that could sabotage your efforts to perfect an appeal.

Confirm that you should be filing an appeal, not a writ petition

You're convinced the superior court got it wrong and are anxious to take that adverse ruling up to the Court of Appeal. But, before filing a notice of appeal, you'd better confirm that you have an appealable judgment or order.

The primary statute to consult is Code of Civil Procedure section 904.1, subdivision (a). That statute sets forth a general list of the rulings from which an appeal can be taken in unlimited civil cases. (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 556-557; see also *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 267 [appellate jurisdiction conferred by statute].)

All attorneys will correctly intuit that a "final judgment" terminating the trial court proceedings is directly appealable. Most attorneys, based on experience and scuttlebutt, will recognize that certain post-judgment orders and anti-SLAPP rulings are also directly appealable. But, the same cannot necessarily be said for (1) orders granting motions to quash service of summons, orders to stay based on inconvenient forum, or dismissal orders based on inconvenient forum, (2) orders related to attachments, (3) orders related to injunctions, (4) orders appointing receivers, (5) interlocutory judgments/orders/decrees in actions to redeem real or personal property from a mortgage or lien thereon, or orders determining the right to redeem and directing an accounting, (6) interlocutory judgments in actions for partition, (7) orders made appealable by the Probate Code or Family Code, (8) interlocutory judgments or orders related to monetary sanctions, and (9) final orders or judgments in a bifurcated proceeding regarding child

custody or visitation rights. And, "yes," each of those interlocutory judgments and orders is also appealable. (Code Civ. Proc., § 904.1, subd. (a)(3)-(14).)

There's no list of what's immediately appealable

Although Code of Civil Procedure section 904.1, subdivision (a), is the starting place to figure out whether you have an appealable judgment or order, it does not provide a complete answer to the question. Our Legislature would have made matters way too easy had it simply created an inclusive list of everything that's immediately appealable. Sorry, that didn't happen. Thus, for example, although omitted from Code of Civil Procedure section 904.1, subdivision (a), our Legislature has established that an order determining a claim of exemption of property subject to levy is directly appealable. (Code Civ. Proc., § 703.600.) Likewise, a judgment in a contested election proceeding is expressly appealable. (Elec. Code, § 16900.) Other examples abound.

Further, to make even more complicated the question of whether an appealable order exists, courts treat some interim rulings as directly appealable, such as "collateral" final judgments or orders. Thus, "[w]hen 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 [the] payment of money or performance of an act, direct appeal may be taken." (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) On this basis, an order directing payment of attorney fees as a sanction is an appealable collateral order. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, superseded by statue on another ground as stated in *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809-810.)

Similarly, our appellate courts have recognized other rulings are immediately appealable. For example, an order denying certification of a class is an appealable "final judgment" because it is legally equivalent to a dismissal of the action as to all members of the class, aside from the named plaintiff. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) An order dismissing a representative Private Attorneys General Act (PAGA) claim is immediately appealable to the extent it effectively rings the "death knell" of that claim. (*Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 200-203.) And, a judgment enforcing a settlement agreement pursuant to Code of Civil Procedure section 664.6 is appealable (*Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1046), although an order denying such a motion is not (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 167).

Finally, our Legislature has deemed that some orders – that sure look, swim, and quack like they are appealable – can be reviewed only by writ petition. These so-called "statutory writ" petitions include:

- Writs that must be filed within 10 days after service of written notice: disqualification/challenge of a judge (Code Civ. Proc., § 170.3), and quash service of summons (Code Civ. Proc., § 418.10, subd. (c)).
- Writs that must be filed within 20 days after service of written notice: coordination of civil cases (Code Civ. Proc., § 404.6), expungement of lis pendens (Code Civ. Proc., § 405.39), good faith settlement (Code Civ. Proc., § 877.6, subd. (e)), inspection of public records (Gov. Code, § 6259, subd. (c)), reclassification of civil actions (Code Civ. Proc., § 403.080), summary adjudication/judgment denied (Code Civ. Proc., § 437c(m)(1)), venue (Code Civ. Proc., § 400).
- Writs that must be filed 30 days after issuance of a final Agricultural Labor Relations Board order (Lab. Code, § 1160.8).
- Writs that must be filed 30 days after Public Utilities Commission decision on rehearing (Pub. Util. Code, § 1756).
- Writs that must be filed 45 days after denial or disposition of reconsideration by the Workers' Compensation Appeals Board (Lab. Code, § 5950).

Indeed, a judgment of contempt is not appealable, even though the order is made final and conclusive by Code of Civil Procedure section 1222. (See Code Civ. Proc., § 904.1, subd. (a).) A contempt judgment can be challenged only through a petition for a writ of habeas corpus, certiorari, or prohibition. (*In re M.R.* (2013) 220 Cal.App.4th 49, 64-65.)

When in doubt

The point here is obvious: It is fundamentally important that you take the time to discern whether the superior court has issued an appealable judgment or order. And, no, it's not always clear even to experienced appellate counsel. True, an appeal from a final judgment allows the appellant to challenge all interim, non-final, orders and judgments. (Code Civ. Proc., § 906; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649.) But, if you fail to appeal an immediately appealable order or judgment, you will forever waive your right to challenge it in an appeal from the final judgment. (Cf. *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161.) Thus, if the statutes and case law do not clearly answer your appealability question, i.e., some doubt exists as to whether you have an appealable judgment or order, then file a notice of appeal to protect your client's appellate rights.

File a *timely* notice of appeal

To invoke appellate jurisdiction, you must file a timely notice of appeal. (See Code Civ. Proc., § 916; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864.) You want to make sure your notice is timely because deadlines are jurisdictional. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Error is irremediable (*Maynard. v. Brandon* (2005) 36 Cal.4th 364, 372-373), and an untimely appeal must be dismissed by the appellate court (*Hollister Convalescent*

Hosp., Inc. v. Rico (1975) 15 Cal.3d 660, 666-667; Cal. Rules of Court, rule 8.104(b)).

In a "normal" civil appeal, absent a valid post-judgment motion (see Cal. Rules of Court, rule 8.108), a notice of appeal must be filed on or before the earliest of 60 days after either the superior court clerk or a party serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, showing the date either was served, or 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1).) The term "judgment" includes an "appealable order" if the appeal is from an appealable order. (Cal. Rules of Court, rule 8.104(e).)

Again, hazards lurk. You really have to confirm that your appeal is "normal." By statute and/or court rule, the appeal period has been shortened in matters involving public agency "validating proceedings," proceedings to annul elections, proceedings contesting Municipal Improvement Act assessments, specified proceedings challenging validity of assessment levies, sterilization proceedings, attachment proceedings, specified proceedings contesting special tax levies, CEQA cases, and certain cases under the Elder Abuse and Dependent Adult Civil Protection Act. (See Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2019) ¶¶ 3:20-28.6, pp. 3-10 to 3-13.)

The rules requiring a timely appeal appear fairly straightforward. As such, it should come as no surprise that:

- Opposing counsel cannot stipulate with you to extend the appeal period so that the parties can engage in post-judgment settlement discussions. (*Hollister Convalescent Hosp., Inc. v. Rico*, *supra*, 15 Cal.3d at pp. 666-667.)
- The appeal period commences even though you do not actually receive the notice of entry or file-stamped judgment that, purportedly, was served by mail. (*InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1135 [Service by mail of a triggering document commences appeal period, "and does not depend upon the party's actual receipt of the document"].)
- The appeal period commences even if no proof of service was filed in the trial court. (*Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 360-361.)
- The trial judge cannot restart the appeal period by entering a subsequent judgment or appealable order making the same decision. (*Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1226; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.)
- The deadline for filing an appeal cannot be extended or reset by a second or subsequent notice of entry. (*InSyst, Ltd. v. Applied Materials, Inc.*, *supra*, 170 Cal.App.4th at p. 1135.)
- An appellate court cannot treat a late appeal as a writ proceeding. (*Adoption of Alexander S.*, *supra*, 44 Cal.3d at pp. 864-866.)
- The appeal deadline is not extended because the notice of entry was served by mail. (*InSyst, Ltd. v. Applied Materials, Inc.*, *supra*, 170 Cal.App.4th at p. 1134.)

When and from what judgment or appealable order a notice of appeal needs to be taken also warrants careful study and may cause even more consternation.

On the one hand, for example, when a judgment is entered, the notice of appeal period is not altered by the rendition of an amended judgment containing a non-substantial/clerical correction. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 843.) The original judgment remains effective as the only appealable final judgment. (*Stone v. Regents of Univ. of Calif.* (1999) 77 Cal.App.4th 736, 744-745.)

On the other hand, when the judgment is substantially modified, a new appeal period runs from notice of entry or entry of the amended judgment. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 634; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) The appeal from the original judgment becomes "ineffective" or "nonoperative." (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1267.) A "substantial modification" occurs by an amendment that "materially" affects the rights of the parties. (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765.)

The rules may seem easy, but...

Although these governing rules are easy enough to recite, knowing them doesn't necessarily provide conclusive answers. The following examples confirm the absence of clarity:

- A substantial modification was found when an amended judgment required payment by the losing party of an additional nine months of costs. (*Stone v. Regents of Univ. of Calif.*, *supra*, 77 Cal.App.4th at pp. 743-744.)
- An amendment to a personal injury judgment to reduce by 30 percent the award of past medical expenses to reflect plaintiff's comparative fault materially affected the rights of the parties and thus restarted the notice of appeal period. (*Sanchez v. Strickland*, *supra*, 200 Cal.App.4th at p. 767; see *ibid*. ["Furthermore, from a quantitative perspective, a reduction of an award by 30 percent or, in absolute terms, by $72,800, is material"].)
- Reduction of a default judgment by more than $4 million, to strike the portion of the damages award in excess of the amount of damages requested in the complaint, was not a substantive modification because the size of the award was not the real issue; rather it was whether the defendant's right to appeal was affected by the amendment. The Court of Appeal explained that, "[t]hough the monetary positions of the litigants have been changed, in doing so the trial court did not deprive the parties of their ability to challenge any portion of the judgment." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509; see also, e.g., *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass'n* (2004) 122 Cal.App.4th 994, 1003 [amendment changed only amount of judgment but did not alter bases for appeal].)

- A substantial modification occurs when the original judgment is amended to include attorney fees and costs, but the entitlement to, and the amount of, the fees/costs were determined after entry of judgment. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007-1010.)
- When the judgment adds costs, attorney fees, and interest, the original judgment is not substantially changed, and the modification does not impact the time to appeal. (*Torres v. City of San Diego*, *supra*, 154 Cal.App.4th at p. 222.) (This likely is so because post-judgment awards of attorney fees, costs, and interest are separately appealable matters collateral to the judgment, so it stands to reason that they do not substantially modify the judgment itself. (*Dakota Payphone, LLC v. Alcaraz*, *supra*, 192 Cal.App.4th at p. 505.)

To protect your client's appellate rights and avoid a possible waiver, sometimes the best course of action to take in ambiguous situations is to appeal from both the original and amended judgments. If you do file two notices of appeal, then move the Court of Appeal to consolidate the matters.

Time to file extended by denial of post-trial motion

You must assess whether the time to file your notice of appeal has been extended by the denial of a specified post-trial motion. The deadline for filing your notice of appeal is extended by the superior court's denial of a new trial motion, a motion to vacate, and a motion for judgment notwithstanding the verdict. (Cal. Rules of Court, rule 8.108; but see *Id*. at rule 8.702(c)(1)-(3) [CEQA].)

New-trial motion

The superior court's denial of a timely served and filed new trial motion will extend by 30 days the time to appeal the judgment. (Cal. Rules of Court, rule 8.108(b).) If the superior court expressly denies the motion, the 30-day extension runs from the date the clerk or a party serves the order or notice of entry of that order. (Cal. Rules of Court, rule 8.108(b)(1)(A).) If the motion is denied by operation of law (see Code Civ. Proc., § 660), the 30-day extension runs from the date the order is deemed denied. (Cal. Rules of Court, rule 8.108(b)(1)(B).) If no notice of entry of the order denying the motion is served, the time to appeal is 180 days after entry of judgment. (Cal. Rules of Court, rule 8.108(b)(1)(C); *Anderson v. Chikovani* (2010) 181 Cal.App.4th 1397, 1398-1399.)

Be careful, though. The 30-day extension is not triggered by a motion that failed to comply with the procedural requirements of Code of Civil Procedure section 659. (*Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 435-437.) In other words, to receive the additional 30 days, there must exist a valid and timely notice of intention to move for a new trial. Section 659's time periods are jurisdictional. (*Marriage of Patscheck* (1986) 180 Cal.App.3d 800, 802.)

Motion to vacate

Likewise, an appeal-period extension is available when the superior court denies a motion to vacate. If any party serves and files a valid notice of intention or motion to vacate the judgment, the appeal period is extended for all parties until the earliest of: "(1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; (2) 90 days after the first notice of intention to move – or motion – is filed; or (3) 180 days after entry of judgment." (Cal. Rules of Court, rule 8.108(c)(1)-(3).)

The appeal period commences if the motion to vacate is deemed denied. (Code Civ. Proc., § 663a(b).) No extension adheres if the motion was not based on recognized grounds or if the motion was untimely. (*Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1107-1108; *Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108-109.)

Motion for judgment notwithstanding the verdict

Finally, if any party files a valid motion for judgment notwithstanding the verdict, the time to appeal from the judgment is extended for all parties following denial of the motion. (Cal. Rules of Court, rule 8.108(d)(1)(A)-(B).) The appeal period is extended to the earliest of (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; (2) 30 days after denial of the motion by operation of law; or (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.108(d)(1)(A)-(C).)

Again, to extend the appeal period, the motion must have been filed timely. (Cal. Rules of Court, rule 8.108(d)(1); *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 136.)

Filing a cross-appeal and/or a protective cross-appeal

If any party has filed a timely initial appeal, the appeal period for all other parties to file a subsequent notice of appeal from the same judgment or appealable order is extended until 20 days after the superior court clerk serves notification of the first appeal. (Cal. Rules of Court, rule 8.108(g)(1).) Of course, this 20-day extension does not apply when the appeal period has been shortened. (See, e.g., Cal. Rules of Court, rules 8.702(c)(4) [CEQA], 8.712(c)(2) [Elder Abuse and Dependent Adult Civil Protection Act].)

The cross-appeal 20-day extension applies so long as the first appeal is timely. Notably, however, the first appeal does not need to have been valid to trigger the extension. (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1295-1298 [extension applied because the first appeal was timely, even though it was invalid for want of appellate standing].)

Again, be careful. The cross-appeal must be from the same judgment or appealable order. (Cal. Rules of Court, rule 8.108(g)(1).) Thus, the time for filing a cross-appeal from a judgment is not extended by an earlier appeal from a post-judgment attorney fee or cost award. (*Fundamental Investment Growth Shelter Realty Fund 1-1973 v. Gradow* (1994)

28 Cal.App.4th 966, 976-979; *CC-California Plaza Assocs. v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1047-1048.) Similarly, a post-judgment order enforcing an appeal is not cross-appealable on the basis that there's been an earlier appeal from the judgment. (*Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 295.)

Also, be alert to the possible necessity of filing a "protective" cross-appeal from the judgment, a circumstance that arises typically when the superior court has granted either a motion (1) to vacate the judgment, (2) for new trial, or (3) for judgment notwithstanding the verdict. If the party who prevailed under the original judgment reverses the post-judgment order, the original judgment is automatically reinstated. The original judgment is not subject to appellate review unless a separate cross-appeal is taken. The cross-appeal is "protective" in that it ensures the right to obtain appellate review of the original judgment if the post-trial order is reversed. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910; see also *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 798.) If the post-trial order is affirmed, the Court of Appeal simply dismisses the cross-appeal as moot. (*Sandco American, Inc. v. Notrica* (1990) 216 Cal.App.3d 1495, 1498.)

Conclusion

Although filing a notice of appeal to protect your client's appellate rights is a seemingly simple task, determining whether and, if so, when to appeal often can be a daunting task. The road to answering the whether and when questions surrounding a notice of appeal can be filled with pitfalls and unexpected hazards. As a result, keep your eye on the road by consulting the governing statutes, court rules, and case authority. And, when in doubt, file that notice of appeal, and do it early. You never want to take a chance with appellate jurisdiction.


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