

Appellate Tips for Trial Lawyers

LOS ANGELES COUNTY BAR ASSOCIATION

Volume 1, Number 15 ● An E-Publication of the Los Angeles County Bar Association ● May 2009

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you have lost.

Post-Trial: Fatal Lateness

Some Post-Trial Deadlines You Can't Afford To Flub

by Feris M. Greenberger

The post-trial period in California courts is studded with rigid deadlines. Easily overlooked procedural nuances can lead to dire calculation errors. Here are a few unforgiving rules to keep in mind.

No Extra Time for Mailing Post-trial Motions or Notices of Appeal

Trial lawyers accustomed to adding five days to their deadlines (Code Civ. Proc. § 1013 (a)) can be tripped up when calculating due dates for motions for new trial, to vacate judgment and for JNOV, and notices of appeal. Section 1013 expressly does not apply to notices of appeal or to motions for new trial or to vacate judgment, and the JNOV statute follows the new trial procedure. (*See id.*, §§ 629 [JNOV], 659 [new trial], 663a [vacate judgment], 1013 (a).) Counting wrong has serious consequences: A trial court has no power to grant a new trial or vacate a judgment except on a party's procedurally valid motion, and while a court can grant JNOV sua sponte (*see id.*, § 629), that is very rare.

Late Notice of Appeal Is Fatal

The consequence of filing a late notice of appeal is particularly harsh. While a timely filed notice of appeal "must be liberally construed[.]" a late notice of appeal is fatal. (Cal. Rules of Court, Rules 8.100(a)(2), 8.104(b).) "If a notice of appeal is filed late, the reviewing court must dismiss the appeal." (*Id.*, Rule 8.104(b), emphasis added.) It is critical, therefore, to keep accurate track of when the notice is due. (*See id.*, Rules 8.104, 8.108.) If relying on the extension occasioned by denial of a motion for new trial, vacation of judgment, or JNOV, be aware that only denial of a valid motion—one that is timely filed and otherwise procedurally sound—affords the extra 30 days. (*Id.*, Rule 8.108.)

Protective Cross-Appeal Needed upon Appeal from Order Granting New Trial

A notice of appeal from an order granting a new trial or other post-trial motion has special significance for the respondent. That party can—and as a practical matter, must—protectively cross-appeal from the original judgment. (*Id.*, Rule 8.108(f)(2).) If the reviewing court overturns the new trial order, it will examine the judgment for error on cross-appeal. Absent a cross-appeal, the court will simply reinstate the original judgment, which will be final immediately upon entry. (*E.g.*, [Sanchez-Corea v. Bank of America](#) (1985) 38 Cal.3d 892, 910.)



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