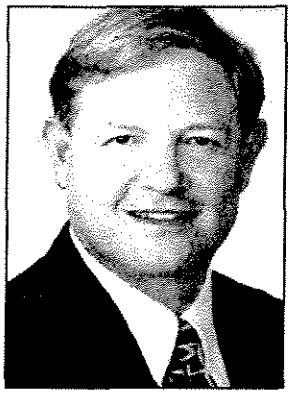
In the Thicket of Appellate Jurisdiction

Appellate courts take their jurisdiction seriously: Without it, there can be no appellate review. As recent cases from the Ninth Circuit demonstrate, determining whether there is jurisdiction for an appeal can be a thorny issue in several different respects.

• A timely notice of appeal is essential to appellate jurisdiction, but calculating the deadline for filing an appeal requires attention to several interrelated rules about judgments and appeals. Compare the results in two cases.



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In the first case, *Ford v. MCI Communications Corp. Health and Welfare Plan and ITT Hartford Ins.*, 399 F.3d 1076 (9th Cir. 2005), the district court granted defendant's summary judgment motion by a November 18, 2002 minute order that concluded: "IT IS SO ORDERED." Ordinarily, notice of appeal must be filed within 30 days after entry of judgment. Fed. R. App. P. 4 (a) (1) (A). Plaintiff filed notice of appeal more than seventy days after entry of the order, on February 3, 2003.

Nevertheless, the Ninth Circuit held that this appeal was timely. For starters, the Court explained that while a final judgment is necessary for an appeal, the minute order was sufficiently final to permit an appeal. Although Fed. R. Civ. P. 58(a) (1) requires that a judgment be set forth in a separate document, the failure to file a separate document does not preclude an appeal where the order appealed from appears to dispose of the case and the parties believe a final judgment has been entered. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). In this case, because the minute order terminated the case and the parties treated it as the judgment, the order was appealable as a judgment.

Next, the Court determined that because there had been no judgment entered as a separate document, under Rule 58(b) (2) (B) the judgment was not deemed entered until 150 days after entry of the order in the district court's docket.

Finally, the Court found that plaintiff's February 3, 2003, notice of appeal actually was premature, because judgment was not deemed entered under Fed. R. Civ. P. 58(b) until April 17, 2003. Prematurity was not fatal to the appeal, however, because under Fed. R. App. P. 4(a) (2), the filing of a premature notice of appeal is deemed filed on the date entry of the judgment appealed from. The appeal was therefore timely.

In the second case, on the other hand, the same rules worked against the appellant. The plaintiff in *Casey v. Albertson's, Inc.*, 362 F.3d 1254 (9th Cir. 2004), also lost on summary judgment. The district court issued a seven-page minute order that disposed of plaintiff's claims and concluded "IT IS SO ORDERED." Again, the court never entered a separate judgment. A year later, the plaintiff filed a Fed. R. Civ. P. 60(b) motion for relief from the judgment. When the district court denied her motion, she appealed from that ruling.

On appeal, the plaintiff sought to challenge the summary judgment order on its merits. She reasoned that because Rule 58 required entry of a separate judgment, and it is the entry of a separate judgment that triggers the time for post-judgment review, Fed. R. App. P. 4(a) (7), there was still time for the Ninth Circuit to review the summary judgment ruling.

The Ninth Circuit disagreed with the plaintiff's argument and held that it had no jurisdiction to review the merits of the summary judgment because the time to appeal from the judgment had expired before the plaintiff filed her notice of appeal from the Rule 60(b) ruling. The Ninth Circuit again determined that even without entry of a separate judgment under Rule 58, the minute order was sufficiently final to permit an immediate appeal. The Ninth Circuit "found no cases that apply Rule 58...as a sword to reopen a case in which the parties and the judge all have indicated that they treat a district court entry as a final, separate judgment.... [T]he district court's failure to enter a separate judgment...does not create a loophole through which we can reach past [plaintiff's] Rule 60(b) motion to get to the merits of the district court's summary judgment ruling." *Casey*, 362 F.3d at 1259.

• For purposes of appeal, finality in substance is just as important as finality in procedure. *Dees v. Billy*, 394 F.3d 1290 (9th Cir. 2005), was a medical malpractice action in which the defendants petitioned to compel arbitration pursuant to an arbitration agreement with the plaintiff. The district court granted the motion and ordered: "The action is stayed pending completion of arbitration and shall be administratively closed." The plaintiff purported to appeal from that order.

The Ninth Circuit held that although the district court considered the case closed for procedural purposes, it was not closed for purposes of appeal. An order staying judicial proceedings and compelling the parties to arbitrate the dispute is not appealable as a final judgment because it does not end the litigation on its merits. An order compelling arbitration *and* dismissing the action is appealable as a final judgment because the order ends the litigation on the merits. Here, however, the Ninth Circuit held that the order that the case be "administratively closed" was not the equivalent of a dismissal on the merits. The closure was "a docket management tool that ha[d] no jurisdictional effect." *Id* at 1294. The plaintiff cited a Fifth Circuit decision in which an order compelling arbitration and closing the case was deemed an final, appealable order. The Ninth Circuit distinguished that decision on the ground that the lawsuit had been brought solely for purposes of compelling arbitration. Once arbitration was compelled, there was nothing left to decide. This lawsuit, on the other hand, was brought to recover damages for medical malpractice, and since there has been no decision on the merits, the appeal was dismissed.

• Appellate courts are liberal in interpreting the language of notices of appeal, both as to the parties who intend to appeal and as to the rulings which the parties seek to have reviewed. But liberality has its limits, as demonstrated by *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F.3d 972, 973 (9th Cir. 2004). Evans was the general partner of D-Beam, a limited liability partnership. He and D-Beam sued Roller Derby and others on claims arising out of a contract between D-Beam and Roller Derby and out of promissory notes given by Roller Derby to Evans. Judgment was entered for the defendants. Evans, who was not an attorney, filed a notice of appeal on his own behalf.

After initial briefing by Evans, the Ninth Circuit took the unusual step of appointing *pro bono* counsel who filed supplemental briefing on behalf of D-Beam challenging the judgment

(Continued on page 9)

In the Thicket of Appellate Jurisdiction

Continued from page 8

against D-Beam. In the end, however, the Ninth Circuit ruled: "Because Evans appealed *pro se*, we lack jurisdiction over D-Beam's claims and they are dismissed." *Id.*

The Ninth Circuit explained that a corporation or other association must appear through counsel. While a notice of appeal signed by a corporate officer may be valid, here Evans signed the notice of appeal for himself, not for D-Beam. That notice was inadequate to give notice of D-Beam's intent to appeal. Furthermore, after filing the appeal, D-Beam remained unrepresented by counsel. "Allowing Evans to advocate D-Beam's claims, when he clearly intended to proceed *pro se* and counsel was not retained prior to motions or briefing on appeal — and then subsequently only upon court appointment — would eviscerate the requirement that corporations and other entities be represented by counsel." *Id.* at p. 974.

As this assortment of recent decisions indicates, practitioners may not always be able to avoid the brier patch of appellate jurisdiction, but they can limit unnecessary entanglements by carefully reading and following the rules.

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