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By Janet Gusdorff

# Filing an Appeal: The Basics

Trained to think in terms of worst-case scenarios, attorneys are committed to doing everything in their power to prevent them from actually occurring. Sometimes, though, a situation crops up resulting in an unjust result and the time comes when filing an appeal becomes a necessity.



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**L**AWYERS ARE TRAINED TO ANTICIPATE A WORST-case scenario for their clients and do everything in power to prevent it from actually occurring.

Sometimes, though, such a situation crops up resulting in an unjust result and the time comes when most attorneys first consider filing an appeal.

This article will offer some guidance to help navigate the process.

### Identifying an Appealable Order

The first step in filing an appeal is to determine whether the ruling or order is appealable, and if so, what triggers the deadline to file a notice of appeal.

The Code of Civil Procedure (CCP) identifies broad categories of such appealable judgments and orders, but the Code is neither exclusive nor exhaustive.<sup>1</sup>

To the contrary, one of the enumerated categories broadly references an order made appealable by the Probate Code or the Family Code.<sup>2</sup>

Nevertheless, that section codifies the common law “one final judgment” rule, which states that, “An appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy.”<sup>3</sup>

That is the reason why, for instance, an appeal may properly arise from a judgment entered after the grant of summary *judgment*, but not summary *adjudication*.

There are exceptions, though, to the “one final judgment” rule—some collateral judgments are appealable, including, for instance, monetary sanctions exceeding \$5,000, while others include an order on a motion to tax costs, attorneys’ fees after voluntary dismissal, in a multi-party action, judgments that are final as to a specific party.

There are also judgments that, though seemingly final, are nevertheless not appealable.

Generally, interlocutory judgments are non-appealable—unless the type specified in Section 904.1 of the CCP, and although contempt orders are final, they are also not appealable.

Other final, but non-appealable, judgments include judgments on writ petitions in limited civil cases, judgments on superior court appeals of limited civil case decisions, and judgments entered solely on ministerial acts by the clerk.

When determining whether a judgment is final and appealable, there is no bright-line rule, but courts often consider whether issues remain for the lower court, and the nature of those issues, as well as the substance and effect of the judgment.

Generally speaking, bifurcated trials are not appealable until all trial phases are completed.

### Filing a Timely Notice of Appeal

- In State Court: In unlimited civil cases, after identifying the appealable judgment or order, the next step is to file the notice of appeal before the deadline.

Unlike most deadlines, the failure to file a timely notice of appeal is *fatal* to an appeal because it is a *jurisdictional* deadline. Parties cannot stipulate to additional time or request an extension. Filing the notice of appeal vests jurisdiction in the appellate court, terminating the trial court’s jurisdiction, with a few exceptions.

For family law appeals, depending on the order, a party may need to obtain a certification from the superior court as well as the appellate court’s grant of a motion to file an appeal.<sup>4</sup>

The substance of the notice of appeal, itself, is liberally construed. It is not necessary to identify the legal issues that will be raised. Rather, the notice must identify the name of the party appealing, the judgment or order from which the party is appealing, as well as the date it was entered.

For unlimited civil cases, Judicial Council Form APP-002 may be used for either the notice of appeal or cross-appeal. It is important to remember to serve opposing parties.

Counsel may sign and file the notice of appeal on behalf of the party it is representing.

The notice of appeal is filed in the superior court, not in the appellate court. When calendaring the due date, err on the earliest possible date as it is always better to file early than to inadvertently miss a deadline.

The California Rules of Court detail three methods of calculating the deadline, depending on whether a party or clerk serves notice of entry of judgment or appealable order. The earliest calculation governs.<sup>5</sup>

Most commonly, a notice of appeal must be filed within 60 days of notice of entry of judgment by the clerk or party or, if both, whichever was earliest.<sup>6</sup>

If for whatever reason, notice is not served, then the notice of appeal is due 180 days after the entry of judgment.<sup>7</sup>

Although those rules apply to most civil appellate matters, the California Rules of Court carves limited exceptions for a statute or rules that provide otherwise.<sup>8,9</sup>

Additionally, the time to file a notice of appeal may be extended by certain events, such as bringing a valid motion for a new trial.

One of the most common questions trial attorneys ask is: Where an original judgment is subsequently modified with attorneys’ fees, costs, and interest, does the time to file the notice of appeal run from the original or the modified judgment?

Where the amended judgment is not substantially changed, the time to appeal is not affected.<sup>10</sup>

Consider, however, an original judgment that left the determination of whether a party was entitled to fees for a future hearing. In such a case, the amended judgment containing a costs award would have substantially modified the judgment.

In practice, though, the line is often not as clear. First, research examples to see whether the issue has already been discussed by an appellate court. If, after researching the issue,

doubts persist, it is better to file a notice of appeal from both and move to consolidate them into one case than to miss the opportunity to appeal. Note: the time to appeal is not extended by the “mailbox” rule.

- In Federal Court: In civil cases to which the government is not a party, the deadline to file the notice of appeal is 30 days after the judgment or order is entered on the district court docket.<sup>11</sup>

Where the government is a party, more than nominally, the deadline is 60 days.<sup>12</sup>

Other shorter deadlines apply in specific circumstances, such as:

- Petitions for permission to appeal interlocutory orders: 10 days.<sup>13</sup>
- Petitions to appeal interlocutory class action certification orders: 14 days.<sup>14</sup>
- Criminal cases: Generally 14 days for defendants, 30 days for government appeals.<sup>15</sup>
- Tax court appeals: 90 days.<sup>16</sup>

Be advised that, as with State Court, the use of regular “snail” mail does not extend the time to file a notice of appeal.<sup>17</sup>

## Designate the Appellate Record

- State: Within ten days after notice of appeal has been filed, the appellant will need to file a designation of record in the superior court. Typically, attorneys use Judicial Form APP-003 rather than reinventing the wheel.

The catchall term “appellate record” describes the materials the appellate court will review. These materials include trial exhibits, as well as a transcript of oral proceedings and a collection of pertinent written materials that were put before the trial judge.

Most often, the written materials are assembled into a clerk’s transcript or an appendix. If the party proceeds by utilizing a clerk’s transcript, the designation of record form must specify which documents will be part of the written record on appeal. Parties are not given free-rein in this particular process.<sup>18</sup>

The California Rules of Court (CRC) contain a list of documents that must be designated for inclusion in a clerk’s transcript, and also incorporates these requirements for appendices. In either case, the record should be complete and not one-sided.<sup>19 20</sup>

For instance, it would be improper to designate only the moving papers to a pertinent motion and exclude the opposition.

If counsel elects to proceed by appendix in lieu of a clerk’s transcript, that choice must be made in the designation of record.

However, unlike the clerk’s transcript, the contents do not need to be designated at that point, and the appendix itself is due at the time the appellant’s opening brief is filed.

The court prefers a single appendix rather than an appellant’s appendix and a respondent’s appendix. Nevertheless, the respondent has an opportunity to counter-designate any materials it deems necessary to the appeal.

What happens if there was an important hearing, but it was not transcribed? The California Rules of Court provide guidance here, permitting, in such a case, the parties to proceed by an agreed statement or the more formal process of a settled statement.<sup>21 22</sup>

In some circumstances, it may be necessary to designate the record of an administrative hearing if it was admitted into evidence, refused, or lodged in the superior court.<sup>23</sup>

Similarly, where the parties agree and local rules permit, the parties may rely on the superior court’s file in lieu of a clerk’s transcript.<sup>24</sup>

It is important to be thoughtful when designating an appellate record. On appeal, there is a presumption that the lower court’s ruling or the judgment below is correct. It is incumbent on the appellant, therefore, to *demonstrate* any reversible error.

If the appellate record is incomplete and thus prevents the appellate court from fully considering the issue, the appellant will lose.

Moreover, the CRC details various sanctions—including the dismissal of the appeal—for failure to procure the record.<sup>25</sup>

- Federal: The Ninth Circuit’s record designation is similar, but not identical to the state’s procedure.

The appellate record includes the reporter’s transcript, the docket sheet, the clerk’s record of original pleadings, and other pertinent documents filed in the district court, as well as excerpts of the record, which function similarly to an appendix.

If the hearing was not transcribed, the parties may create a statement of evidence or proceedings to the best of their recollection, or less commonly, use an agreed statement.<sup>26</sup>

As in state court, the appellate record in the Ninth Circuit may not include any materials that were not before the District Court judge before the time the order or judgment was entered.

Also, as in state court, if the appellant fails to procure the record, the Ninth Circuit will likely dismiss the appeal, or at least, affirm the appealable order or judgment.

## Timely File Ancillary Documents

In both state and federal court, it is the appellant’s job to procure the record, and that duty includes confirming that the clerk’s transcript, the reporter’s transcript, or any other portion of the record, actually is complete and correct.

If it is not what the appellant designated, or what the respondent/appellee counter-designated, it rests on counsel to notify the clerk of the error or omission.

Depending on the court and local rules, the deadline to do so may be rather short after receiving the transcripts. As a result, upon receiving the transcripts, counsel should immediately review them to determine whether they are accurate and complete and, if not, immediately file a letter/notice to correct the record.

Occasionally, as attorneys prepare their appeal, they realize that an appellate issue requires documents that were not initially designated. In such cases, a motion must be filed in order to augment the record.

Additional ancillary documents may be required between the designation of the record and the filing of the opening brief.

For instance, in state court, a civil case information statement is required that helps the court clerk determine whether the court has proper jurisdiction over the case, whether there is an appealable order or the appellant must show cause, who are the parties and attorneys in the case, and basic information about the type of case.<sup>27</sup>

Failure to file the civil case information statement in a timely fashion may result in a notice of default, which, if not corrected, will likely result in dismissal of the appeal.

Often, counsel needs additional time to file its briefs. In state court, the parties may stipulate for up to a 60-day extension of time, and must request any additional time from the Court of Appeal.

In the Ninth Circuit, each party is entitled to one 30-day streamlined, or automatic, extension of time per brief, and additional time must be requested from the Court.

In California, the briefing deadline features a built-in default period for the appellant's opening brief and the respondent's brief. It does not, however, apply to the appellant's reply brief.

This default period maintains that when a party fails to file an appellant's opening brief or a respondent's brief in a timely manner, "the reviewing court clerk must promptly notify the party in writing that the brief must be filed within 15 days after the notice is sent and that if the party fails to comply, the court may impose one of the enumerated sanctions, including dismissal of the appeal or decision on the appellant's brief only."<sup>28</sup>

#### **Prepare The Appendix/Excerpts of Record**

If counsel has not designated a clerk's transcript, then, prior to filing the opening brief and often before even beginning to draft the opening brief, counsel will need to prepare an appendix in state court (or excerpts of record in the Ninth Circuit). There are numerous formatting requirements, especially since the adoption of electronic filing, as well as substantive requirements.

As previously discussed, in state court, the appendix must include the materials specified in the California Rules of Court in the appropriate format.<sup>29 30</sup>

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Parties must also pay attention to sealed documents which carry additional requirements. Similarly, the Ninth Circuit has particular requirements for the excerpts of record.

A Ninth Circuit Rule supersedes FRAP 30's appendix requirement.<sup>31</sup>

Circuit Rules set forth the required contents of the excerpts, and also detail formatting requirements, as well as what must be excluded from the excerpts.<sup>32 33 34</sup>

Both state and federal courts provide exceptions to the electronic formatting requirements for pro se litigants.

## **Brief Writing**

Finally, the time has come to draft, edit, and file the opening brief.

Although this article will not attempt to offer step-by-step instructions for drafting an appellate brief, there are a few key points to consider, especially for those new to appellate litigation.

- One: Before drafting the brief, make sure to determine the applicable standard of review for each argument. The standard of review shapes the way the appellate court reviews the legal and factual arguments, including how much deference, if any, to give the lower court's findings. Be mindful of the standard when crafting an argument.
- Two: Are the arguments preserved for review? The fastest way to lose an appellate challenge is by forfeiting an issue. Was there a timely objection in the trial court? Was there an offer of proof? Was a new trial motion brought to challenge the amount of damages?
- Three: Make sure to leave ample time for editing. Try to complete the draft with sufficient time to ignore it for several days—ideally a week—before editing. Otherwise, it can be difficult to objectively review the brief.

There are multiple parts of an appellant's opening brief, generally including an introduction, a table of contents; a table of authorities; factual and procedural statements; a statement of appealability—for example, under what statute is the order or judgment appealable; the legal argument or arguments; a conclusion; a certificate of word count; proof of service; and, if necessary, a certificate of interested parties.<sup>35 36</sup>

In the Ninth Circuit, additional sections are detailed in Circuit Rules that include a disclosure statement, if necessary; a jurisdictional statement; a statement of issues; a statement of primary authority or addendum; a summary of the argument; a certificate of compliance; and, if necessary, an immigration detention status statement and a statement of related cases.<sup>37</sup>

As with the appendix/excerpts of record, the briefing must satisfy various electronic formatting rules, including electronic bookmarking, OCR searchable text, consecutive page numbering, and electronic filing.

After the appellant has submitted an opening brief, the responding party has 30 days to respond, unless there has been an extension of time. The respondent/appellee's brief contains similar requirements as the opening brief.

Within ten days of the filing of respondent's brief in the Court of Appeal, or within ten days of the expiration of time to file that brief, the party who wants the reviewing court to consider any original exhibits that were not copied in the clerk's transcript or appendix must serve a notice in the Superior Court identifying what exhibits to transmit to the Court of Appeal.<sup>38</sup>

After the respondent/appellee's brief is filed, the appellant has the option to file a reply brief.

In state court, the reply is due within 20 days of respondent's brief, unless the time to file has been extended, while, in the Ninth Circuit, the brief is due within 21 days of appellee's brief.

When representing an appellant, make sure not to save any arguments for the reply brief, as an argument raised for the first time in a reply brief is usually deemed forfeited.

## **Oral Argument**

After briefing is completed, the parties have an opportunity to argue the case before a panel of three judges of the California Court of Appeal. Typically parties may request a specific amount of time, usually 30 minutes or less, to argue their appeal.

These arguments are typically held in-person, although during the on-going COVID-19 pandemic, the courts have been using alternative methods, including videoconferencing and telephonic appearances.

The argument itself is usually brief while the order of argument usually mirrors the order of the briefing with the appellant arguing first, the respondent responding, and, if the appellant has saved time, the appellant replies. No jury or witnesses appear.

Oral argument in the Ninth Circuit is not guaranteed. However, if the court decides to hold a hearing, it proceeds in similar fashion to its state court counterpart.

## **Decision and Next Steps**

Typically, by the time the court schedules an oral argument, the justices have familiarized themselves with the cases and the applicable law and have internally circulated a draft opinion.

Despite this, the opinion is usually finalized and filed from one week and three months after the hearing is held.

In state court, after the opinion is filed, a party has 15 days to petition the Court of Appeal for a rehearing before the same panel.<sup>39</sup>

The opposing party may not file an answer to the petition for rehearing unless the court requests it. Within ten days after the Court of Appeals decision has become final, a party may petition the California Supreme Court for review.<sup>40</sup>

Unlike a rehearing petition, the opposing counsel may file an answer and the petitioning party may file a reply. If the petition is granted, the Court will specify the grounds upon which review has been granted.

In the Ninth Circuit, the deadline for filing a rehearing petition is 14 days, unless the United States or another agency is a party, in which case the deadline is 45 days. As in state court, no answer should be filed in absence of a court request.


Sometimes, a party will petition for en banc review along with its petition for rehearing. In such a case, the original panel will decide whether to grant the petition and, only if it denies the petition, does the whole court determine whether to grant en banc review.

If an en banc review hearing is granted, the court will rely on the original briefing unless it requests supplemental briefing, while any party dissatisfied with the en banc decision may petition for a rehearing before the full court.

### Final Thoughts

There are numerous resources available to demystify the mechanics of filing an appeal in both the California Courts of Appeal and Ninth Circuit Court of Appeals.

California's appellate court website contains step-by-step instructions, while the Ninth Circuit provides a comprehensive appellate practitioner's handbook, including checklists.<sup>41 42</sup>

Remember to leave plenty of time for brief writing, and enjoy the opportunity to help shape the law. 

<sup>1</sup> Code of Civil Procedure Section 904.1.

<sup>2</sup> *Id.* § 904.1(a)(10); see e.g., Fam. C. § 2025.

<sup>3</sup> *Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697.

<sup>4</sup> Fam.C. § 2025; CRC 5.392.

<sup>5</sup> California Rules of Court, rule 8.104(a).

<sup>6</sup> *Id.* 8.104(a)(1)(B).

<sup>7</sup> *Id.*

<sup>8</sup> 104(a)(1)(C). 8 California Rules of Court, Rule 8.104(a).

<sup>9</sup> *Id.* 8.108, 8.702, or 8.712.

<sup>10</sup> *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.

<sup>11</sup> 28 USC § 2107(a); FRAP 4(a)(1)(A).

<sup>12</sup> *Id.* § 2107(b); FRAP 4(a)(1)(B).

<sup>13</sup> *Id.* § 1292(b).

<sup>14</sup> FRCP 23(f).

<sup>15</sup> *Id.* 4(b).

<sup>16</sup> *Id.* 13.

<sup>17</sup> *Haroutunian v. I.N.S.*, (9th Cir. 1996) 87 F.3d 374, 376-377.

<sup>18</sup> California Rules of Court 8.122(b).

<sup>19</sup> *Id.* 8.122(b).

<sup>20</sup> *Id.* 8.124(b).

<sup>21</sup> *Id.* 8.134.

<sup>22</sup> *Id.* 8.137.

<sup>23</sup> *Id.* 8.123.

<sup>24</sup> *Id.* 8.128.

<sup>25</sup> California Rules of Court 8.140.

<sup>26</sup> FRAP 10(c),(d).

<sup>27</sup> Judicial Form APP-004.

<sup>28</sup> California Rules of Court 8.220.

<sup>29</sup> *Id.* 8.124(b).

<sup>30</sup> *Id.* 8.74.

<sup>31</sup> Ninth Circuit Rule 30-1, 30-1.4(a).

<sup>32</sup> *Id.* 30-1.4.

<sup>33</sup> *Id.* 30-1.5.

<sup>34</sup> *Id.* 30-1.6.

<sup>35</sup> California Rules of Court 8.204(c).

<sup>36</sup> *Id.* 8.208.

<sup>37</sup> Circuit Rules 28-1, 28-2, and 32-1; FRAP 28, 28.1, and 32.

<sup>38</sup> California Rules of Court 8.224.

<sup>39</sup> *Id.* 8.268.

<sup>40</sup> *Id.* 8.500.

<sup>41</sup> <https://www.courts.ca.gov/selfhelp-appeals.htm> <last accessed 8-24-20>.

<sup>42</sup> <https://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf> <last accessed 8-24-20>.

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# Filing an Appeal: The Basics

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1. All judgments are appealable.  
 True  False
2. No monetary sanctions are appealable.  
 True  False
3. Parties can stipulate to an extension of up to 30 days for filing the notice of appeal.  
 True  False
4. A new trial motion may extend the time necessary to file the notice of appeal.  
 True  False
5. The time for filing a notice of appeal differs under state and federal rules.  
 True  False
6. An appeal may be properly taken from a judgment entered after a motion for summary judgment.  
 True  False
7. When designating the record, it is necessary to identify each document for inclusion in the appendix.  
 True  False
8. After the reporter's transcript and clerk's transcript are filed, it is necessary to determine whether additional documents should be added in a supplemental appendix.  
 True  False
9. Failure to procure the record will likely result in the appeal being dismissed.  
 True  False
10. The designation of record form is due within 30 days of filing the notice of appeal.  
 True  False
11. In state court, each party may receive an automatic 30-day extension of time to file its brief.  
 True  False
12. For each brief filed in California Courts of Appeal, there is a 15-day default period after the deadline.  
 True  False
13. Appellants have a right to oral argument.  
 True  False
14. Electronic filing is mandatory.  
 True  False
15. The standard of review shapes the way the appellate court reviews the legal and factual arguments, including how much deference, if any, it gives the lower court's findings.  
 True  False
16. When representing appellant, it is often a good strategy to save the best arguments for the reply brief so that appellant gets the last word.  
 True  False
17. For state criminal appeals, the defendant must be present for oral argument.  
 True  False
18. A panel of three judges or justices will determine each appeal.  
 True  False
19. Within two weeks of oral argument, court will issue its opinion.  
 True  False
20. A petition for rehearing en banc is determined in the first instance by the original panel that heard the case.  
 True  False

## Filing an Appeal: The Basics

### MCLE Answer Sheet No. 144

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