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What Triggers Your Time to Appeal: It's Not Sexy, But You Better Understand It

The deadline to file a notice of appeal is one of the few absolutes in judicial procedure. The deadline is jurisdictional. A day late and clients are irretrievably out of luck. Recent California Supreme Court and Ninth Circuit decisions clarify one aspect of this technical but vital area of the law: What type of trial court order triggers the time period for filing a notice of appeal? This jurisdictional snare can trap unsuspecting practitioners — careful analysis of any order or judgment is mandatory to assess when the jurisdictional clock starts to tick.

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State Courts

The procedural maze in the Supreme Court case, *Alan v. American Honda Motor Co.*, 40 Cal. 4th 894 (2007), almost swallowed the appellant. The trial court denied plaintiff Alan's class certification motion, but did so in what the Supreme Court described as an "idiosyncratic manner." *Id.* at 898. The court mailed the parties a single envelope containing two documents: (1) a file-stamped "Statement of Decision Re: Alan's Motion for Class Certification," which set out the court's reasons for denying the motion and ended with the sentence, "Alan's motion for Class Certification is denied"; and (2) a minute order, "Ruling on Submitted Matter/Motion for Class Certification," which was not file-stamped and indicated that having heard argument and read the papers, the court was issuing its statement of decision. *Id.* Nineteen days later, defendant filed and served a "Notice of Entry of Order and Statement Denying Class Certification," attaching

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both orders. *Id.* at 899. Alan filed his notice of appeal 63 days after the dual orders, but only 44 days after the notice of entry. *Id.* The Court of Appeal ruled the appeal was untimely under rule 8.104(a) of the Rules of Court, but the Supreme Court disagreed. *Id.* at 899, 905.

Rule 8.104(a) imposes three alternate deadlines for filing a notice of appeal, the *earliest* of which applies:

> "(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;
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> (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
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> (3) 180 days after entry of judgment."

Alan held that the statement of decision was not an appealable order, and that the minute order was not file-stamped — thus, neither order alone satisfied rule 8.104(a)(1). *Id.* at 901-02. Defendant American Honda contended the two orders, taken together, satisfied the rule. *Id.* at 901. The Court, noting that the rule must be applied strictly since the time limits are jurisdictional, held that rule 8.104 requires a single document that satisfies all the rule's conditions — "either a 'Notice of Entry' so entitled or a file-stamped copy of the judgment or appealable order." *Id.* at. 902, 905. That left defendant's "notice of entry" as the only document which triggered rule 8.104 and plaintiff's appeal was thus timely.

Parties, particularly the prevailing ones, would be well-served not to rely on the trial court to get it right as to serving a document that satisfies rule 8.104(a)(1). Instead, once a judgment is entered or an appealable order issues, they should file and serve a "Notice of Entry of Judgment [or Order]." This indisputably starts the appeal clock running under rule 8.104(a)(2) and avoids a costly procedural exercise battling over whether the appeal is timely. If you are representing the appellant and the record contains an ambiguous trial court order, be conservative and file the notice of appeal within 60 days of the service of that order.

Federal Courts

Confusing matters more for practitioners, the rules are equally arcane, indeed sometimes Byzantine, in federal court. In *Stephanie-Cardona LLC v. Smith's Food & Drug Centers, Inc.*, 476 F.3d 701 (9th Cir. 2007), the Ninth Circuit held an appeal was untimely. *Id.* at. 702. The District Court had entered an order granting summary judgment on all but one cause of action, and some nine months later the parties had submitted a stipulation and order that dismissed the remaining claim. *Id.* The court signed the stipulated order and indicated that "this case is now ripe for entry of final judgment," and the order was entered in the court docket. *Id.* at 702-03. But a formal judgment was not entered until more than six months later, after the court had considered and denied a fees and costs motion. *Id.* at 703.

In federal courts, a notice of appeal must be filed "within 30 days after the judgment or order appealed from is entered." (Fed. Rules App. Proc., rule 4(a)(1)(A).) For orders that require a separate document under F.R.C.P. Rule 58(a)(1) — like all judgments and summary judgment motion orders — an order is "entered" under Rule 4 on the earlier of (a) the date the separate document is entered on the docket, or (b) 150 days from the entry of the underlying order itself in the docket. (Fed. Rules App. Proc., rule 4(a) (7)(A); F.R.C.P., rule 58(b).)

Thus, in *Stephanie-Cardona*, even though a separate judgment was not entered until many months later, since the stipulated order was an appealable final order that had been docketed, the time to appeal began to run on the date it was docketed and expired 180 days later — it was "entered" under rule 4 in 150 days and expired 30 days later. (*Stephanie-Cardona v. Smith's Food, supra*, 476 F.3d at p. 703.) The court noted that the rules were modified in 2002 to do away with the absolute requirement of a separate document, instead allowing a concurrent time line to run from an appealable final underlying order that had been entered on the docket. *Id.* at pp. 703-704.

That change, of course, requires a foolproof understanding of when an order is final and appealable. The Ninth Circuit provided some guidance very recently in *In re Thurman Brown*, 2007 U.S. App. LEXIS 9462 (2007). There, the District Court entered a minute order on the docket that disposed of cross-motions for summary judgment and that took a sanctions motion under submission. *Id.* at **3-4. In the ensuing weeks, the court issued orders granting the sanctions motion and denying a reconsideration motion. *Id.* at **4-5. But the court did not enter a judgment (for the sanctions) until a few months later. *Id.* at **5-6. The Ninth Circuit held that for an order to be final and appealable, "there must be some 'clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as it is concerned, is the end of the case." *Id.* at ** 13-14. The summary judgment order did not satisfy that standard, because it was "simply the memorialization of the proceedings of that day," rather than a document to end the entire case. *Id.* at * 9.

One way to avoid tripping painfully on the first appellate hurdle is for parties to plan on preparing and serving their own notice of entry of judgment or an order. In doing so, parties will be forced to examine whether the order is final and appealable, keeping in mind the lessons provided by *Alan, Stephanie-Cardona* and *Thurman Brown*. Even if that examination reveals no appealable order, the effort will not be wasted. In fact, it just might save practitioners from the awkward task of explaining to their clients why their chance to appeal has evaporated in complex jurisdictional deadlines.

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