

# Daily Journal

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MONDAY, FEBRUARY 25, 2019

## Riding the wave of a successful appeal in California state courts

By Eric M. Schiffer

Practicing appellate law is like walking along the beach: Avoiding the big wave that can wipe you out is pretty easy to do, but it is the constant flow of smaller waves that can trip you up if you are not careful. So here are some tips to help litigators successfully navigate through the appellate process by avoiding some tricky procedural waves.

### Appealability

Few areas of appellate law offer more confusion to litigators than the notion of appealability. Part of the problem is that many statutes define certain orders as “non-appealable.” According to conventional wisdom, those orders are simply beyond reproach, right? Most of the time that is wrong. With some limited exceptions, the notion of non-appealability does not speak to if an order can be appealed at all, but rather *when* an order can be appealed.

California is governed by the “one final judgment” rule which provides that “interlocutory or interim orders are not appealable, but are only reviewable on appeal from the final judgment.” *Rao v. Campo*, 233 Cal. App. 3d 1557, 1565 (1991). When an order is designated as non-appealable by statute, Code of Civil Procedure Section 906 likely renders that order appealable if it “involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party.” In other words, the issue is one of timing and avoidance of piecemeal appeals, not one of fundamental appealability. So be careful when you read that an order is “non-appealable” because it most likely is, just not right now.

### Filing the Notice of Appeal

Most litigators rely upon the 60-day rule for filing a notice of appeal, measuring that time from the filing date of the notice of entry of judgment. But given the notice of entry



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of judgment can be filed either by a party or by the clerk of the court, what happens when *both* a party and the clerk of the court file that notice of entry of judgment? Pursuant to California Rules of Court 8.104(a)(1)(A) and (B), the earliest appeal deadline will govern in that instance. Since appellate filing deadlines are jurisdictional, and a missed date cannot be revived, be sure to play it safe and calendar that earlier date.

The filing of a notice of cross-appeal is one instance where a later date may govern. Most litigators know that 20 days is the correct amount of time in which to file the notice of cross-appeal. But confusion arises as to when that 20 days runs. Contrary to popular thought, it does not run upon the filing of the notice of appeal; rather, CRC 8.108(g)(1) states that the 20 days runs from the date *the superior court serves notification of the first appeal*. This is one of the few times where litigators might get a bit more time than they realize.

Another area where little waves can quickly become big waves involves the impact of a motion for new trial on the time to file a notice of appeal. According to CCP Section 659(a)(2), the party moving for new trial must file a notice of intention to move for

new trial within 15 days of notice of entry of judgment. *If* that notice is filed, there is an automatic extension of the time to file a notice of appeal to 30 days from the denial of the motion for new trial. CCR 8.108(b)(1)(A). But there is a catch: That jurisdictional extension is only invoked by a *valid* notice of intention to move for new trial that specifically enumerates *each and every basis upon which the new trial motion was made*. *See id.* and CCP Section 659(a). So be sure to pay attention to those details in your new trial motion in order to properly extend that jurisdictional deadline to appeal.

One final area where litigators often take pause is when deciding which judgment triggers the statutory time in which to file a notice of appeal. Most often this arises when the court enters an amended judgment that fills in the blanks that are often left to be decided after entry of the original judgment (including the addition of costs, attorney fees, and/or interest to the judgment). In those instances, the amended judgment will not be deemed a “substantial change” to the original judgment, meaning the appeal deadline will still be triggered by the entry of the original judgment. *Torres v. City of San Diego*, 154 Cal. App. 4th 214, 222 (2007). Since courts of appeal will often entertain a premature appeal, but will automatically dismiss a late one, best practice is to default to the original judgment as the trigger for appellate deadlines.

Navigating the civil appellate shoreline requires that litigators take the time to learn the rules of appellate procedure so as to avoid those waves that are waiting to knock them down. With practice and attention to the details, however, the walk can be a successful one.

**Eric M. Schiffer** is a certified appellate law specialist and principal in the firm of Schiffer & Buus, APC, a boutique civil litigation and appellate firm in Orange County.