

Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Section will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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## **Finality & Remittitur: What Goes Up Must Come Down**

By Benjamin Shatz

Sir Isaac Newton and Sammy Davis Jr. (courtesy of Blood, Sweat and Tears) understood a universal law: What goes up, must come down. This applies as much to appellate litigation as gravity. Cases start and end in the trial court. The notice of appeal is the jurisdictional document (filed by a litigant) taking a case "up," and the remittitur (issued by the appellate court) is the jurisdictional document sending the case back "down." Understanding this jurisdictional path is essential to properly managing an appeal to the very end.

**Finality: Is This The End?** The filing of the court of appeal's opinion may feel like the end of the story, but it is actually just a milestone—though a very important one—along the jurisdictional parabola of an appeal's lifecycle. That opinion is not yet jurisdictionally "final" for another 30 days. (Cal. R. Ct. 8.264(b)(1).) "Finality" can mean a number of things; the focus here is not finality for purposes of appealability or preclusion but rather finality for purposes of altering the opinion.

This 30-day finality window—which also applies to orders involuntarily dismissing appeals—exists to provide a little breathing room for the decision and an opportunity to address next-morning regrets. Thus, if the justices wake up the next day (or any day within the 30) thinking "oh no, we've made a terrible mistake," they still have a chance to change the decision. Such second thoughts are very rare, and typically are prompted by a rehearing petition, which the court must decide within the 30 days. After the 30 days, the court of appeal loses its power over the decision and cannot modify it, grant rehearing or order publication. (Rules 8.264(c)(1), 8.268(a)(2), 8.1120(b)(1).) Remember though that many court of appeal rulings are not "decisions" and thus are final immediately, e.g., orders summarily denying writ petitions, including supersedeas petitions. (Rules 8.490(b)(1), 8.264(b)(2)(A).)

If, within the 30-day window, the court of appeal modifies a decision substantively—if it changes the disposition or costs award—or orders publication, then a new 30-day finality period begins. (Rules 8.264(c)(2), 8.264(b)(3).)

If the 30th day falls on a weekend or holiday, then the court of appeal retains power over its decision until the close of the next business day. (Rule 8.264(c)(1).) But this "next day" safe harbor applies only to the court of appeal; it does not apply to the actual date of finality, which remains the 30th day, holiday or not. This point is extremely important because the finality date affects calendaring for all other purposes: for practitioners to file a petition for review or a request to the Supreme Court for depublication; and for the Supreme Court to grant review *sua sponte*. (Rules 8.500(e)(1), 8.512(c)(1), 8.1125(a)(4).) Hence the rule of thumb that a petition for review is due 40 days from the filing of a decision—even though no rule uses the phrase "40 days," that figure derives from combining finality's 30 days with the 10 days to file a petition for review. The 40th day remains immutable even if the finality date falls on a holiday. (However, if the 40th day is itself a holiday, then the filing deadline is the next court day.)

After the 30-day period runs, the decision is final as to the court of appeal, but true "finality" still hasn't occurred: The Supreme Court can grant review or order depublication. Only after the time for Supreme Court action expires does the decision become truly final in the sense that it cannot be changed by any court. So 30-day finality does not mark the true termination of an appeal; for that, meet Mr. Remittitur.

**Remittitur: The Way Back Down.** Like the term "finality," "remittitur" has multiple meanings. In appellate argot, a remittitur is the jurisdictional document that formally ends the life of an appeal by notifying the world—especially the parties and trial court—that the decision is final. Issuance of this one-page document ends appellate authority and reverts jurisdiction in the trial court. It is called a remittitur because the Code of Civil Procedure requires the court of appeal to "remit" its judgment—its decision affirming, reversing, or modifying the trial court judgment that was appealed—back to the court where the appeal originated. (Code Civ. Proc. §§ 43, 912.) (The federal analogue is the "mandate.")

Why does the remittitur matter if the appellate judgment has already issued and become final? Because it creates (and can define) the trial court's continuing jurisdiction. Jurisdiction for what? For anything else that might need to happen in the case. Most importantly, the remittitur contains the award of costs on appeal, and the appellate court's issuance of the remittitur triggers the 40-day time period to file a memorandum of costs on appeal and any attorneys' fees motion. In cases where the fee-tail wags the litigation-dog, issuance of the remittitur may be one of the most key documents in the entire action.

Because a trial court lacks jurisdiction to act on the appellate court's decision before the remittitur issues, in some instances it may be useful to ask that the remittitur's issuance be stayed (typically to allow time to file a petition for certiorari to the United States Supreme Court). And in other highly unusual situations, it may be necessary to petition the court to recall a remittitur to correct a clerical error or revive a dead appeal to prevent a grave miscarriage of justice. A graphic example is *In re Grunau* (2008) 169 Cal.App.4th 997 (appeal dismissed decades earlier is reinstated to remedy lawyer misconduct).

The end stages of the appellate process involve what one might call the 3 R's and the 3 C's: rehearing, review and remittitur; certiorari, costs and closing. Proper file closing—including formal disengagement and disposition of file materials—truly is the end.

And this is the end of our Appellate Tips II series (begun in 2009) that has tracked the life of an appeal from initial decision through remittitur. Stay tuned for the roll-out of series III, which will address further topics from the appellate sphere.



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