
Pitfalls and Hazards When Perfecting a Civil Appeal (Part 2 of 3)

Judith Posner and Gerald Serlin

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This article is Part Two of a three-part series. [Part One](#) discussed how to determine whether a superior court order or judgment is appealable.

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), and an untimely appeal must be dismissed by the appellate court (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666; Cal. Rules of Court, rule 8.104(b)).

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).)

Again, hazards lurk. You really have to confirm that your appeal is "normal." By statute and/or court rule, the appeal period has been shortened in matters involving public agency "validating proceedings," proceedings to annul elections, proceedings contesting Municipal Improvement Act assessments, specified proceedings challenging validity of assessment levies, sterilization proceedings, attachment proceedings, specified proceedings contesting special tax levies, CEQA cases, and certain cases under the Elder Abuse and Dependent Adult Civil Protection Act. (See Eisenberg et al., *Cal. Prac. Guide: Civil Appeals & Writs* (The Rutter Group 2019) ¶¶ 3:20-28.6.)

The rules requiring a timely appeal appear fairly straightforward. As such, it should come as no surprise that:

- 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.)

- 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.)
- 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.* (2009) 170 Cal.App.4th 1129, 1135.)
- An appellate court cannot treat a late appeal as a writ proceeding. (*Adoption of Alexander S., supra*, 44 Cal.3d at p. 864.)
- 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.)

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

On the other hand, when the judgment is substantially modified, a new appeal period runs from notice of entry or entry of the amended judgment. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 634; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222.) The appeal from the original judgment becomes "ineffective" or "nonoperative."

(*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1267.) A "substantial modification" occurs by an amendment that "materially" affects the rights of the parties. (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765.)

The rules may seem easy, but... Although these governing rules are easy enough to recite, knowing them doesn't necessarily provide conclusive answers. The following examples confirm the absence of clarity:

- A substantial modification was found when an amended judgment required payment by the losing party of an additional nine months of costs. (*Stone v. Regents of Univ. of Calif., supra*, 77 Cal.App.4th at pp. 743-744.)
- An amendment to a personal injury judgment to reduce by 30 percent the award of past medical expenses to reflect plaintiff's comparative fault materially affected the rights of the parties and thus restarted the notice of appeal period. (*Sanchez v. Strickland, supra*, 200 Cal.App.4th at p. 767; see *ibid.* ["Furthermore, from a quantitative perspective, a reduction of an award by 30 percent or, in absolute terms, by \$72,800, is material"].)
- Reduction of a default judgment by more than \$4 million, to strike the portion of the damages award in excess of the amount of damages requested in the complaint, was not a substantive modification because the size of the award was not the real issue; rather it was whether the defendant's right to appeal was affected by the amendment. The Court of Appeal explained that, "[t]hough the monetary positions of the litigants have been changed, in doing so the trial court did not deprive the parties of their ability to challenge any portion of the judgment." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509; see also, e.g., *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass'n* (2004) 122 Cal.App.4th 994, 1003 [amendment changed only amount of judgment but did not alter bases for appeal].)
- A substantial modification occurs when the original judgment is amended to include attorney fees and costs, but the entitlement to, and the amount of, the fees/costs were determined after entry of judgment. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007-1010.)

- When the judgment adds costs, attorney fees, and interest, the original judgment is not substantially changed, and the modification does not impact the time to appeal. (*Torres v. City of San Diego*, *supra*, 154 Cal.App.4th at p. 222.) This likely is so because post-judgment awards of attorney fees, costs, and interest are separately appealable matters collateral to the judgment, so it stands to reason that they do not substantially modify the judgment itself. (*Dakota Payphone, LLC v. Alcaraz*, *supra*, 192 Cal.App.4th at p. 505.)

To protect your client's appellate rights and avoid a possible waiver, sometimes the best course of action to take in ambiguous situations is to appeal from both the original and amended judgments. If you do file two notices of appeal, then move the Court of Appeal to consolidate the matters.

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Find the procedures and practice tips for filing a notice of appeal in [California Civil Appellate Practice](#) (3d ed. Cal. CEB) chapter 7. For in-depth discussion of when an amended judgment requires a separate notice of appeal, see CEB's [California Civil Appellate Practice](#) §§ 3.49-3.50.

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