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Gombos gambit saves defective appeals

Not appealing from the correct document means that the Court of Appeal can (and probably will) dismiss the defective appeal. But lawyers also need to be aware that despite the seeming impenetrability of the rule, there are escape valves that courts use to reach the merits of "defective" appeals.

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Like the Golden State itself, California appellate procedure can be a little laid back. Many mistakes can be forgiven and many due dates extended or subject to grace-period notices allowing a second chance to get an appeal back on track. The underlying philosophy here is that because cases should be decided on their merits, appeals should not be killed for technical or procedural flaws. (Another unspoken guiding principle may be that there's no harm in extending ample grace to appellants to allow appeals to be teed up on the merits, because appellants are mostly going to lose anyway.)

Conversely, there are a few crucial areas where getting it right is absolutely essential to the survival of an appeal. One such rule is that notices of appeal must be timely filed. And given that the usual time to appeal in California is a lengthy 60 days from notice of entry of an appealable judgment or order (as opposed to the 30 days usually governing federal practice), that's a pretty reasonable hard line to draw.

Another area where strictness is reasonably applied is requiring appellants to appeal the right thing; i.e., appeals are limited to final judgments and certain specifically appealable orders. *Griset v. FPPC*, 25 Cal.4th 688, 696 (2001). This is Appellate Practice 101 stuff. And yet appellants often (oh so very often) appeal from the wrong thing. Classic examples are appeals from orders sustaining demurrers and orders granting summary judgments. Such orders are – emphatically – not appealable orders. Instead, appellants are to appeal from the actual judgments that follow from such orders.

It doesn't seem too much for an appellate court to ask that appeals come from the proper documents that are made appealable by statute (e.g., Code Civ. Proc. § 904.1). After all, the question of appealability goes to the very jurisdiction of the appellate court, which is "dutybound to consider it" in every case and on its own prerogative. *See Olson v. Cory*, 35 Cal.3d 390, 398 (1983); *Farwell v. Sunset Mesa Property Owners Assn.*, 163 Cal.App.4th 1545, 1550 (2008) ("[W]hether an order is appealable goes to the jurisdiction of an appellate court, which is not a matter of shades of grey but rather of black or white").

Thus, when an appellant jumps the gun (or misfires it) and appeals from, say, an order sustaining a demurrer, we would expect the Court of Appeal to dismiss the appeal. And indeed this happens regularly. Such dismissal orders often even explain, "Hey, you've appealed a nonappealable order, so you're dismissed; come back later in a proper appeal from the judgment." *See* e.g., *Davies v. Iles*, C09573 (3d Dist. June 6, 2023) (noting dismissal of prior appeal from demurrer order).

Although dismissal of improper appeals is probably the most common outcome, sometimes other things happen. Sometimes an especially nice court may hold the dismissible appeal in abeyance and direct that the appellant promptly go get a judgment, and the court will then construe the premature appeal to be from that judgment. Sometimes, instead of dismissing an otherwise dismissible appeal, the court may elect to treat the defective appeal as an extraordinary writ petition. *See Olson*, 35 Cal.3d at 399

(citing examples). But largess in saving a defective appeal by treating it as a writ petition is a power that should not be exercised "except under unusual circumstances." *Id.; see* e.g., *Mounger v. Gates*, 193 Cal.App.3d 1248, 1254 (1987) (defective appeal treated as a writ petition where the issue was of great public importance, the parties fully briefed the appeal, and respondent did not challenge appealability).

Another method of saving defective appeals is to construe the premature appeal as applying to an actual subsequent judgment. *Boyer v. Jensen*, 129 Cal.App.4th 62, 69 (2005) (exercising discretion to entertain premature appeal from a non-appealable order, given that a judgment was eventually entered, there was no doubt what the appellant wanted to appeal, and respondents were not prejudicially misled). This power is employed as an efficiency measure in circumstances where an appeal was erroneously taken from some preliminary order preceding a judgment that was subsequently entered.

But what if there is no subsequent judgment from which to pretend the appeal was taken? Some courts, taking very seriously the directive to construe notices of appeal liberally (Cal. Rules Court, rule 8.100(a)(2)), will create appealability by construing an order that is not a judgment to have incorporated a judgment anyway. *See Levy v. Skywalker Sound,* 134 Cal.App.4th 753, n.7 (2003) (in the interests of justice, given no motion to dismiss was filed, and to avoid delay, court construes order granting summary judgment "as incorporating an appealable judgment" and construes the notice of appeal to be from that judgment). There is Supreme Court precedent for this "incorporation" approach. *See Beazell v. Schrader*, 59 Cal.2d 577 (1963).

Not every justice, however, has been enamored with the incorporation doctrine – especially with regard to repeat offenders. Noting that the courts are "wearying of 'appeals' from clearly nonappealable orders" and that prior instances of "patience" and generosity in construing orders to incorporate judgments ("in the interests of justice and to avoid delay") were "intended to be educative" and "not an indication that we would condone continuing blunders of this sort." *Cohen v. Equitable Life Assur. Society*, 196 Cal.App.3d 669, 671 (1987) (lamenting that "counsel did not get the message"). The court in *Cohen* concluded that "we hereby give notice to the bar that henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders." *Id*. Despite this stern language, some appellate courts continue to use incorporation to save otherwise dismissible appeals. *See* e.g., *Mohazzabi v. AAA, Inc.* (A164197, April 4, 2023); *Jason v. Pardini* (A165974, April 25, 2023).

In the realm of saving defective appeals, apart from construing a dismissible appeal as a writ petition, construing a premature appeal as applying to a later judgment, and incorporating a judgment into an order, there is yet another option.

Code of Civil Procedure section 43 empowers appellate courts to "affirm, reverse, or modify any judgment order appealed from." Using this "modification" power, some

appellate courts have created appealability by modifying an otherwise nonappealable order into an appealable judgment.

An early example of this is *Gombos v. Ashe*, 158 Cal.App.2d 517, 524 (1958), where an appeal was taken in a case that lacked a final judgment addressing all causes of action. The Court of Appeal recognized that it could dismiss the appeal with instructions to the trial court to amend the judgment to account for the missing causes of action. But because this struck the court as "unnecessarily dilatory and circuitous," the Court of Appeal instead ("in the interests of justice and to prevent unnecessary delay") amended the defective judgment to dismiss the missing cause of action. *Id*.

Nearly two decades later, the Supreme Court noted that the "*Gombos* procedure" has been "routinely followed" and applied the approach itself. *Tenhet v. Boswell*, 18 Cal.3d 150, 155 (1976). Witkin notes that the *Gombos* court established a rule that appellate courts have since "applied with no qualifications, as a routine procedure." 9 Witkin, Cal. Proc., Appeal § 139 (6th ed. 2023). See *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 921 (1980).

Lawyers should know, understand, and make all attempts to properly follow the "one final judgment" rule. After all, not appealing from the correct document means that the Court of Appeal can (and probably will) dismiss the defective appeal.

But lawyers also need to be aware that despite the seeming impenetrability of the rule, there are escape valves that courts use to reach the merits of "defective" appeals. As one court put it recently, "the effect of the one judgment rule has been avoided in several cases in the interests of justice and to prevent unnecessary delay by amending the judgment on appeal as needed and then construing the notice of appeal as from the judgment, as amended. When an order sustaining a demurrer effectively disposes of the issue raised by the cross-complaint, we can amend the judgment to do explicitly what was previously implicit." *Jamali v. Select Portfolio Servicing* (B290145, July 14, 2021) (citing *Swain v. Cal. Casualty Ins*. (2002) 99 Cal.App.4th 1, 6) (cleaned up).

Appellants who erroneously appeal non-appealable documents should not expect the appellate courts to save their bacon. But it can happen. On the flip side, respondents cannot always assume that a defective appeal will be dismissed. Sometimes it will be saved. Appellants should strive to get it right and fix their own mistakes. Respondents should pay close attention to appealability and move to dismiss when appropriate. Lack of such diligence is often a factor in courts exercising their saving powers. The despondent respondent – who has to brief an appeal on the merits when it should have been dismissed – should take some solace in knowing that the mistake probably could have been fixed anyway, that the court was just trying to be efficient in reaching the merits, and that, statistically, the respondent should win.