

HOW TO NOT SABOTAGE YOUR OWN PROBATE APPEAL

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A Roadmap for the Next Hour

- Preserving Error for Appellate Review
- Statements of Decision
- Notices of Appeal
- Questions

Preserving Appellate Error

A Failure to Object in the Trial Court Generally Forfeits Error on Appeal

- Object or forfeit. The forfeiture rule is designed to prompt parties to bring error to the trial court's attention at a time when it may be corrected. This allows the trial court to correct or avoid error.

(People v. Saunders (1993) 5 Cal.4th 580, 590; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 (*Keener*); *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 (*Doers*), overruled in part on another ground in *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 573, 582, fn. 4.)

Steps for Preserving Error – Make a Timely Objection

- Object at the earliest opportunity.
(See 3 Witkin, Cal. Evidence Law (4th ed. 2000) Presentation at Trial, § 372, p. 461 (Presentation at Trial); see also, e.g., Evid. Code, § 353, subd. (a).)
- Objection raised at a prior proceeding is insufficient.
(Presentation at Trial, § 372, p. 461.)
- A tentative pretrial evidentiary ruling does not “preserve the issue for appeal if the appellant could have, but did not, renew the objection . . . and press for a final ruling in the changed context of the trial evidence itself.”
(*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

Steps for Preserving Error – Procure an Express Ruling

- Absent a ruling, no error is cognizable.
(*People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650; Presentation at Trial, § 387, pp. 479-480.)
- If the trial court neither expressly rules nor reserves its ruling, the objecting party must “make some effort to have the court *actually rule*” or the party “may be deemed to have [forfeited] or abandoned” the objection as if it was not made in the first place.
(*People v. Rhodes* (1989) 212 Cal.App.3d 541, 554, superseded by statute on other grounds as noted in *People v. Wilson* (1996) 43 Cal.App.4th 839, 352.)

Steps for Preserving Error – Make a Record

- No sufficiency of the evidence challenge absent a record of the oral proceedings.
(*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-188.)
- Discretionary rulings will not be reversed if the record does not reflect the underlying proceedings or the trial court's reasoning.
(*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228-1229; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.)

Steps for Preserving Error – Make a Record (continued)

- Hire a court reporter to transcribe the oral proceedings, including side-bar conferences and in camera proceedings.
(See *Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1327; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 429.)
- If a deposition transcript is used at trial, it must be reported, preferably by the court reporter at trial. At minimum, the record should reflect the pages and lines of testimony that were read and the deposition transcript should be lodged.
(See Cal. Rules of Court, rules 2.1040 (a)(1) & 8.122(b)(4)(A).)
- If the oral proceedings are unreported or if a reporter's transcript is otherwise unavailable, the party asserting error should proceed by obtaining an "agreed statement"
(Cal. Rules of Court, rule 8.134) or a "settled statement" (Cal. Rules of Court, rule 8.137).

Specific Contexts – Evidentiary Issues

- A challenge to the erroneous *admission* of evidence requires a timely, specific, and proper objection or motion to exclude or strike the evidence.
(Evid. Code, § 353, subd. (a).)
- A challenge to the erroneous *exclusion* of evidence requires an offer of proof including the “substance, purpose, and relevance of the excluded evidence”
(Evid. Code, § 354, subd. (a).)

Specific Contexts – Evidentiary Issues (continued)

- A failure to make an adequate proffer forfeits any error.
(Gordon v. Nissan Motor Co., Ltd. (2009) 170 Cal.App.4th 1103, 1113; Shaw v. County of Santa Cruz (2008) 170 Cal.App.4th 229, 282; Heiner v. Kmart Corp. (2000) 84 Cal.App.4th 335, 344.)
- The offer of proof must be specific and identify “the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue.”
(United Sav. & Loan Assn. v. Reeder Dev. Corp. (1976) 57 Cal.App.3d 282, 294.)

Specific Contexts – Post-Trial Motions

- Generally, post-trial motions are not required to preserve issues on appeal.
(*In re Barber's Estate* (1957) 49 Cal.2d 112, 118; see also *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 (*Greenwich*).)
- There are three exceptions to this general rule. A post-trial motion is necessary to preserve the error for appeal under the following circumstances:
 - (1) To preserve an objection on ground the damages awarded are excessive or inadequate (*Greenwich*, 190 Cal.App.4th at p. 759);
 - (2) To preserve claim of jury misconduct; and
 - (3) To preserve a claim regarding newly discovered evidence (*Garcia v. Myllyla* (2019) 40 Cal.App.5th 990, 1005).

Exceptions to the Forfeiture Rule

- Pure issue of law applied to undisputed facts.
(*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699-700; *Allen v. Stoddard* (2013) 212 Cal.App.4th 807, 811.)
- New unpreserved theory on appeal resting on recent authority.
(*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334; *Boeken, supra*, 127 Cal.App.4th at p. 1681.)
- Lack of subject matter jurisdiction. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339-340.)
- Lack of standing. (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 789; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407.)
- Statutory exceptions under Code of Civil Procedure section 647.
- Insufficiency of evidence. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17; *Nationwide Ins. Co. of America v. Tipton* (2023) 91 Cal.App.5th 1355, 1365.)

Statements of Decision

Statements of Decision and Why They Are Needed

- When requested by any party in a nonjury trial, the trial court “shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues.”

(Code Civ. Proc., § 632; see, e.g., *Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 585; *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124 (*Muzquiz*); see *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 425 [“purpose of the statement is to provide an explanation of the factual and legal basis for the court’s decision”].)

- A statement of decision is prepared for the benefit of the trial court and the parties. (See *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126 (*Whittington*).)

“To the court it gives an opportunity to place upon [the] record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which judgment rests. To the parties, it furnishes the means, in many instances, of having their cause reviewed without great expense. It also furnishes to the losing party a basis of his motion for a new trial; he is entitled to know the precise facts found by the court before proceeding with his motion for new trial, in order that he may be able to point out with precision the errors of the court in matters either of fact or law. [Citation.]’ [Citations.]” (*Whittington*, at pp. 126-127.)

Statements of Decision and Why They Are Needed

- The statement of decision provides the Court of Appeal a roadmap of the case so it properly can review the trial court's factual findings and legal conclusions.

(In re Marriage of Sellers (2003) 110 Cal.App.4th 1007, 1010 ["statement of decision is as much, or more, for the benefit of the Court of Appeal as for the parties"]; *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 661 (*Gruendl*) ["One of the primary purposes of a statement of decision is to facilitate appellate review"]; *People v. Landlords Professional Services, Inc.* (1986) 178 Cal.App.3d 68, 70 (*Landlords*) [same].)

Statements of Decision and Why They Are Needed

- When a party fails to request a statement of decision and appeals, the appellate court will “presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. Thus, 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; see also, e.g., Orange County Water Dist. v. Alcoa Global Fasteners, Inc. (2017) 12 Cal.App.5th 252, 311; In re Fladeboe v. American Isuzu Motors Inc. (2007) 150 Cal.App.4th 42, 61 (Fladeboe); Gordon v. Wolfe (1986) 179 Cal.App.3d 162, 168 (Gordon) [absent a statement of decision, “the judgment is effectively insulated from review”].)

Statements of Decision and Why They Are Needed

- “Where [the] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.”

(*In re Marriage of Hoffmeister* (1987) (1987) 191 Cal.App.3d 351, 358.)

- By contrast, “[w]hen a statement of decision does *not* resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue.”

(Code Civ. Proc., § 634, italics added; see *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (Arceneaux) [When “omissions or ambiguities in the statement are timely brought to the trial court’s attention, the appellate court will *not* imply findings in favor of the prevailing party” (italics added)]; *Ruiz v. County of San Diego* (2020) 47 Cal.App.5th 504, 521 & fn. 11.)

Statements of Decision and Why They Are Needed

- When a trial court fails to provide required written findings on material issues, “[r]eversal is compelled if there was evidence introduced on such issues and this evidence was sufficient to have sustained [a] finding in favor of the party complaining.”

(*Duff v. Duff* (1967) 256 Cal.App.2d 781, 785 (*Duff*); see *Williams v. Williams* (1971) 14 Cal.App.3d 560, 566, fn. 1.)

- For example, “[t]he failure to make a finding on the affirmative defense, when supported by the evidence, may well vitiate the judgment.”

(*Duff*, at p. 786 [statute of limitations and laches defenses were material and required findings]; see also, e.g., *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745; *Macmorris Sales Corp. v. Kozak* (1968) 263 Cal.App.2d 430, 440-442 [“failure to make any finding on equitable issues when they are material is reversible error”]; *Mitidiere v. Saito* (1966) 246 Cal.App.2d 535, 539.)

Statements of Decision and Why They Are Needed

- Finally, when a statement of decision clearly expresses the legal and factual bases for the trial court's resolution of controverted issues, an appellate court will not imply findings the trial court did not make.

(See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"]; *Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1015 [same]; see also *In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 293-294 ["statement of decision may reveal that the trial court made factual findings in favor of the prevailing party on some disputed issues but not others, thus depriving the prevailing party of the benefit of inferred findings in its favor"].)

Proceedings in which a Statement of Decision would be Requested

- A statement of decision is required following only a “trial” turning on disputed facts.

(Code Civ. Proc., § 632; *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026 (*Lavine*).)

- The trial need not be a full trial, such as when a trial is limited to the question of damages. (*Gordon, supra*, 179 Cal.App.3d at p. 167.)
- A request for a statement of decision should follow a bifurcated trial when designated factual issues were tried separately. (Cal. Rules of Court, rule 3.1591(a)-(c).)

Proceedings in which a Statement of Decision would be Requested

- When the matter before the court is purely legal, i.e., not factual, a statement of decision is not required.
(*Kroupa v. Sunrise Ford* (1999) 77 Cal.App.4th 835, 842; *Enterprise Ins. Co. v. Mulleague* (1987) 196 Cal.App.3d 528, 540.)
- Moreover, a trial court generally is not required to issue a statement of decision after a ruling on a motion (except on a motion for judgment or when otherwise specified by statute), but can exercise its discretion to do so.
(*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1497; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 353-354; *Lavine, supra*, 169 Cal.App.3d at p. 1026.)
- Some courts have extended latitude when a motion involves “sufficient[ly] important” issues that necessarily require resolution of factual disputes.
(See *Metis Development LLC v. Bohacek* (2011) 200 Cal. App.4th 679, 688-689 [petition to compel arbitration turning on factual matters]; *Gruendl, supra*, 55 Cal.App.4th at pp. 660-661 [motion to amend judgment to add judgment debtor on estoppel or alter ego theory].)

Timing for a Request for a Statement of Decision

- The trial court must issue a statement of decision if a party makes a timely request. (Code Civ. Proc., § 632; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530-1531.)
- The court can extend the time for making a request on good cause shown. (Cal. Rules of Court, rule 3.1590(m).)
- Failure to make a timely request forfeits a party's right to a statement of decision. (*University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 946.)
- The trial court, however, may exercise its discretion to issue one sua sponte. (*Ochoa v. Anaheim City School Dist.* (2017) 11 Cal.App.5th 209, 235; *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476, fn. 7.)

Timing for a Request for a Statement of Decision

- The applicable time frame for making a request for statement of decision turns on the trial's length.
(Code Civ. Proc., § 632; *Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 840.)
- "The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day, in which event the request must be made prior to the submission of the matter for decision."
(Code Civ. Proc., § 632; see also *id.* at § 1013a [service by mail]; Cal. Rules of Court, rule 3.1590(d) & (n).)
- The trial court can announce the tentative decision orally in open court in the presence of all parties or by written statement filed with the clerk.
(Cal. Rules of Court, rule 3.1590(a); *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 203 (*Horning*).)
- If the trial court reserves a ruling on some issues, the 10 days commence after the court completes its announcement of its decision on all reserved issues.
(*Wallis v. PHL Associates, Inc.* (2013) 220 Cal.App.4th 814, 826.)

Timing for a Request for a Statement of Decision

- A request for statement of decision can be oral or written.

(*Whittington, supra*, 234 Cal.App.3d at p. 126; *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 284; but see *Martinez v. County of Tulare* (1987) 190 Cal.App.3d 1430, 1434 [dicta stating that request “must be in writing, unless otherwise agreed”].)

- A written request is deemed “made” when received by the courtroom clerk.

(See *Staten v. Heale* (1997) 57 Cal.App.4th 1084, 1090-1091; *Gordon, supra*, 179 Cal.App.3d at p. 167.)

Required Content of a Statement of Decision

- A request for statement of decision, whether oral or written, must specify the principal controverted issues the court should address.
(Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).)
- The principal controverted issues are the ultimate factual and legal bases for the court's decision, i.e., "those on which the outcome of the case turns."
(*Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, 295; see also *Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 163 (*Ribakoff*) [ultimate rather than evidentiary facts must be stated]; *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513 [core facts are the essential elements of a claim]; *Wolfe v. Lipy* (1985) 163 Cal.App.3d 633, 643, disapproved on other grounds in *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 36-39.)

Required Content of a Statement of Decision

- A party's failure to specifically identify an issue in its request for a statement of decision constitutes a forfeiture of the issue.

(Cheema v. L.S. Trucking, Inc. (2019) 39 Cal.App.5th 1142, 1152.)

- A general request does not compel a statement on all material controverted issues.

(City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal.App.3d 1277, 1292-1293.)

Required Content of a Statement of Decision

- The court is not required to address each question raised in a request for statement of decision.

(*Ribakoff, supra*, 27 Cal.App.5th at p. 163; *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1319; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230; see also *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 983; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500 (*Ermoian*); *Muzquiz, supra*, 79 Cal.App.4th at p. 1126.)

- A request for statement of decision cannot “interrogate the judge” on evidentiary matters.

(*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525, overruled on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-185; see also *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 981-982.)

Required Content of a Statement of Decision

- When a party has timely requested a statement of decision, any other party may make proposals as to the content of the statement.
(Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(e); *Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 140 (*Bay World*).)
- Thereafter, the trial court can prepare the statement of decision itself or designate a party to prepare it and the judgment.
(Cal. Rules of Court, rule 3.1590(c) & (f); see *Whittington, supra*, 234 Cal.App.3d at p. 129, fn. 5.)
- When a party prepares the statement of decision, the court has the responsibility to review, correct, supplement, and edit the statement.
(*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129.)

Preserving Objections to a Proposed Statement of Decision

- The proposed statement of decision must be in writing, unless the parties agree otherwise or the trial was completed within one day. (See Code Civ. Proc., § 632.)
- After the proposed statement of decision is rendered, any party may file objections if, for example, it fails to address the particular issues specified in the request or is ambiguous. (Cal. Rules of Court, rule 3.1590(g).)

Preserving Objections to a Proposed Statement of Decision

- Objections must be specific and contain “sufficient particularity to allow the trial court to correct the defect.”
(*Ermoian, supra*, 152 Cal.App.4th at p. 498; *Bay World, supra*, 101 Cal.App.4th at p. 140; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 (*Golden Eagle*) [objection must allow “the court to focus on the facts or issues the party contends were not resolved or whose resolution is ambiguous”].)
- Failure to object constitutes a forfeiture and will allow the appellate court to imply findings in favor of the judgment.
(*Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134; *Fladeboe, supra*, 150 Cal.App.4th at pp. 59-60.)
- A party, however, is not required to object to legal errors appearing on the face of the statement of decision, as such legal errors are not forfeited.
(*United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182, 186.)

Notice of Appeal

Confirm Your Need to Pursue An Appeal, Not A Writ Petition

- A “final judgment” is directly appealable, as are certain post-judgment orders and anti-SLAPP rulings. But, it’s not always intuitively obvious what is or isn’t appealable. The following orders are:
 - (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,

Confirm Your Need to Pursue An Appeal, Not A Writ Petition (continued)

- (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.
- (Code Civ. Proc., § 904.1, subd. (a)(3)-(14).)

What's Immediately Appealable?

While Code of Civil Procedure section 904.1, subdivision (a), provides a starting point for figuring out whether you have an appealable judgment or order, it does not provide list of appealable orders.

That said, within the probate context, Probate Code section 1300 largely does! Section 1300 provides:

“In all proceedings governed by this code, an appeal may be taken from the making of, or the refusal to make, any of the following orders:

- (a) Directing, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property.
- (b) Settling an account of a fiduciary.
- (c) Authorizing, instructing, or directing a fiduciary, or approving or confirming the acts of a fiduciary.
- (d) Directing or allowing payment of a debt, claim, or cost.
- (e) Fixing, authorizing, allowing, or directing payment of compensation or expenses of an attorney.

What's Immediately Appealable? (continued)

- (f) Fixing, directing, authorizing, or allowing payment of the compensation or expenses of a fiduciary.
 - (g) Surcharging, removing, or discharging a fiduciary.
 - (h) Transferring the property of the estate to a fiduciary in another jurisdiction.
 - (i) Allowing or denying a petition of the fiduciary to resign.
 - (j) Discharging a surety on the bond of a fiduciary.
 - (k) Adjudicating the merits of a claim made under Part 19 (commencing with Section 850) of Division 2.”
- (Prob. Code, § 1300; see also §§ 1301 [appeals from guardianship, conservatorship, and other protective proceedings], 1301.5 [conservatorship appeals], 1302 [power of attorney appeals], 1302.5 [advance health care directives appeals], 1303 [orders regarding a decedent’s estate appeals], 1304 [trusts appeals].)

When In Doubt, File a Notice of Appeal

- It is important that you take the time to figure out whether the superior court has issued an appealable judgment or order. If you fail to appeal an immediately appealable order or judgment, you will forever waive your right to challenge it.
(Cf. *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161.)

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)
- 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).)

File a Timely Notice of Appeal

- 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).)

File a Timely Notice of Appeal – The Appeal Period

- The rules requiring a timely appeal are rigid. So, don't get snookered:
 - 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.)

File a Timely Notice of Appeal – The Appeal Period (continued)

- 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.)

Additional Considerations

When and from what judgment or appealable order a notice of appeal needs to be taken 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.)

Time to File Extended by a 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.)

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, 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].)

Filing a Cross-Appeal and/or A Protective Cross-Appeal

- The cross-appeal must be from the same judgment or appealable order.
(Cal. Rules of Court, rule 8.108(g)(1).)
- 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.)

Filing a Cross-Appeal and/or A Protective Cross-Appeal

- 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.

Filing a Cross-Appeal and/or A Protective Cross-Appeal

- 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.)

Questions?

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