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## Focus

# An Appeal Battle

By Teresa Li and Gary A. Watt

**S**ixty days is a long time. In 60 days, one could sail the world, hike the Pacific Crest Trail or write that novel. When, for example, did any lawyer have a 60 day vacation? But lawyers do have 60 days to file a notice of appeal.

Why do so many attorneys blow the deadline?

In California's state courts, initiating an appeal requires a final judgment or an appealable order. An order is appealable if either a statute expressly says so or it carries the same effect as a final judgment. A good place to start is Code of Civil Procedure Section 904.1. There, for example, one will see that an order granting a new trial or denying a judgment notwithstanding verdict motion is an appealable order. So is an order granting or denying an injunction. So too, an order granting or denying an anti-SLAPP motion. But a preliminary order that is followed by a final judgment is not appealable.

The difference between a final judgment and an order that is not appealable can seem slight. For example, an order granting a motion for summary judgment or sustaining a demurrer without leave to amend

may look and sound final to the losing party, but is not an appealable order. The ensuing judgment disposing of the action, however, is appealable. Likewise, an order denying summary judgment is not directly

appealable, but may be appealed from the final judgment. *Waller v. TJD Inc.*, 12 Cal.App.4th 830 (1993).

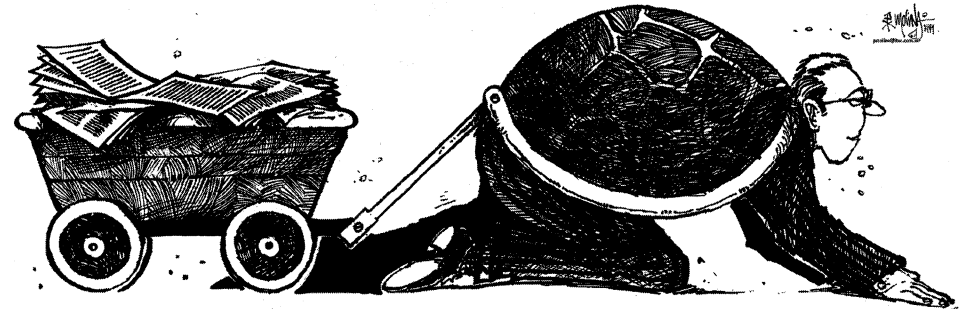
Indeed, a writ is usually necessary to avoid the denial of summary judgment being viewed on appeal as harmless error given the subsequent trial on the merits. *Gackstetter v. Frawley*, 135

Cal.App.4th 1257 (2006).

As for a judgment, it must be complete, reviewable and final. A judgment that disposes of some but not all causes of action is not a "final judgment." *Hill v. City of Clovis*, 63 Cal.App.4th 434 (1998). But a judgment that terminates the litigation as to some of the parties is considered final as to those parties and appealable. *Justus v. Atchison*, 19 Cal.3d 564 (1977). A superior court's statement of decision looks appealable, but this is usually not true.

In *Alan v. American Honda Motor*, 40 Cal.4th 894 (2007), the California Supreme

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Court observed that a statement of decision is normally not appealable. That is because "courts typically embody their final rulings not in statements of decision but in orders or judgments." But there is an exception. When a statement of decision is "filed and does, in fact, constitute the court's final decision on the merits," reviewing courts must treat the statement of decision as appealable.

What about orders made after judgment is entered? Turning to Section 904.1, to be appealable a post-judgment order must satisfy two requirements: "the issue raised by the appeal from the order must be different from those arising from ... the judgment;" and "the order must either affect the judgment or relate to it by enforcing it or staying its execution." *Lakin v. Watkins Associated Industries*, 6 Cal.4th 644 (1993). For example, a post-judgment order on a motion for attorney fees is an appealable

order. *P.R. Burke Corp. v. Victor Valley Wastewater Reclamation Authority*, 98 Cal. App.4th 1047 (2002). Even if the judgment or order is appealable, the right to appeal can be waived. In *Casas v. Record Town USA*, 2009 W1652958, the case settled and Ana Casas accepted the attorney fee award. Nevertheless, she filed an appeal claiming that the trial court abused its discretion by not awarding her higher fees. The court held that *Casas* did not expressly waive her right to appeal — the settlement agreement was silent. But *Casas* impliedly waived the appeal because "the right to accept the fruits of a judgment and the right to attack the judgment on appeal are wholly inconsistent."

Failure to file a timely notice of appeal is fatal. *Van Beurden Insurance Services Inc. v. Customized Worldwide Weather Insurance Agency Inc.*, 15 Cal.4th 51 (1997). Once the deadline expires, the appellate

court must dismiss the appeal. The mailbox extension under Code of Civil Procedure 1013 does not apply to a notice of appeal. And there is no relief obtainable under Section 473(b). *Maynard v. Brandon*, 36 Cal.4th 364 (2005).

Under California Rules of Court Rule 8.104, the clock starts ticking when either of two things happens: the clerk mails or a party serves — a document titled “notice of entry” of judgment or a file-stamped copy of the judgment. If it is the clerk, the document must show the date it was mailed. If a party, the document must be accompanied by a proof of service. The 60-day deadline starts running from the mail (clerk)/service (party) date. But if neither the clerk mails nor the party serves notice, a 180-day “outer limit” is allowed to file the notice of appeal. It is rare that no notice occurs, so proceed with extreme caution.

The 60-day time limit is also subject to extension under Rule 8.108. Under that rule, timely and valid motions for new trial, to vacate judgment, judgment notwithstanding verdict, and to reconsider an appealable order, can result in extensions. But if there is a procedural minefield, this is the place. And the mines explode with surprising frequency.

The decision in *Branner v. Regents of The University of California*, 2009 DJDAR 10325, is instructive. There, the 3rd District dismissed an appeal filed after the normal 60 days had run from notice of entry of an order ruling on a special motion to strike. *Branner* held that a “valid” motion as that term is used in rule 8.108(e) means full

compliance with the procedural requirements for the underlying motion. Branner’s failure to provide the declaration that Section 1008 required barred an extension of time. And his subsequent filing of the declaration could not save the day because “a single, complete, valid motion must be filed - not one that is later assembled from constituent parts like some Frankenstein monster.” A further exploration of the intricacy of Rule 8.108 is needed.

So what does a document triggering time to appeal look like? All that is required is either a file-stamped copy of the judgment or a document titled “notice of entry of judgment.” And a notice of entry qualifies even with technical defects, such as a misstatement of the judgment date. *Delmonico v. Laidlaw Waste Systems Inc.*, 5 Cal. App.4th 81 (1992).

But not all defects are tolerable. In *Sunset Millennium Associates v. Le Songe*, 138 Cal.App.4th 256 (2006), the court held that a 14-page minute order that was not file-stamped, containing the phrase “notice of entry” buried on Page 13 could not trigger the 60-day period.

Failure to title the document using the crucial “notice of entry” language made it defective. As *Sunset* explained, “[t]he use of metaphor and analogy is always a pedagogically risky business. With that cautionary thought in mind though, it is fair to say the title of a book is never at its end—the title is on the cover.” And in *Alan*, the Supreme Court reaffirmed *Sunset*, further holding that notice of entry must be a single document for “the rule does not require

litigants to glean the required information from multiple documents or to guess, at their peril, whether such documents in combination trigger the duty to file a notice of appeal.”

Does the serving party have to prove that other parties actually received notice? The case law says no. *Sharp v. Union Pacific Railroad Co.*, 8 Cal.App.4th 357 (1992). But, improper service, such as mailing to an incorrect address or wrong ZIP code will not start the clock. *Lee v. Placer Title Co.*, 28 Cal.App.4th 503 (1994); *Moghaddam v. Bone*, 142 Cal.App.4th 283 (2006). Traditional mail has long been the accepted method and service is complete at the time of deposit in the mail.

But e-mail service is an evolving area. In *Citizens for Civic Accountability v. Town of Danville*, 167 Cal.App.4th 1158 (2008), the parties were electronically served by LexisNexis with a message stating that judgment had been filed. The 1st District held that e-mail, as opposed to snail mail, does not satisfy the statutory requirement of Rule 8.104(a)(1) because it is not within the legislative meaning of “superior court clerk mails” and to allow otherwise “create[s] a trap for the unwary.” In contrast, the 6th District concluded in *Insyst v. Applied Materials*, 170 Cal.App.4th 1129 (2009), that a clerk can e-mail a judgment or notice of entry of judgment, but that merely providing a link to one of those documents is insufficient. *Insyst* rejected the notice of appeal trigger because “an e-mail explanation of where to electronically locate a judgment [is not] the equivalent of the electronic

transmission of the document.”

Rule 8.100(a)(1) specifies a notice of appeal must be filed in the superior court that issued the judgment or appealable order. And no particular form of notice of appeal is required as long as it is in writing, identifies the “judgment or order being appealed” and is signed by appellant or his or her attorney. The Judicial Council has an easy-to-use check-the-boxes form - when in doubt, fill it out.

Failing to file a notice of appeal within the prescribed time limit is fatal. If lawyers can write bestselling novels and win reality television shows, surely they can file a notice of appeal on time. After all, they have 60 days, sometimes longer. Of course, as one appellate court said while dismissing a case due to a late notice of appeal, trial lawyers can always hire “able appellate counsel.” As Presiding Justice David G. Sills said in *In re the Marriage of Shaban*, 88 Cal.App.4th 398 (2001), “Appellate work is most assuredly not the recycling of trial level points and authorities.”

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