Herb Fox

Professional liability from on above: Avoiding appellate malpractice

Clients must be told that winning an appeal only means winning the right to start the litigation all over again

Litigation is a three-dimensional chess game. As attorneys, we keep our eyes on the past, present and future in order to win cases, collect judgments, and keep our clients happy. But we also need to keep an eye on above, because every case contains the seed of a potential appellate remedy, and the failure to assess and, when appropriate, utilize that remedy contains the seed of appellate malpractice.

Appellate malpractice is not on the radar of most trial attorneys, but it should be. California clients have been suing their attorneys for appellate-level malpractice for over 135 years. (See *Drais v. Hogan* (1875) 50 Cal. 121, affirming the liability of a trial attorney for failing to appeal a judgment that would have been reversed.)

And, of course, the professional-liability risks go beyond malpractice. The dangers lurking in the appellate arena include sanctions for a frivolous appeal or writ *(In re Marriage of Flaherty* (1982) 31 Cal.3d 637*);* fee disputes; and discipline, both coming and going. Attorneys have been disciplined for prosecuting an appeal despite the client's instruction not to do so *(In re Regan* (2005) 4 Cal. State Bar Ct. Rptr. 844; and for failing to prosecute an appeal (*Gadda v. Ashcroft* (2004, 9th Cir.) 377 F.3d 934, ("conduct unbecoming" a member of the 9th Circuit Bar).

But help is here. Exposure for mishandling civil appeals and writs can be minimized with mindfulness of your client's potential appellate remedies, diligence about deadlines and forms, and consultation with a specialist when the heat is on. Here are some danger areas to be wary of, and some advice on staying out of trouble.

Use 'em or lose 'em: not all appellate remedies arise after final judgment

Many of us think of an appeal as an exclusively post-judgment remedy, and of a writ petition as an interlocutory tactical choice that does not implicate waiver. But these are legal myths.

In fact, there are scores of interlocutory orders that must be *immediately* appealed or "writed," and the price for the lack of diligence is waiver of later appellate review. (See, e.g., *Estate of Gilkison* (1998) 65 Cal.App.4th 1443: orders made appealable by the Probate Code must be appealed timely or they become final and cannot be attacked in an appeal from the final order of distribution.)

Thus whenever an order or partial judgment is appealable as a matter of right, or where a statute mandates appellate review by writ petition only (so called "statutory writs"), the rule is "use 'em or lose 'em." (The same is not true for most non-statutory writs, where the error is usually preserved for an appeal from the final judgment, although by then the error can become moot).

These immediate appellate remedies abound everywhere in our civil litigation practice, and trial attorneys should be mindful of the appellate consequences of these interlocutory proceedings. Some of the more common orders and partial judgments that are immediately appealable or writable are set forth in the two charts accompanying this article. (See Chart 1 on next page and Chart 2 on pg 62)

Just because you have an immediate appellate remedy does not mean, of course, that you should pursue it. Indeed, doing so willy-nilly can lead to appellate court sanctions. But to avoid potential liability for appellate malpractice, the decision whether to prosecute an interlocutory appeal or writ should be based on reasoned analysis and exercise of professional judgment, usually in consultation with your client. Ignorance of the availability of the remedy is not an excuse.

If you are unsure of the existence or merits of an appellate remedy, a consultation with appellate counsel can get you off the hook.

Also, be cautious about relying on language in your retainer agreements that exclude appellate services. Such clauses may protect you from post-judgment abandonment claims (see *DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149). But a client can reasonably expect you to protect his or her rights for anything that arises *during* the litigation, and for interlocutory appeals and writs, that clause is not likely to prove exculpatory.

Nor is that clause likely to protect you from claims of failure to create and protect the appellate record in post-trial proceedings, as we shall now see.

Stick around after the ninth inning: creating and preserving the appellate record post-trial

There is no shame in the urge to run and hide after an adverse verdict or tentative ruling. Acting on that urge may cause problems, however. Failing to pursue a motion for new trial/JNOV, or neglecting to request and object to a Statement of Decision, could result in missing or waiving winnable appellate issues – and thus may create liability.

Statements of Decision: In a bench trial, the single most important document for facilitating the scope of appellate review – indeed, often more important than the judgment itself – is the statement of decision. Its main function is to help the reviewing court understand how and why the trial judge came to the ultimate conclusions reflected in the judgment. For appellants, the statement of decision provides a roadmap to demonstrate reversible error.

In most situations, the trial court has a duty to issue a statement of decision only if requested to do so, and the failure

to make a timely and proper request waives any error. Worse, the omission compels the Court of Appeal to infer that the trial court made all of the findings necessary to sustain the judgment (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1991) 51 Cal.3d 1130). In short, the failure to perfect a statement of decision can mean losing an otherwise winning appeal (see, e.g., *In re the Marriage of Ditto* (1988) 206 Cal.App.3d 643. There, the appellant waived a potentially winning legal argument because, in absence of a request for a statement of decision, the appellate court was compelled to infer that the trial court made the correct findings.)

There are two basic steps to perfecting a statement of decision for appellate purposes: First, ask the trial court to issue a statement of decision; second, object to the contents of the statement of decision if it is ambiguous or incomplete. Both the request and the objections should be made early and often.

The convoluted time limits for making a request for and objecting to a statement of decision are set forth in Code Civ. Proc. §632 and Rule of Court 3.159).

To be safe, the initial request for a statement of decision should be made early on, in your trial brief, with a specific list of all issues that need to be resolved. To punch home the request, repeat it in any closing argument, refining the issues as they developed at trial. Then, once the trial court issues a tentative decision, make another request that specifically highlights any errors or ambiguities in the tentative decision.

But that's not all. Once the court or a party prepares a proposed statement of decision – which may or may not be the tentative decision – a new round of proposals and objections is required (Rule of Court 1590(c),(e,f,g)). Finally, once the court signs and enters the final statement of decision, you must again assert any ambiguities or omissions within that final document, prior to entry of judgment or in association with a motion for new trial; if you do not, the Court of Appeal will infer that the trial court made all necessary findings (Code Civ. Proc., §634).

Common Immediate Interlocutory Appeals

Granting *or* denying anti-SLAPP motion	*Civ. Proc., §§ 425.16(i); 904.1(a)(13)*
Denying certification of entire class	*Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429*
Most Probate Court orders	*Probate Code, §§ 3100 et seq.*
Granting *or* denying motion to disqualify attorney	*Meehan v. Hopps (1955) 45 Cal.2d 213*
Granting motion to quash service of summons	*Civ. Proc., § 904.1(a)(3)*
Granting motion to stay or dismiss on grounds of inconvenient forum	*Civ. Proc., § 904.1(a)(3)*
Denying motion to compel arbitration	*Civ.Proc., § 1294(a)*
Granting, denying or dissolving any injunction	*Civ. Proc., § 904.1(a)(6)*
Appointing receiver	*Civ. Proc. § 904.1(a)(7)*
Granting or discharging a right to attach	*Civ. Pro. §904.1(a)(5)*
Any order requiring the immediate payment of money, including sanctions over $5,000	*Lima v. Vouz (2009) 174 Cal.App.4th 715; Civ. Proc., §904.1(a)(11,12)*
Granting or denying interlocutory spousal or child support	*Marriage of Skelley (1976) 18 Cal.3rd 365*
Any dispositive order that is final as to one party among several (e.g., summary judgment in favor of one of several defendants)	*Justus v. Atchison (1977) 10 Cal.3rd 564*

Motion for New Trial: A motion for new trial is often a waste of time – if you are only looking back at the trial judge. For appellate review purposes, however, there are common circumstances in which the motion is necessary in order to preserve or create appellate issues.

As discussed above, you may need to file objections to the final statement of decision in conjunction with a motion for new trial so to avoid adverse inferences on appeal.

And there are other circumstances in which a motion for new trial is necessary in order to preserve an appellate issue or create a record. These include:

Damages: Any claim that the damage award was insufficient or excessive must first be raised by way of a motion for new trial in order to preserve the issue on

appeal *(Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908).

Jury Misconduct: Any issue of jury misconduct discovered after the verdict must first be raised in a motion for new trial in order to create a record for appellate review. Without such a motion, there will be no evidentiary record for the Court of Appeal to review, because no new evidence or issues can be asserted for the first time on appeal.

New Evidence: For the same record-creating reason, any issue regarding the belated discovery of new evidence must also be first raised before the trial court in a motion for new trial. No such arguments will be entertained by the Court of Appeal absent a record below.

Deadlines for appellate relief: if only 60 days was the rule!

Because notice-of-appeal deadlines are jurisdictional in the state courts, miscalculating the filing date is the surest route to a malpractice claim. And blowing that deadline is easier than you may think.

Most litigators are familiar with the general 60 day rule for filing the notice of appeal if there is service of a judgment or order, and 180 days if there is not service (Rule of Court 8.104(a)). That seems easy enough, but the statutory scheme contains numerous traps even for the wary. Here are a few to watch for:

Judgments:

• Be careful if multiple parties serve notice of the judgment or order, or if the clerk mails a copy before any party does. Where there is multiple service, it is the *earliest* service date that triggers the 60 day countdown (Rule of Court 8.104(a));

• Keep your eyes open for the delivery of a file-stamped copy of the judgment. If a proof of service is attached, that starts the clock, and there is no need

Examples of Statutory Writs and Their Deadlines

Denying motion to disqualify a judge	*Civ. Proc., § 170.3(d)*	10 days
Granting *or* denying motion to expunge lis pendens	*Civ. Proc., § 405.39*	20 days
Denying motion for summary judgment	*Civ. Pro. §437c(m)(1)*	20 days
Granting Change of Venue	*Civ. Proc., § 400*	20 days
Denying motion to quash service of summons	*Civ. Proc., § 418.10(c)*	10 days
Determination of good faith settlement	*Civ. Proc., § 877.6(e)*	20 days
Granting *or* denying motion to reclassify case from limited to unlimited or vice versa	*Civ. Proc., § 403.080*	20 days

for a document entitled "Notice of Entry" *(Rule of Court 8.104(a)(1,2);* and,

• The 60 days run from the date on the proof of service, not the date of receipt or the date of a file stamp, and there are no Code Civ. Prov., § 1013 extensions (Rule of Court 8.104(a,b).

Orders: The deadlines for filing a notice of appeal from an appealable order are similar, but not identical, to that for judgments. A common trap arises if the court does not direct the preparation of a formal order, but a party does so anyway. In that event, the time to appeal is 60 days from service of the minute order, or 180 days from entry of that minute order (Rule of Court 8.104(d)(2). The appeal deadline is not affected by the service of the formal order *(Marriage of Adams* (1987) 188 Cal.App.3rd 683).

Extensions of Time: The 60-day rule for filing a notice of appeal is extended by the timely filing of a motion for new trial, motion to vacate, motion for judgment notwithstanding verdict, or a motion for reconsideration of an appealable order (Rule of Court 8.108). But these rules are not uniform and should be carefully studied and applied if you intend to rely on them.

For one thing, while each of these motions extends time by 30 days, that does *not* necessarily mean that you have 90 days (60 + 30) from the date of notice of entry. The 30-day "extension" clock can begin on any number of dates before the 60 days have run, and in some situations you don't get even get 30 days.

For example, if the trial court hears and denies a new-trial motion on day 55 after service of the judgment, and notice of entry of that denial is mailed that same day, you will have a total of 85 days from notice of entry to file (55 + 30).

For another example, if you are relying on a motion to vacate or a motion for reconsideration, the notice of appeal must be filed within 90 days *after the filing of the motion* (Rule of Court 8.108(c)(2); (e)(2)). Thus if the court issues and serves a ruling on day 80 after the filing of the motion, you do not get an additional 30 days from that ruling; you only get 10 days. And the deadline is the same if the court fails to rule at all.

Writ Petitions: There is no standard deadline for filing writ petitions, not even for statutory writs.

All statutory writs are governed by express (and *very short*) deadlines that vary from 10 to 20 days after notice of entry (see chart of statutory writ deadlines). Further, some of these statutory

deadlines are extended by Code of Civil Procedure section 1013 and/or extensions for good cause, but others are not. Thus you must carefully read the individual statute that creates the writ petition requirements; there are no general rules.

The notice of appeal and designation of record: less is more and more is less

The notice of appeal and designation of record forms are deceptively simple (see Judicial Council Forms APP-002, 003) and the contents of the notice of appeal must be liberally construed (Rule of Court 8.100(2)). Nonetheless, mistakes occur and can be costly.

- The notice of appeal must plainly state the names of the parties who are appealing. If you represent multiple parties who intend to appeal, they must each be separately identified as appealing parties (although a single notice of appeal is sufficient). Their presence on the caption alone will not suffice; nor will the statement that "Jane Doe *et al*" appeal from the judgment;
- The notice of appeal should not state the grounds for the appeal. This may limit your right to assert other errors that are later identified by yourself or appellate counsel; and,
- While it may be tempting to designate only a partial reporter's transcript in order to save money, do not do so. A partial designation requires you to identify in advance the grounds for the appeal and limits you to those issues (Rule of Court 8.130(a)(2)). It could also prevent you from demonstrating that an error was prejudicial.

To appeal or not to appeal: Who decides and how?

Finally, the decision to prosecute an appeal or writ petition should not be made lightly or hastily. How to make the decision to litigate in the appellate arena – and who decides – can be a rocky road.

On the one hand, you may be pressured by an unhappy client or your own sense of outrage to prosecute the appellate proceeding. But the risk of prosecuting an appeal or writ petition that is "dead on arrival at the appellate courthouse steps" (*In re Estate of Gilkison* (supra) 65 Cal.App.4th 1443) includes sanctions, more pressure on your cash flow, and an even more unhappy client angling for a fee dispute or worse.

On the other hand, abandoning a potentially worthy appeal or writ petition (without the informed consent of the client), may expose you to a malpractice claim with 135 years of jurisprudence behind it (*Drais v. Hogan* (supra) 50 Cal. 121).

Here are some guidelines:

• First, don't let jurisdictional appellate deadlines lapse for a lack of decisiveness. File first if need be, and assess later. There is little-to-no adverse consequence to abandoning or dismissing an appeal once it is filed (except for filing fees and record costs). (See, e,g. *Small v. Hall's Furniture Defined Benefit Pension Plan* (2000) 79 Cal.App.4th 648 [party who dismissed appeal after consulting with appellate specialist did "the right thing" and was not liable for attorneys fees for the appeal]);

• Don't prosecute the appeal or writ simply because you (or your client) are angry at the result. Appellate courts are different than juries or trial courts, and anger rarely wins the day;

• If you have little appellate experience and/or have doubts about the merits, get help. Consult with a member of your firm who has appellate experience, or consult with an outside appellate specialist. Many specialists will provide a quick reality check at little to no cost, and the cost of obtaining a full review and opinion from an experienced specialist could be, in the long run, priceless; and,

• If you do prosecute an appeal from an adverse final judgment, make sure that your client understands the odds and the limits to what can be won. Many clients mistakenly believe that if the Court of Appeal reverses, it will enter judgment in their favor. That occurs occasionally but not often. Your client should understand that, in most cases, winning an appeal only means winning the right to start the litigation all over again, with all of the risks, opportunities and costs of doing so.

Herb Fox has been litigating civil appeals and writ petitions for over 20 years. A former research attorney for the Court of Appeal, he is a Certified Appellate Law Specialist. His published opinions include Parks v. Safeco Insurance Co. *(2009) 170 Cal.App.4th 992 (bad faith) and* Reyes v. Van Elk Ltd., Inc. *(2007) 148 Cal.App.4th 604 (wage and hour). Herb maintains offices in Century City and Santa Barbara. His Web site is www.LosAngelesAppeals.com and he can be contacted at hfox@LosAngelesAppeals.com.*