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Take a deep breath

TEN SEEMINGLY INTRACTABLE APPELLATE PROBLEMS THAT CAN BE FIXED

We've all encountered that "Houston, we have a problem" moment, when your appeal is rocked by a seemingly intractable predicament. In certain instances, however, a viable solution may exist, if you take the time and apply the necessary focus. In this article, we explore ten legal scenarios that appear to be devastating, but in actuality carry the potential for a lifeline.

1. The court clerk refuses to file your notice of appeal

At the end of the window for filing an appeal, you submit your notice of appeal to the superior court for filing. A few days later, the clerk rejects it because the notice contains a technical defect. It's now too late to file a new notice. Is your appeal jurisdictionally barred? Not necessarily.

A court clerk is required to endorse each paper filed with the court as of the day, month and year that the paper is filed. (Gov. Code, § 69846.5.) Provided the document is in a form (i.e., document size, numbering, etc.) that complies with applicable statutes and rules, the clerk has a ministerial duty to file it. (*Carlson v. Dept. of Fish & Game* (1998) 68 Cal.App.4th 1268, 1276.)

A clerk's improper rejection of a document based on the existence of technical defects does not invalidate the filing, which occurs when the paper is delivered to the clerk's office. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1361; see also *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 918 [although the clerk rejected a petition for review of an administrative decision for various defects, the petition was nonetheless legally "filed" at the time it was presented to the clerk]; *Hoyt v. Stark* (1901) 134 Cal. 178, 179-182; *Mentzer v. Hardoin* (1994) 28 Cal.App.4th 1365, 1372; Cal. Rules of Court, rule 1.20 ["Unless otherwise provided, a document

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is deemed filed on the date it is received by the court clerk"].)

Thus, an otherwise proper notice of appeal (Cal. Rules of Court, rule 8.100(a)(2)) cannot be rejected if, for example, (1) the appellant fails to submit the filing fee with the notice (Cal. Rules of Court, rule 8.100(b)(3); *Lezama-Carino v. Miller* (2007) 149 Cal.App.4th 55, 58-59); (2) the attorney signing the notice is not counsel of record (*Estate of Hultin* (1947) 29 Cal.2d 825, 832; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853); (3) a corporation's notice is filed pro per (see *CLD Const., Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1147; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1282); (4) the notice of appeal omits the case number (*D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-362); (5) the notice sets forth the wrong date of entry for the order being appealed (*Yolo County Dept. of Child Support Services v. Lowery* (2009) 176 Cal.App.4th 1243, 1246); (6) the notice incorrectly identifies the type of judgment or order being appealed (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251); or (7) the notice of appeal is not served (Cal. Rules of Court, rule 8.100(a)(3) ["Failure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure"].)

2. You fail to file your notice of appeal within 60 days of the "notice of ruling"

Failure to file a timely notice of appeal is a jurisdictional error that cannot be remedied. (*K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, 881 (*K.J.*); *Van Beurden Ins. Services, Inc. v. Customized Worldwide Ewather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) In state court, the appellant generally has 60 days to appeal an adverse judgment or order if "notice of entry" is given by the clerk or opposing party; alternatively, the appellant has 180 days to appeal if no notice is given. (Cal. Rules of Court, rule 8.104(a)(1).)

Is an appellant jurisdictionally barred from pursuing an appeal if s/he fails to file a notice of appeal within 60 days of the clerk's or opposing party's "notice of ruling"? No.

Notice of ruling does not equate with "notice of entry" under California Rules of Court, rule 8.104. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905.) "It might seem that the difference between a 'notice of ruling' and a 'notice of entry' is hypertechnical. In another context it might be." (*20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 672.) But, because the time limits for filing a notice of appeal are jurisdictional, "we must apply [California Rules of Court, rule 8.104] . . . strictly and literally according to its terms; the rules 'must stand by themselves without embroidery.'" (*In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 686, quoting *20th Century Ins. Co.*, at p. 672.) Thus, courts have consistently held the required document entitled "notice of entry" (Cal. Rules of Court, rule 8.104(a)) must bear precisely that title. (*Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 260.)

3. Your notice of appeal fails to include all of the parties on whose behalf you intended to appeal

You file a notice of appeal on behalf of some, but not all, of the parties who wish to pursue an appeal. You discover the mistake after the time to file a timely notice has passed. Are the parties omitted from the notice jurisdictionally barred from pursuing an appeal? Probably not.

In California, "notices of appeal are liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*In re Joshua S.* (2007) 41 Cal.4th 261, 272; see also *Walker v. Los Angeles County Metro. Transp. Auth.* (2005) 35 Cal.4th 15, 18 ["law aspires to respect substance over formalism and nomenclature"]; Cal. Rules of Court, rule 8.100(a)(2) ["notice of appeal must be liberally construed"].) Although the liberal construction rule is most commonly used to remedy defects in a notice's designation of the order or judgment that is being appealed, the rule also applies to defects in the notice's designation of the parties to the appeal. (*K.J., supra*, 8 Cal.5th at p. 885.)

California courts have construed notices of appeal to include omitted parties. (See, e.g., *K.J., supra*, 8 Cal.5th at p. 885 [appeal from sanctions order to include an omitted attorney when it was reasonably clear the attorney intended to join the appeal]; *Estate of Strong* (1937) 10 Cal.2d 389, 391 [appeal construed to include appellant, in her individual capacity, when notice erroneously identified her as an executrix]; *Chung Sing v. Southern Pacific Co.* (1918) 178 Cal. 261, 261-263 [appeal deemed to include appealing defendant, even though his name was omitted]; *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1216-1217 [notice signed by one of two co-parties was liberally construed to effect an appeal as to both]; *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1307 [appeal deemed to include cross-defendant not directly sued by plaintiffs]; *Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 6 [appeal construed to include all defendants]; see also, e.g., 9 Witkin, Cal. Proc. (5th ed. 2020) Appeal § 562 [under the rule of liberal construction, "[m]istakes in the designation of parties will not be fatal"].)

4. You appeal from the judgment but fail to appeal from the attorney fees award

An adverse judgment is entered against your client including a determination that the opposing party is entitled to attorney fees and costs, and you timely appeal. Thereafter, the trial court determines the amount of the fees and costs to be awarded, but you fail to

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appeal from the post-judgment order. Have you irrevocably handed your opponent an award of fees and costs, no matter the outcome of the judgment appeal? No.

The right to appeal is strictly statutory (*Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 629) and post-judgment attorney fees and cost awards are separately appealable (Code Civ. Proc., § 904.1, subd. (a)(2); see, e.g., *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015). When challenging both a judgment and fee/cost award, the normal procedure is to file two separate appeals, i.e., one from the final judgment and one from the post-judgment order awarding fees and costs. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 2:156.1, pp. 2-100 to 2-101.)

Nonetheless, when the judgment includes a determination of entitlement to fees and costs, but leaves the amount for a later determination, an appeal from the judgment subsumes any later order setting the amount of the award. (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; see also, e.g., *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1373.) "In effect, this means the notice of appeal from the final judgment encompasses the subsequent order fixing the amount of fees and costs. A separate appeal is permitted, but not required, for appellate review of the post-judgment order." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 2:156.2, pp. 2-101 to 2-102.)

Finally, attorney fees authorized by contract, statute, or law are included in an award of costs. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A)-(C); see, e.g., *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1020.) When a judgment is reversed, the cost award necessarily falls. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) Even if you have not appealed the fee and cost award, "this does not mean that an award of attorney fees [and costs] to the party prevailing stands after reversal of the judgment." (*Allen*, *supra*, 94 Cal.App.4th at p. 1284.) A "successful party is never required to pay the costs incurred by the unsuccessful party." (*Ibid.*) Reversal of a judgment by the appellate court sets the attorney fees and costs "at large," which the trial court should reverse on remand. (*Ibid.*)

5. You're the respondent and your opponents signal they will drag out the appeal to delay your client's receipt of the judgment

Certain appellate matters are entitled automatically to be expedited once they are pending before the Court of Appeal, for example, probate appeals (Code Civ. Proc., § 44), elder abuse appeals (Welf. & Inst. Code, § 15657.03; Code Civ. Proc., § 1294.4, subds. (a)-(b)), CEQA appeals (Pub. Res. C., § 21167.6, subd. (h)), parental rights termination appeals (Cal. Rules of Court, rules 8.416(a)(1) & (f)), and appeals in arbitration proceedings (Code Civ. Proc., § 1291.2). But, one potential source of appellate delay arises while the record is still being prepared.

If an appellant wants to slow down an appeal, especially in a large-record case, they may be able to do so by simply designating a clerk's transcript, i.e., the appellant designates the documents to be assembled by the superior court clerk into the appellate record. (See Cal. Rules of Court, rule 8.122.) Delay invariably arises in major metropolitan areas, like Los Angeles, because the superior court often has a large backlog of clerk's transcripts to prepare. Indeed, an appellant could strategically designate a clerk's transcript to force a settlement.

An alert respondent, however, can forestall the delay caused by the preparation of the clerk's transcript. Within 10 days of the appellant's filing of a notice of appeal, the respondent may serve and file a notice in the superior court electing to use an appendix. (Cal. Rules of Court, rule 8.124(a)(1)(B).) Through this procedural mechanism, the respondent can force appellant's counsel to prepare an appellant appendix, in lieu of a clerk's transcript, and file the appendix at the same time as the opening brief. If appellant's counsel is required to compile the documents filed in the trial court, the appeal will proceed more quickly.

6. Despite adverse rulings by the judge, your client prevails at trial. Your opponent appeals, but you do not file a cross-appeal to challenge the adverse rulings.

Your client prevails in a trial at which the judge made more than a few erroneous rulings. For example, the judge wrongfully excluded some, but not all, of your client's evidence on a pivotal issue. Your opponent appeals, but you choose not to because your client received a favorable judgment. Upon review of your opponent's opening brief, you realize the legal arguments on appeal may have merit and could result in the exclusion of the balance of your evidence on that pivotal issue. Your decision to not appeal the wrongful exclusion of your evidence on that pivotal issue does not necessarily doom your client's judgment.

Under Code of Civil Procedure section 906, "[t]he respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any . . . matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken."

The purpose of this statutory provision is to allow a respondent to assert a legal theory that may result in affirmance of the judgment or show the absence of prejudice flowing from the error. (See *Fuller v. Bowen* (2012) 203 Cal.App.4th 1476, 1483, fn. 6.) "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will

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not be disturbed on appeal merely because given for a wrong reason." (*Zak v. State Farm Mut. Liability Ins. Co.* (1965) 232 Cal.App.2d 500, 506 (*Zak*); see *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 (*D'Amico*); *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).)

7. Your opponent successfully demurs to your complaint. On appeal, you realize a new legal theory could save your case, but you failed to move for leave to amend in the trial court on this basis.

As a general rule, legal theories not raised in the trial court cannot be asserted for the first time on appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:229, p. 8-173.) "'New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal.' [Citation.] '"Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier."' [Citation.]" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 (*Nellie*).)

Our Legislature, however, has made the general rule inapplicable in the context of demurrers. Code of Civil Procedure section 472c, subdivision (a) provides: "When any court makes an order sustaining a demurrer without leave to amend, the question whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."

Thus, following a demurrer, a request for leave to amend can be made for the first time on appeal at which time you can raise new legal theories. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746-747 ["issue of leave to amend is always open on appeal, even if not raised by the plaintiff"]; *Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1007 [leave to amend to plead exhaustion of administrative remedies]; *Jensen v. Home Depot, Inc.* (2018) 24 Cal.App.5th 92, 97 [leave to amend to correct misjoinder]; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 538 [leave to amend to "allege a potentially valid claim for overtime compensation"]; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [leave to amend to add legal theory].)

8. Your opponent obtains summary judgment. The appellate court not only affirms on a ground ignored by the trial court, but the appellate court does not permit you to provide additional briefing.

Appeals are hard because, even when you're right and you establish the trial court committed error, you are not guaranteed to obtain a reversal. As noted, a decision correct in law will be affirmed on appeal even if the trial court's reasoning was incorrect. (*D'Amico*, *supra*, 11 Cal.3d at pp. 18-19; *Zak*, *supra*, 232 Cal.App.2d at p. 506; see also *Burgess*, *supra*, 13 Cal.4th at p. 32 ["We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked"].)

So, how does this play out in the context of summary judgment? Suppose you're appealing a judgment following an order granting summary judgment, and the Court of Appeal agrees that the legal bases relied on by the trial court were wrong, but then advances an independent ground to support an affirmance without allowing supplemental briefing. Has the appellate court properly applied the aphorism that a decision correct in law will not be reversed? Actually, no.

As with demurrers, our Legislature has created an exception to the general rule for affirming summary judgments. Code of Civil Procedure section 437c, subdivision (m)(2) specifies that, "[b]efore a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party."

For this reason, appellate courts generally will not consider a moving party's argument "raised in an appeal from a grant of summary judgment . . . if it was not raised below and requires consideration of new factual questions.' [Citation.]" (*Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal. App.4th 579, 594; see also *Uriarte v. U.S. Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 790-791.)

9. The Court of Appeal affirms an adverse judgment on an issue not raised or briefed by the parties

It will come as no surprise that appellate courts are inherently reluctant to grant rehearing petitions. Generally, rehearing will be ordered only upon a showing of substantial error in the decision. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 12:1, p. 12-1, citing *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1308.)

Nevertheless, a timely petition for rehearing *must* be granted if the decision was based on an issue not raised or briefed by any party and the court failed to give the parties an opportunity to present supplemental briefs on the issue. (Gov. Code, § 68081; *People v. Alice* (2007) 41 Cal.4th 668, 674-679.) The question of "briefed by a party" turns on whether the

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issue was "fairly encompassed" within the brief. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 12:20; p. 12-4; *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 141; *Dieckmeyer v. Redevelopment Agency of City of Huntington Beach* (2005) 127 Cal.App.4th 248, 250, fn. 1.)

10. After the Court of Appeal affirms an adverse judgment, you learn the California courts lacked subject matter jurisdiction

As noted above, to preserve error, the appellant must bring a timely challenge. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:229, p. 8-173; *Nellie*, *supra*, 4 Cal.App.5th at p. 997.) Failure to do so will result in an appellate shrug and a "too little, too late" admonishment. (See, e.g., *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454-1455; *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 843.)

That said, certain issues can be raised, no matter how delinquently. For example, state court subject matter jurisdiction is never waived. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339-340.) The issue can be raised at any time, directly or collaterally, and may be raised for the first time in a rehearing petition (*Sime v. Malouf* (1950) 95 Cal.App.2d 82, 116) or even in a petition for review (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 73). Once raised, the court must address the jurisdictional issue. (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union, Local 16* (1968) 69 Cal.2d 713, 721; *Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1246; *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 896 ["adequacy of the court's subject matter jurisdiction must be addressed whenever that issue comes to the court's attention"; issue raised for first time in reply brief].)

Conclusion

Rules of appellate procedure are cumbersome and complex. Sometimes, they can serve as a trap for the unwary. That generally comes as no surprise to those litigating in the appellate courts, whether trial lawyers or seasoned appellate practitioners. Sometimes, however, a situation that at first glance seems to spell doom for an appeal can be rescued through close examination and navigation of those appellate procedure rules. A good working knowledge of the rules, including their twists and turns, or consultation with an appellate specialist, can help guide a litigant through a variety of sticky situations on appeal.

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