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DIY appeals for trial lawyers

CIRCUMVENTING COMMON PROCEDURAL SNAGS IN HANDLING AN APPEAL

You have poured thousands of dollars and weeks of your life into your case, but you know it is worth the risk. Your case is rock solid. Except that somehow, the court granted defendant's summary judgment motion. Obviously, the ruling is wrong and you need to appeal. Unfortunately, you do not have the budget to hire an appellate attorney, and the appellate attorneys you have contacted have declined to take your case on contingency. You will handle the appeal yourself. Before you do, here are some pointers to help you avoid some embarrassing and time-consuming pitfalls.

Disclaimer: this article does not attempt to present a complete how-to guide of every rule of court or every procedural hurdle involved in an appeal. Practice guides such as CEB, The Rutter Group, or Witkin can provide such detailed information. Additionally, it is essential to always check the applicable statutes and rules for updates rather than simply relying on secondary references. This article is intended to answer some of the most common procedural questions I receive from trial attorneys embarking on their first appeals.

When should you file the notice of appeal?

General rules: The only mistake that is truly irreversible and fatal to an appeal is to file a notice of appeal after the deadline. Normally, there are three possible deadlines, depending on the triggering event. The notice of appeal must be filed in the Superior Court on or before the earliest possible triggering event. The most common deadline is 60 days after a party's *notice of entry* of judgment (or a file-endorsed copy of the judgment, accompanied by proof of service). When calculating the deadline, calendar from the date of service. (Cal. Rules of Court ("CRC"), rule 8.104(a)(1)(B).) If the Superior Court clerk serves the notice of entry of judgment or file-endorsed copy of the judgment showing the date either was served, the notice of appeal must be filed on or before 60 days from the clerk's service. (CRC, rule 8.104(a)(1)(A).) If neither party nor court clerk serves notice of entry of judgment, the notice of appeal must be filed on or before 180 days after entry of judgment. (CRC, rule 8.104(a)(1)(C).) When in doubt about the deadline, err on the side of filing early. Premature notices are deemed filed immediately after entry of judgment. (CRC, rule 8.104(d).)

Potential traps: Although the Rules of Court refer to "judgments," the term also applies to appealable orders. (CRC, rule 8.104(e).) One common source of confusion arises with summary-judgment appeals. Remember, it is the judgment, not the order granting the motion for summary judgment, that is appealable.

There are some exceptions to the normal time periods, most commonly for appeals under Code of Civil Procedure section 1294.4 from an order dismissing or denying a petition to compel arbitration (CRC, rule 8.712) and for post-trial motions including: (1) when a party serves and files a valid notice of intention to move for a new trial, (2) when a party serves and files a valid notice of intention to move – or a valid motion – to vacate the judgment, (3) when a party serves and files a valid motion for judgment notwithstanding the verdict (and that motion is denied), and (4) when a party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a).

Additional exceptions include: certain public entity actions under Government Code sections 962, 984, or 985 and cross-appeals. The specifics of these exceptions are currently detailed in Rule 8.108 of the CRC. There are also significantly shortened appeal timelines for review of California Environmental Quality Act cases (CRC, rule 8.702).

The notice of appeal

General rules: The notice of appeal is filed along with two separate payments: the filing fee *and* transcript deposit (or an application per rule 8.26 for waiver of court fees and costs on appeal or order granting the application) in the *Superior Court*, not the Court of Appeal. (CRC, rule 8.100.) Although both payments are submitted with the notice of appeal in the Superior Court, the filing fees are payable to Clerk, Court of Appeal, and the transcript deposit is payable to the Clerk, Superior Court.

There is a judicial council form available (APP-002) for the notice of appeal, but as long as the notice satisfies the requirements, the form is optional. The notice must: (a) identify who the parties appealing are as well as the order or judgment (or particular part of the judgment) being appealed, and (b) be signed by the attorney *or* appellant. Prior nonappealable orders do not need to be specified in the notice. (See CRC, rule 8.100.) Make sure to serve all parties in the case.

Potential traps: Where several judgments and/or orders occur close in time and are separately appealable, the notice of appeal must specify each, either in a single notice or in multiple notices. One common scenario in which this trap arises is appealing from the judgment and a post-judgment attorneys' fee award. You filed a timely notice of appeal from the judgment, but the court then ruled on your attorney's fee motion and you want to challenge that order. Do you file another notice of appeal? It depends.

If the judgment awarded routine costs of suit and/or attorneys' fees, and the post-judgment order simply

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determines the amount, no separate notice of appeal is necessary. (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.) However, a separate notice *is* required where the judgment did not determine entitlement to costs/fees, and where a postjudgment award of discretionary or non-routine costs of suit. When in doubt, file two notices of appeal. However, if you file two notices, remember to move to consolidate the cases in the appellate court.

Designating the record

General rules: As the appellant, you are in charge of procuring the universe of materials the Court of Appeal will review in your case. Failure to do so is fatal to your appeal because error is never presumed; appellants have the burden to produce an adequate record demonstrating error.

The first step in that procurement process is filing a designation of record in the Superior Court and serving it on all parties within 10 days after filing the notice of appeal. Use of the judicial council form (APP-003) helps simplify this process. The "record on appeal" most commonly includes a "reporter's transcript," the court reporter's word-for-word record of oral proceedings, and either a "clerk's transcript" or "appellant's appendix" including necessary documents for the court's review, including those required by court rule, and other relevant written materials such as motions, oppositions, jury instructions, etc.

In the designation of record, appellant elects whether to proceed by clerk's transcript or by appendix. As the name indicates, the court clerk prepares a clerk's transcript, whereas counsel prepares an appendix. There are numerous requirements set forth in the CRC (see rules 8.120-8.163).

Clerk's transcript: One common question is whether to proceed by clerk's transcript or appendix. There are advantages and disadvantages of both choices. The clerk's transcript requires the party designate in the designation of record precisely what materials will be included in the transcript. This requires thought and diligence upfront and can be tricky because sometimes this designation occurs before counsel knows what arguments to raise. It removes from counsel's control the timing of the preparation of the record, including the cost involved. However, having a clerk create the record avoids having counsel navigate the detailed rules concerning tables and formatting. This may be money well spent depending on your schedule and comfort with technology. (*Editor's note:* Use of a clerk's transcript can slow the appeal, sometimes by up to a year, because the clerk's office can be slow in preparing the clerk's transcript.)

***Appendix*:** If proceeding by appendix, counsel must designate that an appendix will be used, but does *not* need to list its contents in the designation of record. The appendix is due when the opening brief is filed and can be less costly than a clerk's transcript. However, there are plenty of formatting requirements that if not followed, may result in the court's rejection of the appendix. Therefore, again, check and double-check the rules to ensure compliance. Keep in mind certain jurisdictions have local appellate rules as well as the Rules of Court that dictate additional requirements for the record.

What happens if there was no court reporter, or if a key ruling or discussion occurred at an unreported sidebar or in-chambers conference? There are a few options, including agreed or settled statements. (CRC, rules 8.134 and 8.137.) While the trial or hearing is fresh in your mind, take detailed notes about everything you remember, including important discussions and rulings. These notes will help you prepare the agreed or settled statement. Another option less commonly used is an original court file under rule 8.128, if local rules of the appellate court so permit.

Multiple appeals: What happens if there are multiple appeals, for instance, an appeal from the judgment and post-judgment order for attorneys' fees? Unless the cases are consolidated on appeal (which does not automatically occur), you will have to prepare a separate designation of record for the second appeal. However, the CRC, Rule 8.147 governs the procedures for incorporating by reference all or parts of a record in a prior appeal in the same case, or in multiple appeals from a single order (i.e., appeal and protective cross-appeal). Keep in mind if you choose to incorporate by reference all or parts of a record in a prior appeal, you must so indicate in the designation of notice. The judicial form does not provide a category to do this; you will need to add it. Rule 8.147 contains a list of required information to add to your designation.

Potential traps: Should you include exhibits in the clerk's transcript or appendix? Doing so is not necessary. All exhibits admitted in evidence, refused, or lodged are deemed part of the record, regardless of whether the appendix or clerk's transcript contains copies of them. Nevertheless, including a key exhibit in the transcript or appendix can be helpful and may save you time. If you plan to rely on certain exhibits and choose not to include them in the appendix or choose not to designate them for inclusion in the clerk's transcript, you must file a *notice of exhibits to transmit to the appellate court*. (See CRC, rule 8.224.) Otherwise, appellants may not argue that trial exhibits undermine the judgment. This notice is filed in the Superior Court, served on the reviewing court, and is due within 10 days after the last respondent's brief is, or could be, filed under Rule 8.220.

Do not over- or under-designate your record. The record is a tool for the court; include all material that will assist the court in making a decision, including opposing counsel's relevant filings and witness testimony. Appellate arguments may be forfeited without an adequate record. For example, an appellant may not challenge the sufficiency of the evidence without a transcript of oral proceedings, or obtain a reversal based upon an abuse of the trial court's discretion without a record explaining what occurred at the underlying hearing or the court's reasoning. Keep in mind, however, designating materials that are irrelevant

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to the issues on appeal may constitute sanctionable conduct. (CRC, Rule 8.276.)

Fees: When filing the designation of record for the reporter's transcript, you must also include a deposit for the estimated cost of the transcript, or of the accepted alternatives. (See CRC, Rule 8.130.) *Beware*: in addition to the deposit (or alternative such as a waiver), an additional $50 fee to be held in trust, payable to the Superior Court clerk, must be included. Failure to pay this fee will result in a letter of default.

Once the record is filed, it is your responsibility to ensure it was properly prepared. Rule of Court 8.155 discusses the procedure for augmenting the record (if you forgot to add something you need for the appeal) and correcting the record (if the court reporter or clerk made a mistake). *Beware*: although Rule 8.155 provides a deadline, local rules may shorten that deadline. In the Second Appellate District, for example, Local Rule 2 provides a 40-day deadline for appellants to augment the record.

Civil case information statement

Potential trap: Within 15 days after the clerk mails the notification of the filing of the notice of appeal, you must file the "Civil Case Information Statement" (i.e., Judicial Council form APP-004) with the Court of Appeal clerk. (CRC, rule 8.100.) Failure to do so will result in a letter notifying counsel that the appeal is in default, and failure to correct will result in the dismissal of the appeal.

Default letters

You receive a letter indicating you failed to file the designation of record, civil case information statement, or a required fee, and are now in default facing potential dismissal of your appeal. Don't panic. Simply cure the defect immediately, and in no event later than the time specified in the letter. Other than an untimely notice of appeal, most appellate procedural errors can be cured.

Extensions of time

General rules: Normally, an opening brief is due within 40 days after the filing of the record in the appellate court. (CRC, rule 8.212.) If you are proceeding by appendix, the 40-day period commences from the date the reporter's transcript is filed. Where an appellant proceeds by appendix and no reporter's transcript has been designated, the brief is due within 70 days after filing the notice of election to proceed by appendix. The respondent's brief must be filed and served within 30 days after the filing of appellant's opening brief. Appellant's reply brief must be filed and served within 20 days after the filing of respondent's brief. These deadlines may be extended by stipulation of the parties, or court order, or both. (CRC, rules 8.60, 8.63, 8.212.)

Potential trap: Parties cannot stipulate to more than 60 days per brief. (CRC, rule 8.212.) If opposing counsel will not stipulate, and/or additional time is needed, a party may apply to the presiding justice for an extension of time.

Default or de facto extension

If a party fails to file a timely opening or respondent's brief, the court clerk will notify the party in writing that the party is in "default," and the brief must be filed within 15 days of the notice, or the appeal may be dismissed (if the unfiled brief is appellant's opening brief), or the appeal will proceed without briefing or argument from the respondent (if the unfiled brief is respondent's brief). (CRC, rule 8.220.) Many attorneys use this "default period" as an automatic de facto extension of time.

Potential trap: There is no "default" period for failure to file a reply brief.

Certificate of interested parties

General rule: California Rules of Court, rule 8.208 mandates each party file a "Certificate of Interested Parties" with the Court of Appeal. If a party files a motion, an application, or an opposition to such motion or application in the Court of Appeal before filing its principal brief, the party must serve and file its certificate at that time, *and* must include a copy of the certificate in its principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must include its certificate in its principal brief, after the cover and before the tables. Judicial Council Form APP-008 may be used.

Potential trap: Failure to timely file a certificate of interested parties will result in a notice of default, providing counsel with 15 days in which to comply.

Briefing

Most of the rules governing brief formatting and mandatory contents are contained in CRC, rule 8.204. Procedural rules for appellate briefs have recently been updated as all of the Courts of Appeal in California have implemented mandatory e-filing. It is especially important to check the local rules of your court; many procedural requirements are unique to each district and have not been uniformly adopted statewide. CRC rules 8.70 through 8.79 discuss electronic filing rules, including electronic page-numbering, text-searchable requirements, electronic signatures, and electronic service. District-specific electronic filing rules may be accessed at the Courts' website, www.courts.ca.gov/courtsofappeal.htm [last accessed 9-19-18].

"The lawyer who represents himself…"

Hopefully, this article provides a quick reference to help you navigate your own appeals. Of course, when it is financially feasible to hire appellate counsel, doing so is money well invested. True, I say this as an appellate attorney. However, you may defer to the opinion of an appellate court if you prefer: "Trial lawyers who prosecute their own appeals…may have 'tunnel vision.' Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and

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taking the advice of disinterested members of the bar, schooled in appellate practice." (*Estate of Gilkson* (1998) 65 Cal.App.4th 1443, 1449-1450.)

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