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PROPOSED RULE OF COURT SPECIFYING WHEN AN AMENDED JUDGMENT OR ORDER REQUIRES A NEW NOTICE OF APPEAL

I respectfully propose that the Judicial Council adopt a new Rule of Court specifying when a new notice of appeal is required following an amended judgment or order.[1] The state of case law on that question cries out for such a rule, and I am aware of no statute limiting the Judicial Council's authority to adopt one. (See Cal. Const., art VI, § 6; Code Civ. Proc. § 901.) To the contrary, the Legislature has long entrusted it with the governance of notices of appeal. (*E.g.*, *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 304; *Alkus v. Johnson-Pacific Co.* (1947) 80 Cal.App.2d 1, 10)

There is a compelling need for Judicial Council action today. Protecting the fundamental right of appeal, for both represented and self-represented parties, requires uniform and bright-line rules for notices of appeal. Unfortunately, though, existing case law on the effect of an amended judgment or order is both conflicting and vague.

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[1] The author has limited his practice to civil appeals since 1982; has been certified as an appellate specialist since 1997; is a past president of the California Academy of Appellate Lawyers; and has published and spoken frequently on appellate practice and professionalism.

As well summarized in Eisenberg et al., *Civil Appeals and Writs* (Rutter, Nov. 2019 update), §§ 3:56 *et seq.*, there are three conflicting lines of authority on this subject. Some cases rely on the clerical vs. judicial distinction, requiring a new appeal only when amendments are made by the trial court. (*E.g.*, *Stone v. Regents v. Univ. of Calif.* (1999) 77 Cal.App.4th 736, 743-44) Other cases reject any role at all for the clerical/judicial distinction, and require a new appeal only if the amendment makes a "substantial modification" of the original judgment or order. (*E.g.*, *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765) Still other cases, however, require a new appeal only if the original judgment or order failed to provide a sufficient opportunity to appeal. (*E.g.*, *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App. 4th 493, 504-09)

Although the substantial-modification line of authority appears dominant today, I do not recommend its adoption by the Judicial Council to achieve uniformity. Its test is unsuitably vague for a rule governing notices of appeal. Similar formulations — "substantial factor" for causation, "substantial motivating factor" for employment discrimination, "substantial prejudice" for arbitration, and "substantial evidence" for appellate review — all invite an exercise of judgment by the relevant tribunal, and appropriately so. But litigants attempting to preserve their right of appeal should not be forced to guess if a modification is "substantial" enough to enshrine the new judgment or order as the only appealable one, therefore requiring a new notice of appeal. It is too easy for parties to guess wrong and lose their right of appeal.

PROPOSED NEW RULE

While different solutions are possible, I recommend adding a bright-line rule to the "Taking the Appeal" group of rules (8.100 *et seq.*) based solely on the timing of the amendment. The rule would require a timely appeal from the original version of a judgment or order affecting a party, and make that appeal sufficient to review any prior or subsequent amendment up to a date certain. A new appeal would be required only if the amendment comes after that date.

My proposed wording follows:

Proposed Rule 8.110. Appealing an amended judgment or order.

A timely appeal must always be taken from the original version of a judgment or order by which a party is aggrieved. An amendment of any kind, whether entered before or after the notice of appeal, may be reviewed on the same appeal with one exception. If it is not entered until after the day notice of the filing of the record is sent pursuant to rule 8.150(b), a timely new appeal is required to permit review of the amendment.

FURTHER DISCUSSION

(1) The proposed rule is designed to promote judicial economy — to avoid new appeals as long as possible without disrupting the briefing of the original appeal. Most amendments occur well before record preparation is concluded for the original appeal. So by the time the notice of record-filing is sent under Rule 8.150(b), in most cases the briefing can address the final status of any relevant rulings. And any necessary additions to the record can be provided by an appendix or augmentation.

To avoid disruption, however, any subsequent amendment requires a new appeal, with consolidation or other management left to the reviewing court's traditional discretion. That is still far better than the current situation, which encourages parties to file protective notices of appeal every time and forces the courts to process every one.

(2) Applying the rule to amendments "of any kind" underscores that criteria in existing case law no longer apply. For example, it is generally held that the addition of a cost or fee award, no matter how large, does not require a new notice of appeal from the amended judgment or order. (*E.g.*, *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222) Under my proposal, however, only the timing of the amendment would matter and, as explained above, in most cases no new appeal would be required in any event. But separate appeals of post-judgment orders would still remain possible under Code Civ. Proc. § 904.1(a)(2).

(3) While it feels more natural to have a notice of appeal apply to amendments entered previously, I am aware of no authority barring its application to subsequent amendments as well. Indeed, the existing Rule 8.104(d) operates prospectively, allowing a premature notice of appeal to apply to the eventual judgment or order no matter when it is entered. Moreover, that rule further supports my proposal because it likewise protects the right of appeal and promotes economy. While "one final judgment" questions might still arise on the merits in appeals involving amended judgments or orders, no authority prevents the Judicial Council from specifying when a new notice of appeal must be filed in such cases or allowing it to apply to both prior and subsequent amendments.

(4) Finally, in response to Rule 10.21, I am not aware of a need for urgent consideration of this proposal, any other proponents or opponents, or any fiscal impact other than avoiding the time and expense involved in processing unnecessary appeals.

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Thank you for your consideration, and I will be happy to provide any further comments or research that might be deemed useful.

ELLIOT L. BIEN

CC: Hon. Louis R. Mauro, Chair
Hon. Kathleen M. Banke, Vice-Chair
Ms. Christy Simons, Lead Staff
Appellate Advisory Committee