

Appellate Horrorscope



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SAGITTARIUS



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EXCEPTIONALLY APPEALING

As another remarkable year draws to a close, it's time to gaze into the crystal ball and prognosticate what fortunes may unfurl. For your amusement and edification, here's an appellate horrorscope.

Aries (Mar. 21-Apr. 19): Have you been naughty again? Your overly aggressive nature will get you into trouble. However much you may dislike your opposing counsel, your opposing party, your trial court judge, or even the appellate court, failing to keep a civil tongue will land you in a world of hurt. Behave or pay the price. An appellate brief is "not an appropriate vehicle for an attorney to 'vent his spleen' after losing." [*Pierotti v. Torian*](#), 81 Cal. App. 4th 17, 32 (2000). Avoid 8.276.

Taurus (Apr. 20-May 20): Don't be so bullheaded. Acknowledge the limitations of the facts and the constraints of controlling law. Let *stare decisis* be your guide. If you insist on pushing things the way only you see them, instead of how the standard of review dictates, you're not only going to end up losing, but you may find yourself in hot water as well.

Gemini (May 21-June 20): Perspective matters and you excel at seeing things both ways. Is your injunction prohibitory or mandatory? You know that matters a lot, so look deeply and honestly when evaluating your next step. Your lucky number for 2021 is S260209 (i.e., *Daly v. San Berdu*).

Cancer (June 21-July 22): You think you're so smart, but maybe you're too cute by half. Yes, you know that Code of Civil Procedure Section 12a(a) extends deadlines falling on a weekend or holiday to the next business day. (And you're not even thrown by a section numbered 12a(a).) But you erred grievously by applying that to your finality calculation for purposes of calendaring your petition for review. A petition for review is due 10 days after finality, and finality is not extended even if it falls on a day the court is closed. Your unlucky number is 8.500(e)(1).

Leo (July 23-Aug. 22): You Leos are so uptight and rule-bound. Give yourself some breathing room. Don't view due dates as deadlines. Rather than giving into the fear and negativity of a "default period," consider what comes as a "grace period" and embrace it. Return to your tasks with fresh eyes and a positive attitude. Your lucky numbers are 8.212 and 8.220. (But don't forget that this applies only to principal briefs, not to reply briefs. See Rule 8.220(a). Make that mistake, and you'll be very unhappy.)

Virgo (Aug. 23-Sept. 22): Once again, you have acted too hastily. Where there's a complaint and cross-complaint involving the same parties, there is no final, appealable judgment until both have been resolved. And don't try to get cute with

the collateral order doctrine. That just makes you look desperate. Finish what was started and then try again. Your lucky mantra is *Om mani padme hum* Morehart Kurwa.

Libra (Sept. 23-Oct. 22): Indecision will cost you. Figure out how you want to proceed. If you elect an appendix, you will have more control -- but must take on the responsibility of more work. Designating a clerk's transcript is a little more work up front, but easier down the road; yet you will slow things down. Further, you know in your heart that it's best also to designate those reporter's transcripts, too. Your lucky numbers are 8.122, 8.124, 8.130.

Scorpio (Oct. 23-Nov. 21): There's a song in your heart and you want to sing out -- or in your case, Scorpio, sting out. It's not like you to just sit back and let the hits and evidence pound you. To challenge the admission of evidence, you must make specific and timely objections. Failure to object is fatal to appellate review. Your lucky number is 353. Your unlucky number is 1150. Don't think that Evidence Code Section 1150 will "automatically preserve" evidentiary issues for you when you didn't object.

Sagittarius (Nov. 22-Dec. 21): Oh no! Did you forget that a judgment or an appealable order is a jurisdictional prerequisite to an appeal? If the order is not appealable, the appeal must be dismissed. In particular, no appeal lies from an order sustaining a demurrer without leave to amend; it lies instead from the signed order or judgment of dismissal entered after the order sustaining the demurrer. *Hill v. City of Long Beach*, 33 Cal. App. 4th 1684, 1695 (1995); *Mounger v. Gates*, 193 Cal. App. 3d 1248, 1254 (1987). Return to where you were, consider your options, and maybe try again with the right order or judgment. You can fix this mess. Your lucky number is 904.1. Consider getting it tattooed where you can see it.

Capricorn (Dec. 22-Jan. 19): It's never enough for you is it? Even with a lengthy reporter's transcript and abundant volumes of appendix (or clerk's transcript), you always insist on more. But is that augmentation really necessary? Are your compulsive hoarding impulses driving you to seek more and more items for judicial notice? Remember that seeking to introduce new evidence on appeal is almost certainly not going to work. Your lucky numbers might be 8.155, 8.252 and 909. See [Silvaco Data Sys. v. Intel Corp.](#), 184 Cal. App. 4th 210, n.2 (2010) (commenting on an 8,000-page appendix: "Seldom have so many trees died for so little.").

Aquarius (Jan. 20-Feb. 18): You know it and your friends know it. You have an unappealing character trait, you Aquarius, you: You're a sandbagger. Time and again, you infuriate everyone by keeping mum when you should speak up, but then you cry out when it's too late. You're all wet. Arguments not raised in the trial court

are forfeited by appellants on appeal. See [People v. Fin. Cas. & Sur.](#), 64 Cal. App. 5th 405, 416 (2021). And arguments not presented in your opening brief are deemed waived. See [Aviel v. Ng](#), 161 Cal. App. 4th 809, 821 (2008). Your mantra from henceforth needs to be: Speak now or forever hold your peace.

Pisces (Feb. 19-Mar. 20): Accept that you are a fish out of water. You thought you had 60 days, only to learn you had only 30? You thought you had the same word-count for your reply brief as your opening brief? Your past mastery of state practices will not help you in federal court (and vice versa). Open your mind to new universes. In the meantime, call your carrier to discuss that tardy notice of appeal. Your unlucky rule is FRAP 4(a)(1)(A), not CRC 8.104(a)(1).

If today's your birthday! If today's your special day, don't hold back. File that writ petition, rehearing petition, petition for review, or petition for certiorari. The stars just might align and grant you a very rare fortunate break. And if the spirit-world rejects your offering, there's always next year.