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Sink or Sign

FOCUS COLUMN

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For all the complexities inherent in appellate work, the start of an appeal is a deceptively simple matter. A notice of appeal to the California Court of Appeal must satisfy only three formal requirements. The first requirement is obvious to anyone who recognizes the jurisdictional nature of the filing: It must be timely filed. California Rule of Court 8.104(b) ("If a notice of appeal is filed late, the reviewing court must dismiss the appeal."). Moreover, a notice may be validly filed even without a proof of service. Cal. R. Ct. 8.100(a)(3) ("Failure to serve the notice of appeal neither prevents its filing nor affects its validity").

The second requirement is that the notice of appeal must identify the particular judgment or order being appealed. Cal. R. Ct. 8.100(a)(2). But that identification is liberally construed, and a notice of appeal need not specify the superior court case number and may even include the wrong case number. *D'Avola v. Anderson*, 47 Cal. App. 4th 358, 361-362 (1996). Similarly, the rules of court specifically provide that the notice need not specify the appellate court to which the appeal is being taken. Cal. R. Ct. 8.100(a)(2). Even if the notice names the wrong appellate court, that defect is not fatal. *First Am. Title Co. v. Mirzaian*, 108 Cal. App. 4th 956, 959 (2003) (appeal perfected even though notice of appeal stated wrong appellate court).

The third formal requirement for a valid notice of appeal is that it must be signed: "The appellant or the appellant's attorney must sign the notice." Cal. R. Ct. 8.100(a)(1). This final requirement sounds like it should be simplest of the three, but in fact is not necessarily as obvious as the first two. After all, the appellate rules expressly provide that appellate *briefs* do not need to be signed. Cal. R. Ct. 8.204(b)(9). A notice of appeal, however, is quite different from an appellate brief: The former is a jurisdictional document filed in the trial court; whereas briefs are not jurisdictional documents and are filed with the court of appeal.

The rules make clear that either the appellant or the appellant's attorney can sign the notice, and this signature requirement is liberally construed. Thus, an attorney may sign for a client even if that attorney has made no prior appearance in the litigation. *Bell v. Hummel*, 36 Cal. App. 3d 1009, 1014 (1982). This makes sense, because an appellant - by definition having lost in the trial court - may not be on the best terms with trial counsel and may have sought new counsel. Such a newly retained attorney may sign and file the notice of appeal even though he or she may never have appeared as counsel of record in the action and without formally appearing even to associate in as counsel. Or the appellant may not have retained new counsel yet, and so may need to sign the notice personally.

Indeed, the term "attorney" in this context takes the word's original, broad definition as "one authorized to act for another." Thus, any person, whether or not a licensed "attorney at law," may sign a notice of appeal for an appellant. *Seeley v. Seymour*, 190 Cal. App. 3d 844, 853 (1987).

The key concept is that the signer must have the appellant's authorization to sign the document. *Edlund v. Los Altos Builders*, 106 Cal. App. 2d 350, 357 (1951). An appeal premised on a notice of appeal signed by an attorney who did not have the client's consent to appeal is subject to a dismissal. *In re Alma B.*, 21 Cal. App. 4th 1037, 1043 (1994). In fact, a lawyer is subject to State Bar discipline for pursuing an appeal without the client's authorization. Business & Professional Code Section 6104; *Matter of Regan*, 4 Cal. State Bar Ct. Rptr. 844, 853-855 (Rev. Dept. 2005) (lawyer suspended for pursuing appeal despite client's contrary instructions); *In re Josiah Z.*, 36 Cal.4th 664, 680 (2005) (lawyer may not "unilaterally appeal" in the name of zealous advocacy).

The courts assume that whomever signs a notice of appeal had the necessary authority to do so, absent "a clear and satisfactory showing" to the contrary. *In re Malcolm D.*, 42 Cal.App.4th 904, 910 (1996); *In re Helen W.*, 150 Cal. App. 4th 71, 78 (2007). This is true, even if the signature appears to be "forgery."

An interesting example of a court invalidating a signed notice of appeal is *Bryan v. Bank of America*, 86 Cal. App. 4th 185, 192 (2001). Bryan concerned a plaintiff who suffered from emotional and mental deficiencies that required medication. While her case was pending she stopped taking her medication, became delusional, and disappeared. The trial court granted summary judgment for defendants, and one of the plaintiff's attorneys signed and filed a notice of appeal. The attorney filed two requests for extensions of time to file his opening brief, each time signing declarations stating that he had obtained permission for the requests from his client as required by the Rules of Court. The plaintiff's other attorney later advised the Court of Appeal that the plaintiff had in fact disappeared nearly a year earlier, was confined to a mental hospital, and was incompetent to handle her affairs. The court dismissed the appeal and issued a remittitur. Several months later, the plaintiff moved to recall the remittitur. The motion was supported by declarations concerning her incompetence, and the second attorney attested that the plaintiff had restarted her medication and wished to proceed with the appeal.

The Court of Appeal denied the motion to recall the remittitur and awarded sanctions against the first attorney. The attorney argued that his duty to protect his client's interests was "at odds with the requirement to fill out a form request for continuance." The court rejected this argument, and held that he was unauthorized to proceed on behalf of a client who was incompetent and who he could not contact. The attorney should have so advised the appellate court and sought deferment of proceedings until a conservator could be appointed.

The law is thus clear that an individual appellant may sign a notice of appeal for himself or herself. Likewise, an attorney in fact or law may sign the notice when he has affirmative permission from the appellant. Complications arise, however, when the appellant is not a human being, but rather a legal entity.

Corporations, of course, cannot represent themselves in court; nor may they act through a non-licensed "attorney." Only a licensed member of State Bar will suffice. *Caressa Camille, Inc. v. Alcoholic Beverage Control App. Bd.*, 99 Cal. App. 4th 1094, 1101-1102 (2002). There is a split of authority, however, on the effectiveness of a notice of appeal filed on behalf of a corporation by a non-lawyer. In *Paradise v. Nowlin*, 86 Cal. App. 2d 897, 898 (1948), the 2nd District held that a notice of appeal entered by a corporation in propria persona was void because a corporation cannot represent itself in court.

More recently, however, courts have backed away from *Paradise*, and found that a corporation's notice of appeal is a curable defect. *CLD Const., Inc. v. City of San Ramon*, 120 Cal. App. 4th 1141, 1147 (2004); *Gamet v. Blanchard*, 91 Cal. App. 4th 1276, 1282 (2001).

According to a recent, unpublished decision, the same rule appears to be true with respect to trusts. *Indyway Investment v. Cooper*, 2007 WL 1196506 (Cal. App. 2nd Dist., April 24, 2007). There, the court concluded that a trustee could sign a notice of appeal on behalf of a trust, despite the fact that a trust may not appear in propria persona in court proceedings. More specifically, the trustee's signature was simply an act of the trust, not the unauthorized practice of law.

Similarly, in *City of Downey v. Johnson*, 263 Cal. App. 2d 775 (1968), a notice of appeal was signed by the executor of an estate. The court held that the notice was valid. It drew a distinction between "the capacity of a person acting in propria persona to sign and file a notice of appeal and his capacity to execute and file pleadings, papers, and briefs in both the trial and appellate courts." The appellate practice rules are "a liberalization and a distinct departure from the general rule that a party represented by counsel may not file papers in propria persona in the litigation." Accordingly, the executor properly could file the notice of appeal, but none of the briefs or other papers.

These complications are easily avoided. In the rush to guarantee a timely filing of the jurisdictional notice of appeal, practitioners should take care not to forget to sign the notice. Moreover, they should ensure an explicit understanding - preferably in writing - with their clients about whether to appeal. A lawyer in doubt about having authority to sign a notice of appeal should have the client sign the notice personally. Lawyers representing corporations or other entities should advise their clients that the safest route to a properly filed notice of appeal is to have a lawyer sign it. Even where there appears to be wiggle room, such as in the context of trusts, the best course is for the lawyer to sign.

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