

Don't miss that appellate deadline

By Alana H. Rotter

There are many steps along the road to a successful appeal. Identifying strong issues is one. Good briefing is another. Preparing for oral argument is a third.

But the single *most* important step happens well before any of these things, and takes far less time: The appellant has to file a timely notice of appeal.

The California Rules of Court establish the deadlines for appealing from appealable orders and judgments in state court. These deadlines are not always easy to calculate, particularly when post-trial motions are involved. But calculating correctly is critical: An appeal filed after the deadline *must* be dismissed for lack of jurisdiction. *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674. That is true no matter how strong the appellant's issues, briefing, and oral argument. Without a timely notice of appeal, nothing else matters.

So, what are the deadlines?

California Rule of Court 8.104 establishes the basic rule. It sets a deadline of the earliest of three dates: 60 days after the superior court clerk serves either a document titled "Notice of Entry" or a file-stamped copy of the judgment/appealable order, showing the date of service; 60 days after any party serves either of the same two documents, with a proof of service; or if no notice of entry is given, 180 days after entry of the judgment or appealable order.

The deadline calculation becomes more complicated when post-trial motions enter the picture. California Rule of Court 8.108 specifies that the time to appeal may be extended by four types of post-trial proceedings:

Valid notice of intention to move for a new trial, or valid motion for judgment notwithstanding the verdict (JNOV): If denied, a valid new trial or JNOV motion extends the deadline to appeal from the judgment until the earliest of 30 days after service of an order, or notice of entry of an order, denying the motion; 30 days after denial of the motion by operation of law; or 180 days after entry of judgment. Rule 8.108(b), (d).

Valid notice of intention to move, or valid motion, to vacate the judgment: If filed within the ordinary time to appeal, this extends the deadline to appeal from the judgment until the earliest of 30 days after service of an order, or notice of entry of an order, denying the motion; 90 days after the first notice of intention to move, or motion, is filed; or 180 days after

entry of judgment. Rule 8.108(c).

Valid motion to reconsider an appealable order under Code of Civil Procedure 1008, subdivision (a): This extends the deadline to appeal from the underlying order until the earliest of 30 days after service of an order, or notice of entry of an order, denying the motion; 90 days after the first motion to reconsider is filed; or 180 days after entry of the appealable order. Rule 8.108(e).

These rules sound simple enough, but complications abound. The 2nd District Court of Appeal, Division One's recent decision in *Starpoint Properties, LLC v. Namvar*, 2011 DAR 17791 (Dec. 12, 2011) addresses one such complication: What happens when a post-judgment motion to vacate is timely filed, but then withdrawn or superseded?

Starpoint Properties stemmed from a judgment that defendants stipulated could be entered if certain events occurred. The events occurred, and the court entered judgment. Notice of entry was served on March 23, 2009. Under the basic Rule 8.104 deadline, any notice of appeal from that judgment was due within 60 days.

Before the 60 days expired, on May 7, 2009, defendants moved to vacate the judgment. That motion would ordinarily extend the deadline to appeal from the judgment under Rule 8.108(c), because it was filed within the time to appeal. But this is where the wrinkle comes in.

The trial court never ruled on the May 7 motion. Instead, on May 26, 2009, defendants filed a second motion to vacate "with the intention of superseding and taking the place of the previously submitted Motion for Relief." The trial court denied this second motion on June 17, 2009, and defendants immediately appealed from the judgment.

The appeal proceeded for more than two years, while the parties filed various procedural motions and briefed the merits of the case. Then, after the close of briefing and oral argument, the appellate court dismissed the appeal as untimely.

Citing *Meier v. Heckel* (1960) 183 Cal.App.2d 329, *Starpoint Properties* emphasized that only a motion to vacate filed *within the normal time to appeal from the judgment* extends the time to appeal. Defendants' original motion fit that description. But characterizing that motion as withdrawn, the appellate court concluded that it was never reviewed by the trial court. The trial court instead must have reviewed the superseding motion, which was filed four days after the appeal deadline and so could not extend that deadline under Rule 8.108.

Starpoint Properties rejected defendants' argument that the order denying the

superseding motion also denied the withdrawn motion. The court explained that such an interpretation would “allow every litigant to increase his or her allotted time to appeal through the continuous filing, withdrawing, and filing of motions, without having to face the consequences—whether adverse or not—of a trial court’s decision on the motion’s merits.”

Because defendants failed to appeal within 60 days of notice of entry of the judgment, and the second motion to vacate the judgment did not extend the time to appeal, the appellate court held that it had no jurisdiction to consider the merits of appellants’ claims regarding the judgment.

The missed deadline made no difference in *Starpoint Properties* because, as the appellate court briefly explained, the defendants also would have lost on the merits. But that will not be true in every case. And an untimely appeal must be dismissed even if the appellants’ arguments might otherwise have prevailed. To avoid such an inevitable loss, keep close track of possible appellate deadlines and, when in doubt, consult a specialist.

Alana Rotter specializes in civil writs and appeals at the law firm of Greines, Martin, Stein & Richland LLP.