

## Chapter 1

# *Can You Appeal?*

You are unhappy with a decision of the superior court. You wish to appeal to a higher court. Can you do so? The first three steps will help you decide. First you must consider whether you are a person who can appeal. Next the court must have made a judgment, an appealable order, or an order after judgment that is appealable, and you must have the paperwork to verify that. Then you must file a form called a *Notice of Appeal* by a certain deadline, letting the court know that you intend to appeal.

### *Step 1. Are you a person who can appeal?*

Not everyone can appeal. In order to appeal, you must be “aggrieved.” “Aggrieved” means the superior court or administrative agency made a decision that affects your legal rights (for example, it upheld your being fired by your employer) or costs you money (for example, ordering you to pay doctor bills for someone you hurt in a car accident that you caused). Usually you must have been a party in the case in the superior court. You may not appeal for a spouse, a child (unless you are the child’s guardian), or a friend.

### *Step 2. What can you appeal?*

Not every court ruling is appealable. In family law and probate cases, most of the orders made in the case can be appealed right away. However, in other cases you can appeal only a final **judgment** or an order after final judgment, with some exceptions. The court usually makes its final judgment at the end of the case. This may be a ruling by the superior court judge, with or without a hearing, or it may be after a trial with a jury.

In some instances, the court dismisses a case before it ever gets to trial. This means the plaintiff has not been able to show the court that anyone did anything legally wrong to him or her. A dismissal may come after a **demurrer**. A demurrer is a motion brought by the defendant saying that even if everything the plaintiff has said in his or her complaint is true, the complaint still does not present anything that is legally wrong or that can serve as the basis for a lawsuit. If the court agrees that there is no basis for a suit, it dismisses the case. Section 581d of the Code of Civil Procedure says the order granting a demurrer and dismissing the case is to be treated as a judgment. Therefore, the ruling granting the demurrer (or, in legalese, “sustaining the demurrer without leave to amend”) and dismissing the case is an

appealable order. Some courts do not treat the order as appealable unless the word *dismiss* is used, so you should make sure that your order actually says the matter is dismissed.

Another condition under which a case might be dismissed before trial is after a motion for summary judgment has been brought. A motion for summary judgment comes after the parties have **discovery**—they have learned the facts of what happened and developed evidence in the case. If there are no “triable issues of material fact”—that is, there is no conflicting evidence about dispositive facts—either the plaintiff or the defendant or both may bring a **motion (or motions) for summary judgment** saying the court must rule in their favor as a matter of law. This is because the trial court is the fact-finding court, and if there is no genuine dispute about the material facts, there are no facts to be found; thus, the court need only apply the law to the undisputed facts and rule for the appropriate side.

Despite the name “summary judgment,” the ruling of the court that comes after the filing of a motion for summary judgment is an **order**, not a final judgment. Unlike the situation of the demurrer—in which it is not necessary to get a final judgment—an order granting summary judgment is not appealable. The court must make a later final judgment, which is appealable.

After the trial or hearing is over *or* the superior court judge makes a ruling, you need to get a file-stamped copy of the ruling you want to appeal. This ruling may be included as part of the court’s minutes, or it may be a separate piece of paper labeled *Judgment, Order* or *Order after Judgment*.<sup>1</sup>

**What are the minutes?** The minutes are the official court record of what happened during the case. Minutes are written down by the clerk and kept in the superior court file for your case. You can identify the minutes by looking at the bottom of the pages in your file and seeing the label “Minutes.” Among the minutes the clerk may record the court’s ruling if it is an order. Because it is presented in the minutes, it is called a **minute order**. (There is no such thing, however, as a minute judgment.) You can recognize the order because it is expressly called an order, or the language directs (orders) that something be done or the language decides or resolves a dispute. If the minute order is signed by the judge and file-stamped, it may be used as the basis of the *Notice of Appeal*.

If you do not see something in the minutes labeled “Order,” look closely through the minutes to see if the court has said that you or one of the other parties should

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<sup>1</sup> We started this section by saying that not every court ruling is appealable. Mainly judgments and orders after judgment are appealable. Orders before judgment—orders from motions ruled on before trial, or during trial before there is a judgment—may be reviewed at the Court of Appeal by a petition for writ. This procedure is very different from appeal. You can learn about it by consulting the references in the Bibliography.

prepare a formal judgment or order. If that is the case, you may not use the minutes but must wait until a separate document titled *Judgment, Order, or Order After Judgment* has been prepared, signed by the superior court judge, and file-stamped (also known as file-endorsed). The file stamping makes this an official court document and includes the date on which the item was stamped. You then use this as the basis for your *Notice of Appeal*.

**What is a judgment or order?** A judgment comes at the end of the case and has to do with one or more of the parties. As already mentioned, it may be the verdict of the jury, or it may be a ruling by the superior court judge.

If it is a ruling by the judge, it may come after a trial in which the parties decided not to have a jury, or it may be the result of a motion before trial. After the superior court judge grants a motion for summary judgment, he or she issues a judgment. In any of these cases, it is the judgment that tells what the final result of the case is—who is the “winner.” It may award money to one or more of the parties, or it may direct that something be done. For example, it might say: “Damages to the plaintiff in the amount of a zillion dollars.” All final judgments are appealable.

Instead of a judgment, you may want to appeal an appealable order. As mentioned, an order is the ruling that is made after the superior court judge has heard and decided a motion. For the order to be appealable, it generally must follow a motion made in a family law or probate matter (in which most orders are appealable), a demurrer or some other motion resulting in a dismissal, or an order following a judgment.

For example, after the judgment has been entered, counsel may make a motion for attorney fees. The ruling on this motion can be appealed separately from the judgment on the case as a whole. In this example, the order would direct or deny the payment of attorney fees. If the judgment or order were in a separate document, the document would probably be titled *Judgment or Order or Order after Judgment*.

If there is no judgment in the court file, and nothing in the minutes says who is to prepare the judgment, then generally the winning party prepares the order or judgment. Before you start your appeal make sure you have a copy of this order or judgment. This court recommends that the order or judgment be signed by the judge and file-stamped in the upper right-hand corner. The date of the file stamp is the date of the entry of the judgment. (If your order is in the minutes, the date of entry is the file stamp on the minutes.) This is the date from which you count to figure out how much time you have to file your *Notice of Appeal*. (CRC rule 8.104(d).)

**How are San Diego family law cases different?** The San Diego County Family Law Court does not file-stamp nor does the judge sign, the preprinted “check-off” minutes form. About two-thirds of the way down the form, toward the right there is a “check-off” as to who is to prepare the order or judgment. If nothing is checked

off, that means the parties should proceed under Superior Court of San Diego County rule 5.11.2. (See [Appendix 2](#).)

### *Step 3. When can you appeal?*

**When can you file a *Notice of Appeal*?** A *Notice of Appeal* is the form you file in superior court to let the court know that you intend to appeal ([Sample Form A](#)). You can file a *Notice of Appeal* as soon as the order or judgment is signed by the superior court judge and file-stamped by the court clerk. An order signed electronically has the same effect as an order signed on paper. (CRC rule 8.104(c)(5).) The judgment is “entered” when it is file-stamped; this is also called the entry of judgment. After the entry of judgment you may want to serve and file a *Notice of Entry of Judgment* ([Sample Form B](#)), which, as discussed later, puts a time limit on the filing of the *Notice of Appeal*.

If an appealable order is included in the minutes, signed by the judge and file-stamped by the court clerk, it can be the basis for your appeal.

If no appealable order is included in the minutes, the person designated in the minutes or, if no one is designated, the winning party, prepares an order or judgment. In any case, you must wait to file the *Notice of Appeal* until a separate document titled *Judgment, Order, or Order After Judgment* has been prepared, signed by the superior court judge and file-stamped by the court clerk. (CRC rule 8.104(d).)

In some cases, no order or judgment has been prepared, no party has been directed to prepare the order or judgment, or the party who was directed to prepare one has failed to do so. Then, any party may prepare an order or judgment in any case except family law cases. Most often, it will be the appellant who does so because he or she needs the order or judgment to go ahead with the appeal. If you prepare a proposed order or judgment, you must serve it (as discussed later) on opposing counsel and on the superior court. Ask for opposing counsel’s approval as to form within a certain number of days say, 10 or 15.

If opposing counsel approves, take or mail the approval along with the proposed judgment or order to the superior court department where your case was heard. Ask the judge to sign it and the clerk to file-stamp it.

If opposing counsel does not approve the judgment or order or does not respond to your request for approval, the superior court will hold the proposed judgment for 20 days from the date of service. At the end of the 20 days the court may sign the order or judgment, hold a hearing, and/or make changes in the proposed order or judgment. In any case, the court will send you a signed, file-stamped copy. It is this order or judgment that you should use as the basis of your appeal.

For family law cases arising out of San Diego County, see Superior Court of San Diego County rule 5.11.2, on the preparation of orders after hearing and judgments. (See [Appendix 2](#).)

**What factors affect the time of filing?** The time allowed to file a *Notice of Appeal* depends on whether there was a notice of entry of judgment and, if so, when it was served (service is discussed later) *or* whether there was a timely motion (for new trial, to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration) that, when denied, extends the time.

**What is notice of entry, and how does it affect the time of filing?** Judgment is entered when the court clerk file-stamps the appealable order or judgment. The parties may not know the exact date when this was done. The court clerk or any party may provide notice that the judgment was entered. The clerk may do so by serving (as discussed later) a *Notice of Entry of Judgment (or Order)* or a copy of the judgment or order to the person filing the *Notice of Appeal*; any party may provide *Notice of Entry of Judgment* by serving each of the other parties with either (1) a *Notice of Entry of Judgment* ([Sample Form B](#)) or (2) a file-stamped copy of the judgment. A *Proof of Service* ([Sample Form C](#)) must be attached to either document. If either the clerk or the party has served the notice of entry, the *Notice of Appeal* must be filed within 60 days of the date of either (1) the court clerk's serving or (2) the party's serving a copy of the judgment, minutes, or *Notice of Entry of Judgment*, whichever comes earlier. (CRC rule 8.104(a).)

**What if there is no notice of entry of judgment?** If there is no notice of entry, the appellant has 180 days after entry of the order or judgment to file the *Notice of Appeal*. (CRC rules 8.104(a)(1)(C).) Even if there are extensions (see next section), the *Notice of Appeal* may not be filed if 180 days have passed since the entry of the order or judgment (recall that this is the date stamped in the upper right-hand corner of the judgment or order).

**What motions will extend the time to file?** The time to file the *Notice of Appeal* may be extended if there is a timely motion:

- For new trial,
- To vacate (or set aside) the judgment,
- For judgment notwithstanding the verdict, or
- To reconsider an appealable order. (CRC rules 8.108(b)–(e), 8.823(b)–(e).)

The time limits for filing these motions are set out in Code of Civil Procedure sections 659 (for motion for new trial), 663a (for motion to vacate the judgment), 629 (for motion for judgment notwithstanding the verdict), and 1008(a) (for motion to reconsider an appealable order). If one of these specified motions has been filed, you should carefully consult CRC rules 8.108 and 8.823 to determine the applicable deadline for filing the *Notice of Appeal*.

**If the *Notice of Appeal* is late in a civil case, the appeal must be dismissed.**

**The five-day extension under Code of Civil Procedure section 1013 for service by mail does *not* apply to notices of appeal and does *not* extend the time to file them.**