

# Appellate Tips for Trial Lawyers

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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've lost.**

## **Motion Practice: Do I Have An Appealable Order?**

I know what you're thinking —"I don't have to worry about the deadline to appeal until entry of judgment after trial." But that supposedly "final" judgment is not the final word on appealability. Many prejudgment orders are appealable. A failure to appeal means that the opportunity to challenge the order is lost forever.

### **What you can appeal**

In California—unlike federal court—"finality" of a judgment means that all issues have been resolved between any two opposing parties, rather than among all the parties in a case. So, for instance, a demurrer sustained or summary judgment granted as to one of several defendants (or against one of several plaintiffs) can yield an appealable judgment. *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 437 (2003); compare *California Dental Ass'n v. California Dental Hygienists' Ass'n.*, 222 Cal. App. 3d 49, 59 (1990) (Dismissal of complaint is not appealable when there is a cross-complaint against the plaintiff.)

An order also can be appealable if it is collateral to the subject matter of the litigation, is final as to that collateral matter, and directs payment or the performance of an act. *Marsh v. Mountain Zephyr, Inc.*, 43 Cal. App. 4th 289, 297-298 (1996) (order setting expert's witness fee); 9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, Section 60, at 116 (A matter is collateral if it is not "important and essential to the correct determination of the main issue").

Although the primary authority for appealability is [Code of Civil Procedure §904.1](#), it's important to check the statutes governing your particular proceeding, because orders can be appealable under other provisions of the Code of Civil

Procedure and under various provisions of the Family and Probate Codes. For instance, an order granting or denying an anti-SLAPP motion is appealable ([Code Civ. Proc., §425.16\(i\)](#)), as is an order denying arbitration—although not an order compelling arbitration ([Code Civ. Proc., §1294](#)).

### **What you can't appeal**

Some orders that might seem appealable aren't. For instance, an order sustaining a demurrer without leave to amend or granting summary judgment isn't appealable—an appeal lies only from the judgment entered pursuant to those orders. See [Evans v. Dabney](#), 37 Cal. 2d 758, 759 (1951) (demurrer). So, don't start celebrating when the opposing party seems to have missed the deadline for filing a notice of appeal after you win a summary judgment motion. If judgment wasn't entered, the deadline period hasn't even started to run.

### **You can't create appealability**

Sometimes parties want to get an early appellate ruling on a dispositive issue. They try to create an appealable judgment by dismissing unaffected causes of action without prejudice so as to be able to reinstate them if there's a reversal. Don't waste your time—the appellate court will dismiss the appeal. See [Don Jose's Restaurant, Inc. v. Truck Ins. Exchange](#), 53 Cal. App. 4th 115, 116-117 (1997) (no finality where stipulation to dismiss some causes of action without prejudice); [Hill v. City of Clovis](#), 63 Cal. App. 4th 434, 444-445 (1998) (same).



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