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## Summary judgment granted and you're on the ropes: now what?

Your three options following the grant of summary judgment or summary adjudication

This article explores the benefits and best practices of three options following the grant of summary judgment or summary adjudication: (1) a new-trial motion, (2) a writ, and (3) an appeal.

### 1. New-trial motion: Reasons to file

If the court granted summary judgment (not summary adjudication), a new-trial motion may be the best move for two reasons.

First, a new-trial motion may get you exactly what you want – a new trial! And, if successful, a two-month new-trial motion is much faster than a two-year appeal.

Accordingly, you must always ask yourself if there is a chance you can turn

this judge around. Possibly the judge has a reputation for being especially open-minded. Also, you may be able to present the briefing with even greater clarity and simplicity, having had the benefit of briefing it once already.

Second, a new-trial motion can help you complete the record. This is especially applicable if newly discovered evidence surfaced after the hearing. But it is broader than that.

For example, if the court denied your continuance motion that would have allowed you to take a critical deposition and you deposed the witness the day after the hearing, consider making a new-trial motion and attaching to your

declaration the most relevant excerpts from that deposition. Or if the court excluded your expert's declaration for lack of qualifications, consider including in your new-trial motion a new declaration from your expert that clearly demonstrates the expert's qualifications to render the opinions given.

### *New-trial motion: Best practices for filing the notice*

When filing a new-trial motion, you should do three things.

First, you must determine whether the summary judgment order operates as a judgment (and so starts the clock on your time to file the notice).

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If the order merely “grants” the motion, then it is just an order. Under this scenario, you may choose whether to file your notice before “the entry of judgment” or within “15 days” of service of “notice of entry of judgment.” (Cal. Code Civ. Proc., § 659.)

On the other hand, if the order grants summary judgment and then goes on to “dismiss” all causes of action (or something similar), then it constitutes a judgment, service of which starts the clock on the 15-day period to file your notice. (Cal. Code Civ. Proc., § 581d, §659.)

Second, you must ensure that your notice is timely filed. Because the deadline for filing the notice is jurisdictional, the court lacks authority to consider any new-trial motion that is untimely, making a late filing fatal. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147.)

Calendaring the correct deadline can be confusing, because multiple notices of entry of judgment (possibly first by the clerk and then later by a party) are not uncommon – lulling even the most experienced lawyers into a false sense of security when they mistakenly calendar the deadline from a later notice instead of from the first.

Moreover, service of notice of entry is complete at the time of deposit in the mail and *receipt by you is not necessary for service to be effective.* (Cal. Code Civ. Proc., § 1013(a); *Sharp v. Union Pac. R.R. Co.* (1992) 8 Cal.App.4th 357, 360.)

Accordingly, to ensure the notice is timely filed, the safest method is to file the notice within 15 days of the date judgment was entered.

Third, your notice should include two things: (a) all possibly applicable grounds (Cal Code Civ. Proc., § 657); and (b) the date the court’s jurisdiction expires. (Cal Code Civ. Proc., § 660.)

Including all possibly applicable grounds in the notice provides maximum flexibility both for you and the court of appeal. For example, new grounds may emerge as you draft the points and authorities (due 10 days after the notice). But if you have not included these in the notice, you may not rely on them in your points and authorities.

Also, the court of appeal may (with a couple exceptions) generally affirm a new trial on any ground stated in the notice – and the more options a reviewing court has, the greater the chance of affirmance.

Your notice should also include in the caption or on the front page the date on which the court’s jurisdiction expires. This will help ensure that both you and the court have this date in mind. An order granting a new trial dated after jurisdiction has expired is a nullity – and would be a travesty! So, protect yourself by putting the date that jurisdiction expires on the front page of the notice (and repeat that date in all your supporting papers).

## 2. Writ: Reasons to file

If the court grants summary adjudication (not summary judgment), a writ may be appropriate, especially if the summary-adjudication order eliminates the heart of your case.

However, because writ review is wholly discretionary and less than 10 percent of writs are granted, you should assess whether you have any novel issue of law or any issue that would otherwise interest the court.

If you have such an issue, then a writ may be worth your while and, if granted, would be much faster than waiting until after trial to appeal plus the two years it takes for the appeal to run its course.

### **Writ: Best practices for filing**

If you decide to file a writ, you should do three things: (1) ensure the writ is timely; (2) ensure your supporting record is sufficient to show that review is warranted; and (3) highlight any novel issues that may make your petition particularly interesting to the court of appeal.

First, ensure the writ is timely by calendaring “20 days after service of notice of entry of the order.” (Cal Code Civ. Proc., § 437c(m)(1).) It is safest to assume that the order was served on the date it was entered. Also, “for good cause,” the trial court may extend your time to file for “one additional period not to exceed 10 days” so long as you apply for the extension before the “expiration of the

initial” 20-day period. (Cal Code Civ. Proc., § 437c(m)(1).)

Second, ensure your supporting record is sufficient. Judges report that attorneys’ failure to provide an adequate record is a significant factor in the high percentage of summary denials.

At a minimum, you should include the following: (1) legible copies of the order from which you seek relief; (2) the minute order and any attorney-prepared orders; (3) all documents and exhibits submitted to the trial court supporting *and opposing* your position; (4) any other documents necessary for a complete understanding of the case and the ruling under review; and (5) reporter’s transcript of the hearing, per California Rules of Court, rule 8.486(b)(3). Also, be sure to check the local rules in the appellate district where you will be filing to see if anything else is required.

Third, because writs are rarely granted and are wholly discretionary, you must frame your issue to the extent possible in such a way as to show it is novel, important, or may otherwise evade review if the court of appeal does not grant review now. The petition is your chance to sell the court on your issue.

## 3. Appeal: Reasons to file

When faced with an erroneous summary judgment where neither a new-trial motion nor a writ is suitable, you should appeal.

Of all the appeals to take, an appeal from summary judgment confers one of the most favorable standards of review possible – de novo review with the evidence viewed in the light most favorable to the plaintiff. (*Collin v. CalPortland Company* (2014) 228 Cal.App.4th 582, 588.)

And because “summary judgment is a drastic procedure to be used with caution,” “[a]n appellate court will reverse a summary judgment if any kind of a case is shown.” (*Levin v. State of California* (1st Dist. 1983) 146 Cal.App.3d 410, 414 (emphasis added).)

Moreover, courts reviewing summary judgment must “accept as true the facts” contained in plaintiffs’ evidence, and

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plaintiffs are also entitled to all “the reasonable inferences that can be drawn” from those facts. (*Wright v. State of California* (2015) 233 Cal.App.4th 1218, 1228.)

**Appeal: Best practices for filing**

If you are proceeding with an appeal, you must do three things: (1) determine whether the order constitutes a judgment, (2) ensure your notice is timely, and (3) name the proper order or judgment you are appealing from.

First, as explained above, before filing your notice of appeal you must analyze the order to determine whether it constitutes a judgment.

If the order is just an order, then you must wait for the judgment and calendar your appeal deadline from the judgment.

On the other hand, if that order contains language that renders it a judgment (Cal. Code Civ. Proc., § 581d), then you should calendar your deadline to appeal from the order.

Second, the notice of appeal must be timely – a late notice is fatal.

A reviewing court “must dismiss the appeal,” if a “notice of appeal is filed late.” (Cal. Rules of Court 8.104(b);

emphasis added.) And appellate jurisdiction cannot be conferred by consent, stipulation, estoppel, or waiver. (*Hollister Convalescent Hosp. Comm. Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667, 674.)

Under Rules 8.104 and 8.108, three possible deadlines govern the filing of a notice of appeal: **(1)** 60 days from service of either the judgment or appealable order; **(2)** 30 days from the denial of a *timely-filed* post-trial motion; or, **(3)** if neither of the first two applies, then 180 days after entry of judgment or appealable order.

Accordingly, if no post-trial motions were filed, the notice of appeal is due 60 days from service of the judgment or appealable order. It is safest to assume the judgment was served on the date it was entered.

If a new-trial motion was *timely filed*, then the notice of appeal is due 30 days from the denial of that motion. (Cal. Rules of Court 8.108(b).) You must confirm whether the motion was denied by an order or by operation of law upon expiration of the court’s jurisdiction (beware of any order entered after expiration of the court’s jurisdiction, which

is a nullity!). (Cal. Code Civ. Proc., § 660.)

Third, be sure to correctly name each appealable order or judgment appealed from. (Cal. Rules of Court 8.100(a).) And make sure your notice identifies all appellants. Failure to do this could result in that portion of the appeal being dismissed because the judgment is considered final as to nonappealing parties. (*Estate of McDill* (1975) 14 Cal.3d 831, 840.)

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