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Appeals are for losers

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EXCEPTIONALLY APPEALING

Appeals are for losers. This should sound obvious. After all, what would a winning party be unhappy about? But litigation is complicated, and a win rarely emerges after a completely one-sided process where the winner prevails on every single point along the way and walks off with a judgment containing absolutely everything the winner's heart desired. Complications like this lead to general rules -- and their inevitable exceptions.

The technical way of saying "only losers get to appeal" is that appellate standing is limited to a "party aggrieved." Code Civ. Proc. Section 902.

A quick digression to highlight an exception: In juvenile delinquency matters, some courts have held that Welfare and Institutions Code Section 800 -- limiting appeals to minors -- controls over Code of Civil Procedure Section 902, such that the right to appeal is limited to the minor, not the minor's parent. *E.g.*, *In re Almalik S.*, 68 Cal. App. 4th 851, 854 (1998). But other courts have either disagreed or created an exception to this exception, holding that non-minors may appeal in such proceedings if appealing is the only way to protect their particular interests. *E.g.*, *In re QN*, 211 Cal. App. 4th 896, 903-05 (2012). Though the Exceptional Lawyer revels in exceptions, and obtains nirvana in exceptions to exceptions, delving into specialty areas like juvenile delinquency is best left to experts in that field. End exceptional digression.

Let's break Section 902's standing requirement into two parts. First, to appeal, one must be a party of record in the case, i.e., one of the litigants. Exception: Attorneys for parties in a case may -- and sometimes must -- appeal certain orders on their own behalf, such as sanctions orders, disqualification orders, or fees orders in class action cases.

Partyhood is relatively easy to straighten out. It's the second requirement, being "aggrieved," where things can get interesting. When we say that only "aggrieved" parties may appeal, we mean parties whose rights or interests have been "injuriously affected" in some "immediate, pecuniary, and substantial" way by the judgment. *County of Alameda v. Carleson*, 5 Cal. 3d 730, 737 (1971). This is another way of saying that only real losers get to appeal, and that winners may not appeal -- unless they can show that the judgment, despite being in their favor, actually aggrieves them. As stated in *Barham v. So. Cal. Edison Co.*, 74 Cal. App. 4th 744, 751 (1999): "Typically, a party cannot appeal from a judgment in its favor. [Cite.] There are, not surprisingly, exceptions to this general rule."

For a winning party to nonetheless be aggrieved, the judgment must lack something substantive that the winner had sought. The easiest example is the plaintiff who wins on

liability, but is unhappy with the amount of damages awarded. Yes, that plaintiff is a winner, but that plaintiff is also an unhappy loser who may appeal the damages award.

This calls to mind, another classic exception involving posttrial motions. Generally, parties need not file a new trial motion to raise issues on appeal. A key exception, however, is that a new trial motion must be pursued (in both bench and jury trials) to raise issues of factual error resulting in inadequate or excessive damages. *Schroeder v. Auto Driveway Co.*, 11 Cal. 3d 908, 918 (1974). *Navigators Specialty Ins. Co. v. Moorefield Constr.*, 6 Cal. App. 5th 1258, 1279 n.2 (2016) ("To preserve a claim of excessive or inadequate damages for appeal, a party must move for a new trial."). The exception to this exception is for challenges to damage awards that are *legal* in nature, e.g., evidentiary rulings, instructional errors, or other legal error leading to the amount of the damages award. Rather than sweat over about what arguments are factual or legal, if there is any doubt, file a new trial motion.

Returning to the question of when a winner is aggrieved, it is useful to ask "should the judgment have awarded something the winner doesn't already have?" Thus, if a plaintiff pursues two causes of action and loses one, then the judgment is plainly missing something the plaintiff wanted. Thus, the plaintiff can pursue an appeal regarding the claim that was lost.

But what if the plaintiff pursued only one claim via different legal theories? Or, to flip sides, what about a defendant who had two different defenses, but was successful on only one? Consider a defendant who argues that the plaintiff's claim is time-barred and also is missing an element of the cause of action. Assume that the trial court disagrees about the statute of limitations defense, but rules that the plaintiff's cause of action is legally flawed, and therefore enters judgment for the defendant. The defendant is the winner, yet may still be smarting over having lost the time-bar defense. Even so, it is the plaintiff -- and only the plaintiff -- who is aggrieved by the judgment.

So assume that the plaintiff appeals the judgment. In responding to the appeal, the defendant will want to raise both its unsuccessful time-bar defense as well as its substantive defense. Does this mean that the defendant should file a notice of cross-appeal? The answer is emphatically no, because defendant, not being aggrieved by the judgment, cannot appeal. Even so, defendant may still raise the time-bar defense in the respondent's brief.

This may confuse lawyers who often misconstrue another fundamental rule: If a point is lost in the trial court, then to raise it on appeal, the losing party must file an appeal, right? Code of Civil Procedure Section 906 says in black and white that appellate courts lack the power to "review any decision or order from which appeal might have been taken" but was not. And our Supreme Court has said, "California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is

forfeited." *In re Baycol Cases I & II*, 51 Cal. 4th 751, 761 n.8 (2011). So how can our defendant not file an appeal yet still raise an issue on appeal that it lost?

The solution to this Section 906 riddle lies, of course, in Section 906. The fundamental rule of "appeal or forfeit the argument" is premised on the notion that the losing party actually could file a valid appeal by virtue of being an aggrieved party. In our example, the defendant is unqualifiedly the winner and not an aggrieved party. Sure, the defendant may feel "aggrieved" (i.e., annoyed and upset) by the trial court's time-bar ruling, but that ruling is not appealable.

Section 906 itself makes explicit that a "respondent, or party in whose favor the judgment was given [i.e., the winner], may, without appealing from such judgment," ask the appellate court to review any "intermediate ruling, proceeding, order or decision" leading up to the judgment that has bearing on whether the appellant was prejudiced by the errors appellant raises on appeal to attack the judgment. As one court has nicely explained: "Generally, a respondent who has not appealed from a judgment or appealable order may not urge error on appeal. However, an exception applies where a respondent raises an issue on an interim ruling for the purpose of determining whether the appellant was prejudiced by the asserted error." *San Diegans for Open Gov. v. Har Constr.*, 240 Cal. App. 4th 611, 627 (2015). Thus, our defendant may raise its time-bar defense to argue that the plaintiff suffered no prejudice worthy of reversing the judgment. To be clear, without appealing, a respondent can raise issues only aimed at obtaining an affirmance; if a respondent wants some form of affirmative relief on appeal (e.g., a reversal or substantive change in the judgment), then a cross-appeal is necessary.

Understanding Section 906 is crucial to saving respondents from filing inappropriate cross-appeals and for stopping appellants from, in reply briefs, incorrectly attacking arguments properly raised by respondents who did not appeal. Sometimes it's okay not to appeal. Remember, appeals are for losers.