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Minerva appeals

We might rightly believe that to give birth to an appeal, one absolutely must file a notice of appeal. That seems like a pretty fundamental precept, right? But in fact, the reporters contain many cases in which an appeal was allowed even without a notice of appeal having been filed.

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EXCEPTIONALLY APPEALING

The most prominent figure on the Great Seal of the State of California is the Goddess Minerva, the Roman deity of wisdom and strategic warfare. *See* Gov. Code Sections 400, 405. Minerva was born by bursting through Jupiter's head, emerging as a grown adult. She represents California because the Golden State too was "born" fully formed, becoming a state without first having been a territory.

Skipping seemingly essential steps may make for exciting mythology, and may justify getting a gold-laden paradise quickly admitted into the Union. But it's not wise when practicing law, especially appellate law (appellate lawyers and judges typically love legal technicalities more than "regular" lawyers). We might rightly believe that to give birth to an appeal, one absolutely must file a notice of appeal. That seems like a pretty fundamental precept, right? But in fact, the reporters contain many cases in which an appeal was allowed even without a notice of appeal having been filed. How can such Minerva appeals burst forth fully formed without the ordinary starting materials? This sounds like an Exceptionally Appealing topic.

We'll begin at the U.S. Supreme Court, with Chief Justice Warren explaining, in *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962), that although "the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal ..., a liberal view of papers filed by indigents and incarcerated defendants" requires courts to be generous in evaluating what is enough to open the gates of appellate jurisdiction.

Thus we have the exceptional principle that even when a party fails to comply with the simple requirement of filing a notice of appeal, an effective substitute may exist as long as there is some written document that might reasonably be construed as a notice of appeal. If such a document provides adequate notice to the courts and parties that an appeal was intended, then that should suffice. Many different sorts of papers have been construed to be substitutes for a notice of appeal, some pretty surprising.

Briefs. Why bother with filing a notice of appeal when you can just file an opening brief? In *Smith v. Barry*, 502 U.S. 244 (1992), an inmate's informal opening brief filed within the time frame for appealing was deemed an adequate substitute for a notice of appeal. The brief was deemed the functional equivalent of a notice of appeal because it

indicated who was appealing, to which court the appeal was being taken, and what was being appealed.

And this isn't just for inmates or pro pers. In *Intel Corp. v. Terabyte Int'l*, 6 F.3d 614, 617-18 (9th Cir. 1993), an opening brief filed by counsel for a corporation was sufficient, since it specified the parties to the appeal, designated the judgment appealed from, and named the appellate court. *See also Allah v. Superior Court*, 871 F.2d 887, 889-90 (9th Cir. 1989); *Kimzey v. Flamingo Seismic Sols. Inc.*, 696 F.3d 1045, 1049-50 (10th Cir. 2012).

Writs. A not-surprising document that may be deemed a notice of appeal is an appellate writ petition. *In re Urohealth Sys., Inc.*, 252 F.3d 504, 508 n.4 (1st Cir. 2001). This one makes some sense. Writs are "like" appeals, and appellate courts sometimes deem flawed appeals to be writs and vice-versa.

IFP Motions. Similarly, a motion for leave to proceed on appeal in forma pauperis can count as a notice of appeal, if filed within the time for filing a notice of appeal. *Taylor v. Knapp*, 871 F.2d 803, 805 n.1 (9th Cir. 1989); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 n.2 (9th Cir. 1986); *Ashford v. Steuart*, 657 F.2d 1053, 1054 (9th Cir. 1981).

Requests for counsel. The same is true for would-be appellants who are acting in pro se and timely file a motion seeking appointment of appellate counsel. *Estrada v. Scribner*, 512 F.3d 1227, 1236 (9th Cir. 2008).

Requests to appeal. And a motion seeking leave to pursue an interlocutory appeal can be deemed a regular old notice of appeal. *San Diego Comm. Against Registration & the Draft (Card) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1473-74 (9th Cir. 1986).

Extension requests. Even a request for an extension of time can qualify. *Andrade v. Attorney General of Cal.*, 270 F.3d 743, 752 (9th Cir. 2001).

And More. The list could go on and on: Letters to the district court or appellate court have been construed as notices of appeal (e.g., *Pierson v. Dormire*, 484 F.3d 486 (8th Cir. 2007); *Grune v. Coughlin*, 913 F.2d 41 (2d Cir. 1990); *Brannan v. United States*, 993 F.2d 709 (9th Cir. 1993)), as have requests for certificates of probable cause or certificates of appealability (e.g., *Ortberg v. Moody*, 961 F.2d 135 (9th Cir. 1992); *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990)), filings concerning the record for appeal (e.g., *Rabin v. Cohen*, 570 F.2d 864 (9th Cir. 1978)); stay motions, and even a civil appeals docketing statement (*Vivendi SA v. T-Mobile USA Inc.*, 2009 WL 3525855 (9th Cir. 2009)). In short, just about any document might do the trick.

California interlude: California law also demands that notices of appeal be "liberally construed" (Cal. Rule of Court 8.100(a)), so that the important right to appeal is not lost

based on noncompliance with technical formalities. *Moyal v. Lanphear*, 208 Cal. App. 3d 491, 497 (1989); *Walker v. Los Angeles Cty. Metro. Transp. Auth.*, 35 Cal. 4th 15, 20 (2005); *Norco Delivery Serv., Inc. v. Owens-Corning Fiberglas, Inc.*, 64 Cal. App. 4th 955, 960-61 (1998) ("This policy is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal."). Thus, an informal letter may qualify as a sufficient notice of appeal. *In re Christopher A.*, 226 Cal. App. 3d 1154, 1158, 1161, n.5 (1991). And a transcript designation could qualify as well. *Dept. of Indus. Relations v. Nielsen Const. Co.*, 51 Cal. App. 4th 1016, 1024 (1996); *but see Bosetti v. United States Life Ins. Co.*, 175 Cal. App. 4th 1208, 1224-25 (2009).

So now, you might think that just about any document could be a notice of appeal. Yet there are -- of course -- plenty of cases rejecting various documents. For instance, in *In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189 (9th Cir. 1990), a request for transcripts (and a letter to the court) did not clearly evince an intent to appeal (and were not served). In *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989), a stay motion filed in the appellate court was not treated as a notice of appeal, and the court refused to interpret it that way. Indeed, the court noted that the "lenient standard" applies primarily for the benefit of parties not represented by counsel. Other cases reiterate the point that lenient treatment should not be expected where parties have counsel and neither life nor liberty is at stake. *Cel-A-Pak v. Cal. Agr. Labor Relations Bd.*, 680 F.2d 664 (9th Cir. 1982); *Munden v. Ultra-Alaska Assoc.*, 849 F.2d 383 (9th Cir. 1988).

Of course, most of this precedent comes from the dark ages before the advent of electronic filing. Back in the snail-mail days, real paper documents appeared at trial and appellate courts willy-nilly, in all manner of formats, ranging from fully compliant to "is this a napkin?" With e-filing, it should be somewhat harder for random filings to suddenly appear, since such filing usually requires at least a valid case number. Thus, while a party could simply deliver an opening brief to a court in the past, with e-filing it does not seem possible to e-file a brief without an appeal already in existence.

Despite the liberality afforded in construing documents as effective notices of appeal, it should be painfully obvious that careful practitioners should never count on that to perfect an appeal. The safest and soundest practice is always to file an honest to goodness notice of appeal -- indeed, like voting in Chicago, file early and file often. That's the best way to give birth to your precious bundle of appellate joy.

Exceptional research provided by Manatt associate Emily M. Speier.