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10 common mistakes in appellate procedure

Procedural pitfalls that can jeopardize your client's appeal

By Donna Bader

After almost forty years of practicing appellate law, I have probably seen every type of error made by trial attorneys in handling appeals. Some may hurt the appeal, while others are fatal to prosecuting it. Here is a list of my top ten:

1. Determining when the notice of appeal is due

The timely filing of the notice of appeal is absolutely crucial; the deadlines are jurisdictional. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) There is generally no relief from filing a late notice of appeal, except in some clerical error or criminal appeal filings. The court cannot extend the time by its inherent power nor can relief be conferred by stipulation, waiver or estoppel. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667; *Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 114.) Nor will a motion for relief under Code of Civil Procedure section 473(b) provide any relief. (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372-373.)

Some attorneys have tried to bypass this rule by reentering judgment, preparing a formal order after the minute order is entered and no formal order is required, or transmitting a new notice of entry of judgment. The deadline cannot be restarted or extended by a new judgment or appealable order from the same decision. (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.)

There are three possible deadlines:

- **60 days after a party is served with notice of entry of judgment.** (Cal. Rules of Court, rule 8.104(a)(1)(B).) If you are giving notice of entry of judgment, use preprinted form, Form CIV-130, entitled "Notice of Entry of Judgment or Order." Be sure to include a signed copy of the judgment or order, as well as a proof of service. A party can prepare his or her own notice of entry of judgment, as long

as it is entitled as "Notice of Entry." (C.R.C. 8.104(a)(1)(B).)

A file-stamped copy of the judgment or order, accompanied by a proof of service, will also qualify as giving notice of entry of the judgment or order. (C.R.C. 8.104(a)(1)(B).) The label of "Notice of Entry" is not required. Many attorneys have fallen into the trap of waiting for a "Notice," but in this situation, the time has already started running.

If no notice is given, the deadline is 180 days after entry of judgment. Why would a prevailing party want to give the appealing party an additional 120 days to appeal when the deadline could be reduced to 60 days by filing a simple notice of entry? If an attorney is representing the prevailing party, assume the attorney has given notice and calculate the deadlines accordingly.

• **60 days after the clerk's notice of entry of judgment.** (Cal. Rules of Court, rule 8.104(a)(1)(A).) The clerk can send out notice of entry of judgment, which will also trigger the 60-day period. As noted above, the clerk could also, but rarely will, send out a confirmed copy of the judgment. If the phrase "notice of entry" is not on the mailing and it does not contain the file-stamp, the 180-day period will apply. (*Cuenllas v. VRL Intern., Ltd.* (2001) 92 Cal.App.4th 1050, 1054.)

• **180 days after entry of judgment.** (Cal. Rules of Court, rule 8.104(a)(1)(C).) If no notice of entry of judgment is given, then the appealing party has 180 days to file the notice of appeal.

These are general rules. Be sure to determine whether special circumstances apply to the appeal. If the appeal is from a limited-jurisdiction case, the time limit is much shorter. (Cal. Rules of Court, rule 8.822(a)(1).) Certain proceedings have special time limits built into the applicable statute. Do not add additional time under Code of Civil Procedure section 1013. (Code Civ. Proc., §§ 1013(a), (c) and (e); Cal. Rules of Court, rule 8.104(b); *InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1134-1135.) The time will be extended, however, when the deadline occurs on a holiday. (Code Civ. Proc., §§ 12, 12a, 12b.)

Save yourself a lot of grief. Calculate the shortest period and you will never be late. And don't wait until the last day to file the notice of appeal. What if the agent for the attorney service runs into a problem, has an accident or other problem?

Don't forget to include in your calculations extensions of time after the denial of post-trial motions, which in unlimited jurisdiction cases is usually 30 days from the notice of entry of the order. (Cal. Rules of Court, rule 8.108.) The deadline cannot be extended beyond the 180-day outside limit nor can it shorten the normal appeal period. One caveat: the post-trial motion must be valid and timely.

2. Advising your client when notice of appeal is due

If a prospective client met with an attorney to discuss a potential case, the attorney would certainly advise the client as to the applicable statute of limitations. Smart attorneys would probably also put the date in written correspondence to the client.

Most trial attorneys do not exercise the same care when it comes to advising the client about when the notice of appeal is due, leaving it to the appellate attorney. If you are not sure when the notice of appeal is due, then consult with an appellate attorney and put it in writing to the client.

3. Determining the date of entry of an appealable order

Attorneys frequently ask whether the date of entry of an appealable order is based on the minute order or a later prepared formal order. The answer depends on whether the court ordered the preparation of a formal order. If no formal order was required, then the date of entry is when the order is entered in the permanent minutes. (Cal. Rules of Court, rule 8.104(c)(2); *Walton v. Mueller* (2009) 180 Cal.App.4th 161, 167.) The appeal period is triggered even if the attorney decides to prepare and file a written order. (*Marriage of Adams* (1987) 188 Cal.App.3d 683, 689.) If the minute order expressly requires the preparation of a formal order, the order is deemed "entered" on the date the signed order is filed. (Cal. Rules of Court, rule 8.104(c)(2); *Matera v. McLeod* (2006) 145 Cal.App.4th 44, 59.)

4. Figuring out whether to file an appeal or a writ

Determining whether to file a direct appeal or a writ is crucial. If an order or judgment is appealable, you must file an appeal or lose the right to do so at a later date. If the order or judgment is nonappealable, consider whether to immediately file a petition for a writ or wait until there is an appealable order or judgment.

The appellate court cannot consider an appeal taken from a nonappealable judgment or order on jurisdictional grounds. (*Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 696.) If your appeal is premature, the appellate court may consider it by construing the appeal from a subsequent appealable judgment or order. Don't rely on the appellate court grant relief. Some courts have expressed harsh criticism of attorneys who fail to determine whether an order is appealable and have suggested they might not "help" attorneys in the future. (*Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1180; *Modica v. Merin* (1991) 234 Cal.App.3d 1073, 1075 [court abandons "its policy of tolerance"], but see *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 213.)

The appellate court can treat an appeal from a nonappealable order as a writ petition. (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.) Again, don't rely on the court to save your faulty appeal; it will only do so under limited circumstances and with an adequate record. (*Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011)

192 Cal.App.4th 1160, 1169.) "Routine granting of requests to treat improper appeals as writs where there are no exigent reasons for doing so would only encourage parties to burden appellate courts with reviews of intermediate orders." (*Estate of Weber* (1991) 229 Cal.App.3d 22, 25.)

Attorneys frequently rely on the "one final judgment rule." (Code of Civ. Proc., § 904.1(a)(1).) But the inquiry should not end there. Sometimes the appealability of an order defies logic. For example, an order granting or denying an anti-SLAPP motion is immediately appealable. (Code of Civ. Proc., §§ 425.16(i), 904.1(a)(13).) Orders and interlocutory judgments can be made appealable by statute, such as Code of Civil Procedure section 904.1, the Family Code, the Probate Code or other statutes.

If the order or judgment is not appealable, consider filing a writ petition. The next step in the analysis is determining whether the writ is statutory or common law. Statutory writs are usually easy to spot; a provision for writ relief, including applicable deadlines, is built into the applicable statute.

A common-law writ may not have a built-in deadline, but that doesn't mean the attorney can relax. After all, the attorney is requesting immediate relief to avoid irreparable injury. Since writs are equitable in nature, relief may be barred by laches. Courts will generally apply a 60-day rule (equivalent to the time for filing a notice of appeal) after service of the order (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173), but if you are challenging a court order that requires compliance with a set time period, then the writ petition should be filed before the date of performance to allow for a stay and to obtain effective orders to deal with the trial court's order.

5. Appealing from non-appealable orders, particularly in demurrers and motions for summary judgment

Attorneys frequently file appeals from orders sustaining a demurrer without leave to amend. These are not appealable orders. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) If the demurrer has been sustained *with leave to amend*, an appeal can be taken from the judgment after trial, or from a judgment or order of dismissal if the demurrer is sustained without leave to amend. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1.)

Orders granting or denying a motion for summary judgment or summary adjudication are also not appealable orders. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn.7.) If summary judgment is granted, the appeal is taken from the judgment. (Code Civ. Proc., § 437c(m)(1).) Review of an order granting summary adjudication is done from the final judgment or a writ petition. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128). An order denying summary judgment can be challenged only by a timely writ petition. (Code Civ. Proc., § 437c (m)(1); *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256.)

One word of caution here: make sure the orders indicated above are orders and that a final judgment of dismissal will be separately prepared. Some orders also contain judgments (or, more commonly, dismissals) that will start the time running for an appeal.

Attorneys may try to appeal from a statement of decision, which sets forth the trial court's reasoning as to the applicable law and evidence. A statement of decision is generally not appealable (*Industrial Indemnity Co. v. City and County of San Francisco* (1990) 218 Cal.App.3d 999, 1003, fn. 3), although the appellate court may treat the statement of decision as appealable when it constitutes the court's final decision on the merits. (*Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 896, fn. 1.)

6. Failing to ask for a statement of decision and following up with the proper procedures

If you are involved in a court trial, you should request a statement of decision on all material issues pursuant to Code of Civil Procedure section 632. If the trial lasted less than one calendar day or took less than eight hours over more than one day, the request must be made before the matter is submitted for decision. (Cal. Rules of Court, rule 3.1590(n).) In all other cases, the request must be made within 10 days after the court announces its tentative decision, which can be extended by Code of Civil Procedure section 1013(a). (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).)

There are several reasons for doing so:

- Protects against implied findings and presumptions;
- Allows the trial court to correct its intended decision;
- Frames the issues on appeal; and
- Helps the appellate court conduct its review.

If you fail to determine the court's reasoning on factual determinations, your appeal will be bound by the doctrine of "implied findings," which means that all factual determinations are presumed in favor of the judgment. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) "In other words, the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) The failure to request a statement of decision will expand and complicate the scope of the appeal.

Don't forget to follow the procedures involved in requesting a statement of decision, including making objections and proposals. The court may even order a hearing on the proposals and objections. (Cal. Rules of Court, rule 3.1590(k). Don't make a request that is argumentative, attacks the trial judge, or asks for a statement of decision on every fact, especially if they are subsidiary issues. "The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and

legal basis for the court's decision regarding the principal controverted issues at trial as are listed in the request." (*Hellman v. La Cumbre Golf & Country Club* (1994) 6 Cal.App.4th 1224, 1230.)

7. Failing to ask for a stay of enforcement from the trial court

While some types of judgments or orders are automatically stayed on appeal, a money judgment is not. (Code Civ. Proc., § 917.1(a)(1).) A money judgment can usually be enforced as soon as judgment is entered, which can cripple a party's ability to pursue an appeal or arrange for a bond or undertaking. At the last hearing before judgment is entered, ask the trial court for a temporary stay pursuant to Code of Civil Procedure section 918. A temporary stay can be granted to allow the losing party to decide whether or not to appeal and, if necessary and possible, to arrange for a bond.

8. Failing to bring a motion for new trial

There are a few grounds where bringing a motion for new trial is required: if inadequate or excessive damages are awarded, or jury misconduct. In the first instance, the appellate court reasons that the trial court is in a better position to determine – and correct – if inadequate or excessive damages were awarded. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Development Co.* (1977) 66 Cal.App.3d 101, 122.) In the second instance, how else would the appellate court know if the jury committed misconduct as these matters are often brought to the trial attorney's attention after the trial is over and he or she is conducting interviews of the jurors?

9. Failing to ask for a court reporter

With so many courts suffering budget cutbacks, court reporters are often not provided. If you think a hearing on a motion or trial may result in the need for an appellate challenge, make sure a court reporter is present. After all, the appellant has the burden of showing error on an adequate record. (*Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1209.) Contact the court before the hearing and determine if a court reporter will be provided. If not, make sure one is available. The alternatives, such as obtaining a settled statement, are less effective.

10. Failing to keep the exhibits with the trial court

At the conclusion of the trial, the lower court often urges the parties to pick up their exhibits. Request that the court maintain possession and custody of all exhibits. If the trial court maintains the exhibits, at least the parties know where the exhibits are and that no one has access to them to alter them without consent. It also makes it easier to transmit the originals to the court of appeal when required. (Cal. Rules of Court, rule 8.224.)

Conclusion

Appellate procedural rules often seem like a maze for trial attorneys. This article has identified the more common mistakes and can help you avoid pitfalls that will jeopardize your client's appeal.

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