



## APPELLATE INSIGHT

Peg Carew Toledo

Reprinted with permission from the Daily Recorder

### *Don't Be Late!*

Every appeal begins with the appellant filing a notice of appeal. It is important to understand the deadline for filing a notice of appeal because it is jurisdictional. Thus, the failure to file a timely notice of appeal will result in the dismissal of the appeal for lack of jurisdiction.

Here, we discuss the California Rule of Court governing notices of appeal in civil cases and two recent decisions interpreting that rule.

#### Rule 8.104

California Rule of Court 8.104 establishes the deadline for filing a notice of appeal from a judgment or appealable order. The rule expressly states that "if a notice of appeal is filed late, the reviewing court must dismiss the appeal."

Rule 8.104(a) provides that the earliest of seven possible dates is the deadline for filing a notice of appeal: 1) 60 days after the superior court clerk mails the party filing the notice of appeal a document titled "Notice of Entry" of judgment showing the date it was mailed; 2) 60 days after the superior court clerk mails a file-stamped copy of the judgment showing the date it was mailed; 3) 60 days after the party filing the notice of appeal serves a document titled "Notice of Entry" of judgment accompanied by a proof of service; 4) 60 days after the party filing the notice of appeal is served by a party with a document titled "Notice of Entry" of judgment accompanied by a proof of service; 5) 60 days after the party filing the notice of appeal serves a file-stamped copy of the judgment accompanied by a proof of service; 6) 60 days after the party filing the notice of appeal is served by a party with a file-stamped copy of the judgment accompanied by a proof of service; or 7) 180 days after entry of judgment.

For purposes of Rule 8.104(a), the term "judgment" includes an appealable order. Also, service by mail of a "Notice of Entry" of judgment or file-stamped copy of a judgment does not extend the time to file a notice of appeal. The 60 days begins on

the date of mailing and does not depend upon whether the party actually receives the document.

Although calculating a 60-day time period is relatively simple, often it can be difficult to determine which one of these seven deadlines governs your appeal. Two recent appellate decisions provide additional guidance on this issue.

#### **Alan v. American Honda Motor Co.**

In *Alan v. American Honda Motor Co.*, 40 Cal. 4th 894 (2007), the California Supreme Court addressed the issue of whether the appellant had timely filed his notice of appeal from the superior court's order denying class certification.

On January 2, 2003, the superior court clerk mailed to the parties two documents in a single envelope. The first document was titled "Statement of Decision Re: Alan's Motion for Class Certification," which was file-stamped. The second document was a minute order titled "Ruling on Submitted Matter/Motion for Class Certification," which contained the date that the two documents were mailed to the parties, but it was not file-stamped.

On January 21, 2003, the defendant, American Honda Motor Company, filed and served on the plaintiff a document titled "Notice of Entry of Order and Statement of Decision Denying Class Certification." The January 2nd minute order and statement of decision were attached.

The plaintiff filed his notice of appeal on March 6, 2003 — 63 days after the superior court clerk mailed copies of the statement of decision and minute order, and 44 days after Honda mailed its "Notice of Entry" of the court's ruling. The Court of Appeal dismissed plaintiff's appeal as untimely.

The California Supreme Court reversed, concluding that neither document mailed by the superior court clerk on January 2nd satisfied Rule 8.104(a)(1). The Court held that "rule 8.104(a)(1) does indeed require a single document — either a 'Notice of Entry' so titled or a file-stamped copy of the judgment or appealable order — that

is sufficient in itself to satisfy all of the rule's conditions, including the requirement that the document show the date on which it was mailed." Thus, the clock did not start to run until Honda served the "Notice of Entry" and plaintiff's appeal was timely filed 44 days later.

**Citizens for Civic Accountability v.  
Town of Danville**

In *Citizens for Civic Accountability v. Town of Danville*, 167 Cal. App. 4th 1158 (2008), the Court of Appeal addressed whether the superior court clerk's e-mailing of a notice of filing of a file-stamped judgment triggered the 60-day period to file a notice of appeal. The appellate court held that e-mail did not comply with Rule 8.104(a)(1).

In this case, a superior court order required the parties to electronically file and serve documents because it was a complex litigation matter. The superior court clerk e-mailed the parties a notice that judgment had been filed. The e-mail directed the parties to a website where they could log in and open an electronic copy of the file-stamped judgment.

In denying the respondents' motion to dismiss the appeal, the appellate court reasoned that e-mail is not "mail" as that term is used in Rule 8.104. The court held that the term "mail" as used in the rule means the United States Postal Service. The court reasoned that allowing the clerk's e-mail to trigger the appeal period would create a trap for the unwary. The decision acknowledges that in most cases

it is not the clerk's action that triggers the beginning of the period to file a notice of appeal. Rather, "in the ordinary case, either a party triggers the time to appeal by serving a notice of entry of judgment or the appeal period runs for 180 days from entry of judgment."

**Conclusion**

Three lessons can be learned from these cases. First, there must be exact compliance with Rule 8.104 to trigger the time to file a notice of appeal. Second, once a party decides to appeal, it makes sense to file the notice of appeal immediately. Third, promptly file and serve a "Notice of Entry" of the judgment or appealable order to create certainty as to when the time to appeal expires.

*Peg Carew Toledo is Of Counsel at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgslaw.com.*

*C. Athena Roussos contributed to this article. Roussos is an attorney in Elk Grove, California, and is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches Appellate & International Advocacy at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.*