The Fed/State Difference

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When you are handling an appeal in federal or state court be careful, as important terminology varies depending on the forum. In the California courts of appeal, the party filing the second brief is the "respondent." In the Ninth Circuit, that party is the "appellee." And Golden State attorneys refer to the state court of "appeal" (singular). On the federal side, it's the Ninth U.S. Circuit Court of Appeals. In the state appellate courts, an advocate addresses "justices." Ninth Circuit jurists are "judges."

Nomenclature aside, there are important substantive differences in appellate practice between California's state and federal courts. Here are ten key distinctions to keep in mind.

1. Appealable Orders

Both California and federal law allow a party to appeal from a "final judgment." (Cal. Code Civ. Proc. (CCP) § 904.1(a)(1); 28 U.S.C. § 1291.) In California, other appealable orders are listed by statute. (See CCP § 904.1(a)(2)–(13); see also, CCP § 425.16(i).) Generally speaking, if a trial court's order is *not* listed by statute, a party's appellate recourse is limited to discretionary writ review.

In the federal system, the law is not as certain. The Ninth Circuit construes the final judgment rule practically, not technically, and thus the fact-based "finality" of a district court order is not always clear. (See *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996).) There are also federal exceptions to the final judgment rule. In a multiparty or multiclaim action, accelerated review is allowed for an order that adjudicates fewer than all the claims or rights or liabilities of fewer than all parties. (Fed. R. Civ. P. (FRCP) 54(b).) Moreover, a federal statute permits immediate appeal from certain interlocutory orders. (28 U.S.C. § 1292(a).) A related section (28 U.S.C. § 1292(b)) allows appeals from other interlocutory orders that involve a controlling question of law, when there is a substantial ground for difference of opinion and when an immediate appeal may materially advance the ultimate determination of the case; both the district court and the Ninth Circuit must grant permission.

In federal class actions, Rule 23(f) permits a party to petition the Ninth Circuit to appeal an order "granting or denying class-action certification." California, however, allows appeals from an order denying class certification only if it constitutes the death knell of the litigation. (See *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).)

2. Obtaining a Stay

California courts of appeal and the Ninth Circuit have discretion to stay money judgments or injunctions while an appeal is pending. At the trial court level, though, there are big differences. For money judgments, state trial courts can stay enforcement until ten days after the last date for filing a notice of appeal. After that, an appellant can stay enforcement only by posting a bond or complying with other measures prescribed by statute. (See CCP § 918.)

A federal court money judgment is automatically stayed for 14 calendar days following its entry. (FRCP 62(a).) Thereafter, district courts have discretion to stay enforcement with a bond in any amount deemed appropriate or, according to some courts, no bond at all. (See *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988).) Federal courts also permit posting real property in lieu of a security bond. (See *Athridge v. Iglesias*, 464 F. Supp. 2d 19 (D.D.C. 2006).)

What about injunctions? In California trial courts, a "mandatory injunction" requiring a party to take action that changes the status quo is automatically stayed on appeal. A "prohibitory injunction" requiring no action to maintain the status quo is *not* automatically stayed. (*Agric. Labor Relations Bd. v. Superior Court*, 149 Cal. App. 3d 709, 716–17 (1983).)

In a federal trial court, neither type of injunction is automatically stayed. (See FRCP 62(a)(1).) To obtain a stay, a party must file a motion with the district judge, who has discretion to "suspend, modify, restore, or grant an injunction on terms for bond or terms that secure the opposing party's rights." (FRCP 62(c).)

Under California law, an appeal of an order denying a motion to compel arbitration automatically stays the proceedings in the trial court. (*Prudential-Bache Secs., Inc. v. Superior Court*, 201 Cal. App. 3d 924, 925 (1988).) Under section 3 of the Federal Arbitration Act (FAA), however, a party whose motion to compel arbitration has been denied must request a stay from the district court. That court's denial of a stay is itself appealable under the FAA. (See 9 U.S.C. § 16(a)(1)(A).)

3. Notice of Appeal

On this point, the courts differ slightly about the content of the notice but more substantially on timing. California requires a notice of appeal to identify only the judgment or order being appealed. (Cal. Rules of Court (CRC) 8.100(a)(2).) In federal court, the notice also must specify the parties taking the appeal and name of the court to which the appeal is taken (this is especially relevant for patent infringement appeals, over which the Federal Circuit has exclusive jurisdiction). (Fed. R. App. P. (FRAP) 3(c).)

In California, the notice of appeal must be filed either within 60 days after the notice of entry of judgment, or 180 days after entry, whichever comes first. (CRC 8.104(a).) Although certain post-judgment motions can extend the filing deadline, a court cannot otherwise do so; the deadline is jurisdictional. (CRC 8.104(b), 8.108.)

In federal courts, the notice of appeal must be filed within 30 days after the entry of judgment (not notice), but the deadline is not jurisdictional. (FRAP 4(a)(1).) A district court may either extend or reopen the time to appeal under certain circumstances. (FRAP 4(a)(5)–(6).) As in state court, the deadline may be extended by certain post-judgment motions. (FRAP 4(a)(4).)

4. Mediation Programs

Some California courts of appeal and the Ninth Circuit have mediation programs. Ninth Circuit mediators are attorneys who work exclusively for the program. Circuit mediators, certified as "deputy clerks," select cases by using a mediation questionnaire. They have the authority to determine who must appear for the mediation and whether to stay appellate proceedings and briefing schedules while negotiations are pending. They also can take steps to assure that the parties are not disadvantaged by participating in the program. Mediations are subject to strict confidentiality restrictions. (See Ninth Circuit Rule (9th Cir. Rule) 33-1.)

The California courts of appeal have various programs, ranging from mandatory mediation of selected cases to voluntary mediation at the request of the parties. Mediators may be appellate justices, trial court judges, or appointed attorneys. Briefs may or may not be allowed to be kept confidential, appeal deadlines may or may not be suspended during negotiations, and strict court rules may govern who must attend. Certain courts of appeal have suspended their mediation programs, reportedly due to state budget cuts, so it's best to check directly with the court to confirm its present practice.

5. Compiling the Record

In both the Ninth Circuit and California courts of appeal, the record consists of certain written items filed in the trial court and transcripts of oral proceedings. State and federal courts differ, however, in their approach to who prepares the record, and on what portions of that record should be put before the appellate judges.

In California, the parties may designate the "clerk's transcript" for the clerk's office to compile, or one party may elect to proceed with an "appendix" prepared by the parties. Either a clerk's transcript or an appendix must include any item "necessary for proper consideration of the issues." Neither can contain any reporter's transcripts, which remain separate. (See CRC 8.122, 8.124.)

In the Ninth Circuit, when the parties file their opening briefs, they also must submit "excerpts of record," or ER. (9th Cir. Rule 30-1.) Only specified items must be included (9th Cir. Rule 30-1.4), and the excerpts are much more limited than a clerk's transcript or appendix in state court. The federal appellate ER should not, for example, include briefs filed in the district court except those few pages necessary to resolution of the issues on appeal. (9th Cir. Rule 30-1.5.) Once the Ninth Circuit accepts a case, however, all documents filed in the district court are deemed part of the record on appeal. So, in addition to citing the ER, counsel can cite particular docket entries in subsequent briefs or at oral argument.

6. Extensions of Time

State court of appeal rules permit parties to stipulate to obtain extensions of up to 60 days to file their briefs. Permission from the court of appeal is not required. (CRC 8.212(b).) If a party fails to timely file its opening brief (or its respondent's brief), the clerk is required to notify the party by mail that its brief is due within 15 days. (CRC 8.220.)

There is no similar grace period in the Ninth Circuit. Unless the case has been set for oral argument, though, a party that has not yet asked for any deadline extension may request one of up to 30 days by filing a Streamlined Request to Extend the Time to File Brief, which will be "routinely approved." (See Ninth Circuit Announcement, February 2014.) This streamlined request is "intended to be the sole extension of time to file the brief."

7. Format of Briefs

In the Ninth Circuit, the rules require the opening brief to include the following *in the order listed:* 1) a corporate disclosure statement, if required; 2) a jurisdictional statement, including the basis for appellate jurisdiction and timeliness of the appeal; 3) a statement of issues, including where in the record each issue was raised and decided; 4) a "statement of the case" setting forth the relevant facts and procedural history

and identifying the rulings presented for review; 5) a summary of argument; 6) an argument, with the applicable standard of review stated for each issue; 7) a conclusion, with the relief requested; 8) a statement of any related cases; and 9) a certificate of compliance (word count limit). Specific formatting rules also apply. (See FRAP 28-1 through 28-2.6.)

In state court, the appellant's opening brief must state the nature of the action, the relief sought in the trial court, and the judgment or order being appealed. It must also include a "statement of appealability" stating why the judgment or order is appealable, as well as a summary of significant facts. Each point of argument must be briefed under a separate heading or subheading. Each party must also submit a Certificate of Interested Entities or Persons. (CRC 8.208.) Copies of exhibits or other materials in the record or relevant authorities not readily accessible may be attached to the brief but are limited to ten pages. There is even a list of the appropriate colors for the brief cover. (CRC 8.40.) Unlike in the Ninth Circuit, state court appellants need not identify the standard of review for each issue or follow a particular order in presenting its brief. (See CRC 8.204.)

8. Oral Argument

The California Constitution recognizes the right to oral argument and provides that judgment depends on the concurrence of four justices (in the California Supreme Court) and two justices (in the courts of appeal) "present at the argument." (See Cal. Const., Art. VI, §§ 2–3.) Case law and applicable appellate rules echo the right to oral argument. (See *People v. Brigham*, 25 Cal. 3d 283, 285 (1979); CRC 8.524 (California Supreme Court), 8.256 (Court of Appeal).) Thus, as a general rule, reviewing courts in California cannot grant summary dispositions without oral argument.

The federal procedure is very different. To begin with, there is no federal constitutional right to oral argument. In fact, oral argument is not required if a "panel of three judges who have examined the briefs and record unanimously agree" that argument is unnecessary. (FRAP 34.) Ninth Circuit procedure also provides for a "summary disposition" of a pending appeal in appropriate cases. (9th Cir. Rule 3-6.) As the court has noted, "Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned." (*United States v. Hooton*, 693 F.2d 857–58 (9th Cir. 1982).)

Many practitioners believe oral argument matters far more in the Ninth Circuit than it does in the California courts of appeal.

Ninth Circuit judges usually do not "conference" a case before argument. By contrast, "most [state] courts of appeal do substantial amounts of work on a case *before* oral argument takes place," including a conference, and "[o]ften a tentative decision will be written and circulated to other panel members for their comments." (*Moles v. Regents of Univ. of Cal.*, 32 Cal. 3d 867, 873 (1982) (italics original).) Given this procedural distinction, many appellate practitioners believe oral argument matters far more in the Ninth Circuit than in the California courts of appeal.

9. Stare Decisis

A prior published Ninth Circuit decision binds its three-judge panels, which cannot reconsider a decided issue unless its precedential value is undermined by an en banc decision, a U.S. Supreme Court decision, or subsequent legislation. This is true even if all three judges question the correctness or wisdom of the prior decision, and when there are contrary decisions by other circuits. (*Ritchie v. United States*, 733 F.3d 871, 877–78 (9th Cir. 2013).)

In California, however, a decision by one court of appeal does not bind other courts of appeal. Even two divisions within the same district can reach conflicting opinions on the same issue. "[B]ecause there is no 'horizontal stare decisis' within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court is not absolutely binding on a different panel of the appellate court." (*Marriage of Shaban*, 88 Cal. App. 4th 398, 409 (2001).) Nevertheless, in appellate districts not divided into permanent divisions, a three-judge panel will rarely overrule a decision by another three-judge panel of the same court "except for compelling reasons." (*People v. Bolden*, 217 Cal. App. 3d 1591, 1598 (1990).)

10. Res Judicata

A California state court judgment "is not final for purposes of res judicata during the pendency of and until the resolution of the appeal." (*Agarwal v. Johnson*, 25 Cal. 3d 932, 954, n.11 (1979).) In contrast, a federal district court's judgment is "final until reversed in an appellate court, or modified or set aside in the court of its rendition." (*Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938).)

This difference presents an interesting twist: A party in a California appellate court may assert as res judicata a federal district court judgment that is being appealed in the Ninth Circuit. (*Agarwal*, 25 Cal. 3d at 954.)

Every case and every appeal is different. Advocates who know the key distinctions between federal and state court procedures can better select the most advantageous forum long before the time comes to file a notice of appeal. CL

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1. A party need not obtain a bond to stay enforcement of a mandatory injunction on appeal in state court.

❍ True ❍ False

2. In the Ninth Circuit, the rules permit a motion for summary disposition of an appeal.

❍ True ❍ False

3. Unlike those in state court, federal district court judges can permit a party to post real property as security to stay enforcement of a money judgment on appeal.

❍ True ❍ False

4. In the Ninth Circuit, filing an appeal from an order denying a motion to compel arbitration automatically stays further proceedings in district court.

❍ True ❍ False

5. Parties have a constitutional right to oral argument in the California courts of appeal.

❍ True ❍ False

6. The amount of the bond needed to stay enforcement of a federal district court money judgment is set by statute.

❍ True ❍ False

7. In the Ninth Circuit, like the state courts of appeal, there is a grace period if the appellant does not file its opening brief on time.

❍ True ❍ False

8. A California court of appeal must follow the published precedent of any other court of appeal, regardless of which district or division decided the earlier case.

❍ True ❍ False

9. In the Ninth Circuit, a three-judge panel must follow an earlier published Ninth Circuit decision, even if it conflicts with later precedent from other circuits.

❍ True ❍ False

10. Both state and federal appellate courts require parties to file some form of corporate disclosure statement.

❍ True ❍ False

11. In the Ninth Circuit, briefs must state the issues presented for review, along with a concise statement of the standard of review for each.

❍ True ❍ False

12. Mediation is a mandatory procedure in the California courts of appeal, but not in the Ninth Circuit.

❍ True ❍ False

13. Retired judges conduct mediations in the Ninth Circuit.

❍ True ❍ False

14. In both California and the Ninth Circuit, appeals must be filed within 60 days after entry of judgment.

❍ True ❍ False

15. In the Ninth Circuit, the deadline for filing the notice of appeal is not jurisdictional.

❍ True ❍ False

16. The Ninth Circuit allows immediate appeals from certain interlocutory orders, but only if the appealing party obtains the permission of both the district court and the Ninth Circuit.

❍ True ❍ False

17. Both California and the Ninth Circuit allow a direct appeal of certain interlocutory orders.

❍ True ❍ False

18. In California, the parties can choose to have the clerk prepare the record, or prepare it themselves.

❍ True ❍ False

19. In the Ninth Circuit, the court rules call for including all of the pleadings from the district court in the excerpts of record.

❍ True ❍ False

20. A state court judgment is res judicata while it is on appeal. It's just the opposite in federal court.

❍ True ❍ False

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