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And that's final!

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EXCEPTIONALLY APPEALING

The issuance of an appellate opinion prompts jubilation for the winners and despair for losers. And why shouldn't it? The appellate court has decided the case for all to see, so it's all over but the crying, right? Well, not really. The appellate lawyers -- those wallflowers standing in the corner -- aren't fully engaged in the celebration. They know the wisdom of the great Yogi (as in Berra), that it ain't over 'til it's over. Or in legalese, an opinion isn't really final until finality.

As its title makes clear, California Rule of Court 8.264 governs "Filing, finality, and modification of decision." The "filing" of a decision is the excitement-inducing part: when the court issues its decision, i.e., per subdivision (a)(1), the appellate court clerk promptly notifies the parties and lower court of the opinion. These days, notification issues via e-mail, and opinions are posted online both on the published/unpublished opinion pages and on the "Case Summary" webpage of the online docket.

Subdivision (b), governing "finality of decision," is the party-pooper. That part of the rule makes clear that "a Court of Appeal decision in a civil appeal" (even including an order involuntarily dismissing an appeal) is not "final in that court" until 30 days after filing. This means that the Court of Appeal has 30 days within which to change its mind and modify its decision any way it likes. If it so desired, the court could -- on the same day as issuing the opinion or on any of the next 30 days -- simply withdraw its decision and issue a completely different decision. The "tap, tap, no-take-backs" kindergarten rule doesn't apply. This is why appellate lawyers do not party like there's no tomorrow upon receiving a favorable decision. They know that there are at least 30 more tomorrows before the opinion is secure.

As noted, until "finality" attaches, the court may "modify" its decision, which allows for any sort of change, large or small. Modifications range from minor tweaks and edits -- like fixing typos or adding the names of all counsel -- to inserting a bit of new text or a footnote, to changing publication status, or even to changing the outcome. A court may modify its decision sua sponte. More often, however, modifications are prompted by the parties, who can use the 30-day window before finality to request changes. Thus, within 15 days of a decision, an unhappy party may file a rehearing petition (Rule 8.268). Such petitions are overwhelmingly denied summarily. But in exceptional cases, they may provoke a modified decision. (Only in truly exceptional cases is there really a rehearing.)

Short of a formal rehearing petition, at any time within the window of opportunity, a party may submit a request for correction or modification (pointing out a typo or suggesting some other minor change). Even non-parties can get into the action by filing modification requests or -- within 20 days from issuance -- requests for publication (Rule 8.1120).

So that's what this 30-day "trial period" is all about: giving the court and parties a bit of time to examine and digest the decision and see if there's a need for some change. If the court agrees that a change is appropriate, any modification order must expressly state whether it is, or is not, changing the actual judgment, i.e., changing who the winner is or making some substantial alteration in the outcome (Rule 8.264(c)(2)). If the judgment is changed, then the modified decision is really a new decision, and so the 30-day finality period starts all over again (meaning, for example, that the now-loser has a chance to petition for rehearing). Id. If the judgment is not

changed, then the finality clock is not restarted and the finality date remains the same, with finality attaching 30 days from the issuance of the decision. Id.

The same is true for a change in publication status: If an unpublished case is ordered published, then the finality period starts over, with the 30 days running from the date of the publication order (Rule 8.264(b)(3)). This makes sense, because a party who was willing to live with an adverse decision that was unpublished might feel differently if the decision is published, and decide that publication changes things enough to petition for rehearing or seek some other modification. Restarting the clock also allows a window for interested non-parties to react to a decision that has now become binding precedent. Such meddling busybodies might not have noticed or cared about the unpublished decision, but might care very much about a published opinion.

Once finality attaches, however, the Court of Appeal loses jurisdiction to modify the decision, grant rehearing, or order publication.

Properly calculating the date of finality is important. First, the court and parties need to know the date when the decision really is beyond the Court of Appeal's control. Second, the date of finality triggers the deadlines for possible Supreme Court review, either the 10-day time period to petition for review (Rule 8.500(e)(1)) or the 30-day time period for a sua sponte grant of review (Rule 8.512(c)(1)). Finality is also the trigger for the 30-day period for anyone to request the Supreme Court to depublish a published opinion (Rule 8.1125(a)(4)).

So let's break this down. Suppose the 30th day for finality of a decision falls on a Saturday, a legal holiday for calendaring purposes (Code Civ. Proc. Section 12a). Unlike many calendaring dates, this does not mean that the date of finality extends to the following Monday. Finality can be on a weekend or holiday for Supreme Court calendaring purposes (Rule 8.500(e)(1)). Note, however, that under rule 8.264(c)(1), if the court is closed on the date of finality, then the court may modify the decision the next date the court is open. So for purposes of the Court of Appeal, finality does extend to the next business day. But that doesn't work for counsel's purposes: If finality falls on a Saturday, the next day (Sunday) is day one of the ten-day period to petition for review.

Note that the Court of Appeal has no power to extend its 30-day finality window. In contrast, the Supreme Court does have the power to extend the 30-day finality clock for its opinions, to a maximum of 60 additional days (Rule 8.532(b)(1)). Finally, one very rarely invoked finality quirk is when "a Court of Appeal decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount"; in that scenario, if a consent to the additur or remittitur is timely filed before finality, then the finality restarts from the filing date of the consent (Rule 8.264(d)).

A point of confusion in this area is that the Court of Appeal's online "Disposition" page for each docket includes a box for "Disposition Type," which usually reads "Final" when a decision issues. But this clerk's online docketing notation about the decision being "final" has nothing to do with "finality" regarding the court's jurisdiction. Instead, that clerk's entry is meant to reflect whether the disposition is "partial" (meaning that a further disposition will eventually come) or

"final" meaning no further disposition is expected because the decision resolves all claims as to all parties. Thus, the word "final" on the online docket disposition page (or in email notifications about disposition) is not the sort of finality lawyers and parties care about.

All of that outlines the basics of finality, which are well-known to appellate specialists, but not always understood by "normal" lawyers or their poor assistants who have to calendar key dates. So now let's make it more interesting by addressing the exceptions.

Not every Court of Appeal decision enjoys a 30-day "trial period." Instead, certain decision are final immediately upon issuance. These are: An order summarily denying or dismissing a writ petition, or an order denying or dismissing a writ petition as moot after issuance of an alternative writ, OSC, or writ of review (Rule 8.490(b)(1)); the denial of a petition for writ of supersedeas (Rule 8.264(b)(2)(A)); the dismissal of an appeal on request or stipulation (Rule 8.264(b)(2)(b)); an order denying transfer of a case from a superior court appellate division to the Court of Appeal (Rule 8.1018(a)); and a decision in a writ proceeding for which the Court of Appeal expressly states that finality is immediate to prevent mootness or frustration of the relief granted, or otherwise to promote the interests of justice (Rule 8.490(b)(2)A)). There are also finality exceptions in the criminal and habeas realms, e.g., the denial of an application for bail or to reduce bail pending appeal, and the dismissal of an appeal on request or stipulation. See Rules 8.366(b)(2) and 8.387(b). The immediate finality of orders denying writ petitions is especially important, because it means parties have only ten days to petition for review.

Regardless of these technical exceptions, what's really exceptional, of course, is for any decision to change within the 30-day window for finality. The vast majority of cases live out this month without incident -- even including cases where rehearing is sought, since most rehearing petitions are summarily denied. Of course, the sort of "finality" we've been discussing is still not finality as a normal human being would view it. As described already, even after finality in the Court of Appeal, the Supreme Court may still grant review or order publication or depublication. So "finality" is not true finality; or, as appellate nerds say, it ain't over 'til the remittitur issues.