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Timing Appeals

FOCUS COLUMN

By Benjamin G. Shatz

California law is clear that, "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal." California Rules of Court 8.104(b). This means litigators must understand when the time to file a notice of appeal - usually 60 days after notice of entry of the judgment or appealable order (Rule 8.104(a)) - begins to run. An awareness of Code of Civil Procedure Section 581d may be critical to ensuring a timely appeal.

Defining Dismissal

Despite its awkward numerology, Section 581d should not be confused with unrelated Section 581, subdivision (d). Indeed, because California's codes contain quite a few numbered sections followed by separate sections designated with letters, the California Style Manual requires citations in the form "Section 581, subd. (d)," rather than "Section 581(d)" to differentiate the former from Section 581d. Style Manual 4th Section 2:7.

Section 581d contains only two simple sentences: "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered. All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action, and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." Essentially then, Section 581d says that a document that otherwise looks like an ordinary trial-court order, in fact may be the final appealable judgment in the action.

War Stories

The following war story illustrates the devastating effect these simple sentences may have on an aspiring appellant. In this particular case, the defendant demurred to all causes of action in the plaintiff's complaint. At the demurrer hearing, the trial court indicated that the demurrer would be sustained because the complaint failed to state any causes of action as a matter of law.

The judge asked the plaintiff's counsel whether leave to amend would be appropriate. The plaintiff's counsel responded that no leave was necessary, because no amendment could resolve the legal question at issue, and that the plaintiff intended to appeal.

The next day, the court issued a two-page document, which looked like a minute order, that included the court's analysis on one page and stated, "The demurrer is sustained without leave to amend; the case is ordered dismissed." Unlike the typical minute order, however, this document was signed by the trial judge and included a "Clerk's Certificate of Mailing/Notice Entry of Order" signed by the court clerk on the second page.

Because this order was in writing, ordered the case dismissed and was signed by the trial judge, it qualified as a judgment under Section 581d. Moreover, because the court clerk had served a notice of entry of the order, the time to file an appeal began with that service of the order. Compare *Sunset Millennium Assocs. v. Le Songe LLC*, 138 Cal.App.4th 256 (2006).

The plaintiff's counsel, however, apparently unfamiliar with Section 581d, waited for the court to issue a separate document titled "judgment." After a month of waiting, the plaintiff's counsel took action and lodged with the court a "[Proposed] Judgment," using Judicial Council form JUD-100. The trial court correctly ignored this document.

After fruitlessly waiting another month for the judge to sign the proposed form judgment, the plaintiff's counsel lodged another "[Proposed] Judgment," this time drafted in longhand by the plaintiff's counsel (rather than on a Judicial Council form). The trial court signed this document in the space provided but did so more than 60 days after entry and notice of entry of the dismissal order. Shortly thereafter, the plaintiff

filed a notice of appeal from this signed judgment.

On its face, the plaintiff's notice of appeal seemed proper and timely. After all, the plaintiff - now appellant - had filed a notice of appeal within 60 days of a signed "judgment" and attached that document to the appellant's Civil Case Information Statement, form APP-004. Thus, the Court of Appeal had no way of recognizing that the appeal might be tardy.

Accordingly, the defendant - now the respondent - filed a motion to dismiss the appeal. This very short motion cited the black-letter law that a timely notice of appeal is jurisdictional. *Pressler v. Donald L. Bren Co.*, 32 Cal.3d 831 (1982) (failure to timely file an appeal cannot be excused by mistake, inadvertence or neglect); *Hollister Convalescent Hospital v. Rico*, 15 Cal.3d 660 (1975) (absent a timely appeal, the Court of Appeal "lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse").

The motion demonstrated that the dismissal order qualified as a judgment under Section 581d, that the clerk's service of a notice of entry started the time to appeal and that the notice of appeal was thus filed after the 60-day period had expired. *Daar v. Yellow Cab Co.*, 67 Cal.2d 695 (1967) ("an order of dismissal is to be treated as a judgment for the purposes of taking an appeal"); *Hudis v. Crawford*, 125 Cal.App.4th 1586 (2005) (order sustaining demurrer and stating the "case is dismissed" is appealable).

Shortly after receiving the motion to dismiss - and presumably finally recognizing what had happened - the appellant filed an abandonment of the appeal, which put an end to both the appeal and the entire litigation.

Lessons Learned

This tale teaches several valuable lessons. First, familiarity with Section 581d is critical for litigators. Understanding that section will reveal the circumstances under which an apparently nonappealable interlocutory order may in fact be a dismissal order that qualifies as the final judgment in the action. Had the order simply sustained the demurrer without leave to amend and not specifically included language dismissing the case, this story might have turned out differently.

Accordingly, practitioners should review orders carefully, with an eye for dismissal language that might be embedded in other text. Another item to look for is signatures on the order. Ordinary minute orders typically are not signed by the judge or served by the court clerk. The fact that the minute order in this case had executed signature blocks for both the judge and court clerk should have been a clue that something special about this order was special.

Second, although the trial judge in this story ultimately signed one of the plaintiff's "proposed judgments," that did not and could not excuse or remedy what turned out to be the tardy filing of a notice of appeal. "The [California] Rules of Court do not provide, once a judgment or appealable order has been entered, that the time to appeal can be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision." *Laraway v. Pasadena Unified School District*, 98 Cal.App.4th 579 (2002); see also *Filipescu v. Cal. Housing Authority*, 41 Cal.App.4th 738 (1995) (the rules do not allow a "second" notice of entry of judgment or final order to restart the time to appeal). This emphasizes that, with respect to jurisdictional documents, counsel must be aware of the proper rules and procedures and cannot rely on the trial judge to somehow fix a missed deadline.

Finally, when in doubt about a jurisdictional deadline, such as the time to file a notice of appeal, the prudent lawyer files the document, even if possibly prematurely, rather than waiting to obtain a clear answer. In this case, the plaintiff's counsel apparently understood the general rule that an appeal must be from the one final judgment issued in the case. Consequently - and to the plaintiff's detriment - counsel assumed that a document titled "judgment" was needed, and thus counsel continued to submit proposed "judgments" to the court until a signed judgment could be obtained. However, the fact that the court did not issue a judgment on its own and ignored the plaintiff's first proposed judgment should have been recognized as a sign that something was wrong with counsel's assumptions.

Navigating Filing

Visualize the consequences of either decision. Filing a premature notice of appeal simply means that the notice will not effectively perfect an appeal; but filing a tardy notice of appeal means that there can be no appeal. When faced with such options, counsel in doubt about what to do should elect the safest course and file the notice. Otherwise, the consequences may be severe and unremediable.

Although filing a notice of appeal is simple, filing a timely notice of appeal often is quite tricky. The plaintiff's counsel here apparently was unfamiliar with the importance of Section 581d, a code provision that seasoned appellate lawyers know well. Consulting with an appellate specialist may reveal hidden traps for the unwary and is well worth the call.

Benjamin G. Shatz is a certified specialist in appellate law in the appellate practice group of Manatt, Phelps & Phillips in Los Angeles. He filed the motion to dismiss referenced in this article.