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PERSPECTIVE

Common pitfalls of appellate practice

By Robert J. Stumpf, Jr., Karin Vogel and Guylyn Cummins

According to Merriam-Webster, a pitfall is a "danger or problem that is hidden or not obvious at first." If you're a lawyer who specializes in appeals, the "hidden problems" in appellate practice we highlight below are obvious, or at least well known. If you only occasionally have an appeal, however, and wish not to be caught off-guard, here are 10 pitfalls to avoid:

(1) Miscalculating the date on which a court of appeal opinion becomes "final."

Under Rule 8.264(b) of the California Rules of Court, a court of appeal opinion usually becomes "final" 30 days after filing. To seek review in the state Supreme Court, Rule 8.500(e) requires you to file your petition within 10 days after the court of appeal opinion becomes final. What happens when the 30th day falls on a Sunday? You start calculating the 10-day period for seeking review on Monday, right? Wrong. You start counting on Sunday. The same is true for Saturdays and holidays. A court of appeal opinion becomes final 30 days after filing — period. On the other hand, if the 10th day for seeking the review falls on a Saturday, Sunday or holiday, you have until the next business day to file your petition. Rule 8.60(a). The unwary sometimes confuse these two rules.

Of course, the "usual rule" that a court of appeal decision becomes final 30 days after filing is only the *usual rule*. There is one really important exception: under Rules 8.264(b)(2) and 8.490(b)(1), a summary denial of a writ petition and the denial of a petition for writ of supersedes become final *immediately* upon filing. In other words, start counting the 10-day review period that very day.

(2) Appealing from an "order granting summary judgment."

The unwary sometimes file appeals from a trial court's order granting summary judgment. Despite their scary nomenclature, such orders are not appealable. *Kasparian v. Avalon Bay Communities*, 156 Cal. App. 4th 11, 14 (2007). It is the judgment the trial court enters after its order that is appealable. Courts of appeal do have discretion to "deem" the dismissal order to incorporate a judgment and thus "save" the appeal. But such appellate grace is becoming increasingly rare. And one division of the 2nd District Court of Appeal has warned practitioners it is "wearying of 'appeals' from clearly non-appealable orders" and "henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders." *Cohen v. Equitable Life Assurance Society*, 196 Cal. App. 3d 669, 671 (1987).

The importance of checking on whether an order is appealable is underscored by a contrary rule in cases involving special motions to strike under the anti-SLAPP statute. Code Civ. Proc. Section 425.16. An order granting or denying a special motion to strike is directly appealable. Code Civ. Proc. Sections 425.16(i), 904.1(a)(13); *JSJ Limited Partnership v. Mehrban*, 205 Cal. App. 4th 1512, 1519 (2012). A party must file a timely notice of appeal and cannot wait until judgment is entered. Rule 8.104(a)(1)(A) and (B); *Russell v. Foglio*, 160 Cal. App. 4th 653, 659 (2008).

(3) Not knowing a trial court's power to grant a new trial expires 60 days after notice of entry of judgment.

Unwary practitioners — and, unfortunately, some trial courts — forget that a superior court's power to grant a new trial motion expires 60 days after the mailing of notice of entry of judgment. Code Civ. Proc. Section 660. Even if a trial court holds a hearing on a party's timely filed new trial motion within 60 days, the new trial motion is deemed denied by operation of law if the trial court does not issue its order by the 60th day. And, of course, an order *denying* a new trial motion is not an appealable order.

A related and even more maddening pitfall is when a trial court issues a new trial order that lacks a statement of reasons that are "specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation." *Oakland Raiders v. National Football League*, 41 Cal. 4th 624, 640 (2007). Such an order is defective (although not necessarily void). To make matters worse, the new trial statute (Code Civ. Proc. Section 657) prohibits the court from directing the attorney for a party to prepare the new trial order or specification of reasons. On top of that, the court of appeal does not even have the authority to remand the case to the trial court to correct the insufficient statement of reasons. Talk about pitfalls!

> Most everyone knows the filing of a notice of appeal usually deprives the trial court of jurisdiction. That's not always the case, though. Even after a notice of appeal has been filed, a trial court retains jurisdiction over 'collateral' matters.

(4) Not knowing you can pursue a new trial motion even if you've already filed a notice of appeal.

Most everyone knows the filing of a notice of appeal usually deprives the trial court of jurisdiction. *Varian Medical Systems Inc. v. Delfino*, 35 Cal. 4th 180, 196-98 (2005). That's not always the case, though. Even after a notice of appeal has been filed, a trial court retains jurisdiction over "collateral" matters, e.g., determining the amount of contractual attorney fees or the nature and amount of security necessary to stay enforcement pending appeal. Perhaps less known is the fact that filing a notice of appeal does *not* deprive the trial court of jurisdiction to rule on and grant a new trial motion. If the trial court grants a new trial, the appeal is moot.

(5) Not filing a "protective cost-appeal."

This relatively arcane issue arises only in cases where the trial court vacates a judgment, or grants judgment notwithstanding the verdict or a new trial. If the court of appeal reverses any one of these rulings, the original judgment springs back to life. And unless the party who prevailed at trial files a "protective" cross-appeal, that will be that. Of course, this type of cross-appeal becomes irrelevant if the appellate court does not reverse the JNOV or new trial orders. To learn more, review the state Supreme Court's opinion in *Sanchez-Corea v. Bank of America*, 38 Cal. 3d 892, 910 (1985).

(6) Not paying attention to the "technicalities" in filing a writ petition.

For the nonspecialist, writs are even more mysterious than appeals. Most practitioners know writ petitions are rarely granted. After all, a writ is by definition "extraordinary relief." Nonspecialists may not know, though, that not following the "rules" is a good way to persuade the court of appeal to deny your petition without regard to its merits. For example: not verifying the petition; not including a reporter's transcript (or declaration explaining why the transcript is unavailable and fairly summarizing the proceedings); or not providing the court of appeal with the order or judgment at issue and all documents the parties submitted to the trial court. Another less known fact: Unlike the situation with appeals, a party filing a writ petition may be able to supplement the record with "new evidence," e.g., a declaration showing why, for example, it will suffer irreparable harm unless the court grants writ review. See *McCarthy v. Superior Court*, 191 Cal. App. 3d 1023-30 (1987). But don't count on it.

(7) Not requesting a statement of decision.

In California courts of appeal, the tie usually goes to the respondent. More precisely, a court of appeal will usually construe ambiguities in favor of the judgment and be well down the road to affirming. In a court trial,

Code of Civil Procedure Section 632 gives any party the right to request a "statement of decision," in other words, a statement "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." This process can be quite complicated, time-consuming, and expensive. If an appellant did *not* request statement of decision, however, and there's substantial evidence in the record, the court of appeal will presume the superior court made all of the factual findings necessary to support the judgment. In unusual circumstances, this doctrine of "implied findings" could cause the court of appeal to affirm a judgment that it would otherwise have reversed. *See, e.g., Marriage of Ditto*, 206 Cal. App. 3d 643, 647 (1988).

Likewise, if a court does issue a statement of decision and a party does not make appropriate and specific objections, the court of appeal can find a waiver. It is not enough that the party offered its own statement of decision. Until recently, if a party requested a statement of decision but the trial court did not provide one, the result was reversible error per se. *See Miramar Hotel Corp v. Frank B. Hall & Co.,* 163 Cal. App. 3d 1126, 1129 (1985). Not so, according to a recent ruling by the 3rd District Court of Appeal. *F.P. v. Monier,* No. C062329 (3d Dist. Jan. 9, 2014).

(8) Not being mindful of the deadlines for filing "statutory writs."

Nonspecialists often are aware of the rule of thumb that a party filing a writ petition should do so within 60 days of the order at issue. Although this "60-day rule" is not jurisdictional, as with an appeal, most courts of appeal will require a good reason if you wait longer than that. This "rule" does not apply to so-called statutory writs, i.e., writs that have their own deadlines defined by statute. For example: motions for summary judgment/adjudication, to quash service of process, to expunge a lis pendens, applications to disqualify a judge. Missing those deadlines is jurisdictional; and complying with the usual 60-day rule doesn't help.

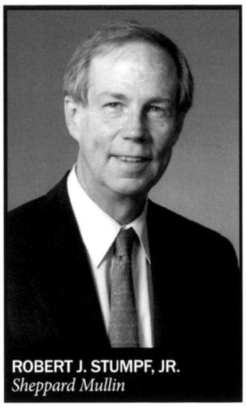
(9) Not moving for a new trial on grounds of excessive or inadequate damages.

Is it necessary to file a motion for a new trial to preserve issues for appeal? No, usually not. There's one key exception: If you want to argue on appeal that an award of damages was either excessive or inadequate, you first have to file a timely motion for new trial. Otherwise, you will have waived that issue on appeal. County of *Los Angeles v. Southern California Edison Co.*, 112 Cal. App. 4th 1108, 1121 (2003).

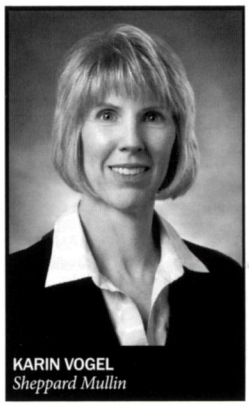
(10) Not being creative in staying enforcement pending appeal.

Typically, to stay enforcement of a money judgment on appeal you need to obtain a bond from a corporate surety for one and one-half times the amount of the judgment. This can be quite expensive and sometimes not possible because bonding companies usually require collateral in the form of liquid assets in the full amount of the bond. Four quick tips. First, under Code of Civil Procedure Section 918(b) the trial court has discretion to stay enforcement — with no bond — for up to 10 days after the last date a notice of appeal can be filed. Second, consider using "personal sureties," that is, one or more California residents who own real estate here and have a net worth in the amount of the bond (or an aggregate net worth twice the amount of the bond if three or more sureties sign). Even an affiliated corporation may suffice. Third, consider *negotiating* a stay with your opponent. Perhaps offer to pay half the bond costs with no strings attached. Or offer some cash plus real property collateral. Fourth, consider seeking a stay from the court of appeal, which is not bound by the strict bond requirements imposed on trial courts.

Robert J. Stumpf, Jr., Karin Vogel, *and* **Guylyn Cummins** *are members of Sheppard Mullin's Certified Appellate Specialist Team and have handled more than 300 appeals and writs, including more than 75 published appellate opinions. Bob Stumpf is the immediate past chair of the Appellate Law Advisory Commission, which administers the appellate specialist certification program for the State Bar of California.*



ROBERT J. STUMPF, JR.
Sheppard Mullin



KARIN VOGEL
Sheppard Mullin

GUYLYN CUMMINS
Sheppard Mullin