

Invitation to Comment

Title	Appellate Procedure: Extension of Time to File Notice of Appeal (amend Cal. Rules of Court, rules 8.104, 8.108 and 8.823).
Summary	This proposal would amend the rules relating to extending the time to appeal to include extensions required by statute when a public entity defendant takes certain postjudgment actions. It would also modify the language of the rule regarding these extensions in Court of Appeal proceedings to make it more consistent with recent amendments to the rule on the time to file a notice of appeal.
Source	Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair
Staff	Heather Anderson, Committee Counsel, 415-865-7691, heather.anderson@jud.ca.gov

Rule 8.104 of the California Rules of Court establishes the time for filing a notice of appeal in a civil case being appealed to the Court of Appeal. Currently, subdivision (c) in this rule provides for an extended time to appeal if a public entity defendant elects, under Government Code section 984 and rule 3.1804, to pay a judgment in periodic payments. All other extensions of the time to file a notice of appeal in such cases are addressed in rule 8.108. To bring together the provisions addressing extending the time to appeal, this proposal would delete subdivision (c) from rule 8.104 and move its substance to a new subdivision (f) in rule 8.108.

The extension of the time to appeal if a public entity defendant elects to pay a judgment in periodic payments is based on a provision in Government Code section 984 that directs the Judicial Council to adopt a rule providing for such an extension. There are two similar statutory provisions for which no rules have yet been adopted. Government Code section 962 provides that, in civil cases in which a verdict for damages of more than \$100,000 is returned against a public entity, the public entity may, within the time set for filing a motion for a new trial in section 659 of the Code of Civil Procedure, request a mandatory settlement conference for the purpose of discussing methods of satisfying the judgment, such as structured payment plans. Along similar lines, Government Code section 985 provides that in civil cases in which a verdict for damages is returned against a public entity, the public entity may, within the time set for filing a motion for a new trial in section 659 of the Code of Civil Procedure, move for a posttrial hearing on reducing the judgment based on the plaintiff’s receipt of certain collateral source payments. Both sections 962 and 985 also provide that the Judicial Council “shall adopt rules providing for a reasonable extension of the time for filing the notice of appeal from a judgment on the

verdict” to permit a request under section 962 or a motion under section 985 and the mandatory settlement conference under section 962 or hearing under section 985 itself.

To encompass these two other statutorily required extensions, this proposal would expand the extension of time now provided for public entity elections to make periodic payments under Government Code section 984. The committee believes that applying this existing extension to these other situations is appropriate because Government Code section 962 and 984 require that elections for periodic payments be considered *after* any settlement conference under section 962 and *after* any deduction is made from the judgment under section 985. Since elections under section 984 are addressed last, the extension of time already provided for these elections should also be sufficient to also encompass situations in which there is a settlement conference under section 962 or a hearing on deductions under section 984.

Rule 8.823, which addresses extending the time to appeal in limited civil cases, would also be amended to include a new subdivision providing for extensions under Government Code sections 962, 984, and 985. The language of this provision would be identical to that in proposed rule 8.108(f), except that the extension would be shorter. This shorter time period reflects the fact that the underlying time to appeal in limited civil cases is shorter than the time to appeal in unlimited civil cases (see rules 8.104 and 8.822).

Last year, the Judicial Council amended rule 8.104 to provide that the time for filing a notice of appeal runs from when the superior court clerk “serves,” rather than “mails,” the judgment or notice of entry of the judgment. This change was made in response to a recent court decision, *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, which held that electronic service of a judgment by the court did not constitute mailing of the judgment within the meaning of rule 8.104 and thus did not start the time period for filing a notice of appeal. In several places, rule 8.108 contains language about the clerk mailing a judgment, notice of entry of a judgment, or other order similar to the language in rule 8.104 that was amended last year. This proposal would amend rule 8.108 to be consistent with the new language in rule 8.104 by providing that the extensions of the time for filing a notice of appeal run from when the superior court clerk “serves,” rather than “mails,” these documents. It is the committee’s understanding that when trial court clerks mail documents to parties, they routinely comply with the requirements of Code of Civil Procedure sections 1013 and 1013a relating to service by mail and use of a clerks’ certificate of mailing and, therefore, that changing “mails” to “serves” in this rule will not require a change in trial court practices. The committee would particularly appreciate comments about whether this understanding is accurate.

Rules 8.104, 8.108, and 8.823 of the California Rules of Court would be amended, effective January 1, 2011, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 1. Taking the Appeal

Rule 8.104. Time to appeal

(a) – (b) * * *

~~**(c) Periodic payment of judgments against public entities**~~

~~If a public entity elects, under Government Code section 984 and rule 3.1804, to pay a judgment in periodic payments, subdivision (a) of this rule governs the time to appeal from that judgment but the periods prescribed in (a)(1) and (2) are each 90 days.~~

~~**(d)(c) * * ***~~

~~**(e)(d) * * ***~~

~~**(f)(e) * * ***~~

Rule 8.108. Extending the time to appeal

(a) Extension of time

This rule operates only to extend the time to appeal otherwise prescribed in rule 8.104(a); it does not shorten the time to appeal. If the normal time to appeal stated in rule 8.104(a) is longer than the time provided in this rule, the time to appeal stated in rule 8.104(a) governs.

(b) Motion for new trial

If any party serves and files a valid notice of intention to move for a new trial, the time to appeal from the judgment is extended for all parties as follows:

1
2 (1) If the motion is denied, until the earliest of:

3
4 (A) 30 days after the superior court clerk ~~mails~~, or a party serves, an order
5 denying the motion or a notice of entry of that order;

6
7 (B) 30 days after denial of the motion by operation of law; or

8
9 (C) 180 days after entry of judgment.

10
11 (2) If any party serves an acceptance of a conditionally ordered additur or remittitur
12 of damages pursuant to a trial court finding of excessive or inadequate
13 damages, until 30 days after the date the party serves the acceptance.

14
15 **(c) Motion to vacate judgment**

16
17 If, within the time prescribed by rule 8.104 to appeal from the judgment, any party
18 serves and files a valid notice of intention to move—or a valid motion—to vacate the
19 judgment, the time to appeal from the judgment is extended for all parties until the
20 earliest of:

21
22 (1) 30 days after the superior court clerk ~~mails~~, or a party serves, an order denying
23 the motion or a notice of entry of that order;

24
25 (2) 90 days after the first notice of intention to move—or motion—is filed; or

26
27 (3) 180 days after entry of judgment.

28
29 **(d) Motion for judgment notwithstanding the verdict**

30
31 (1) If any party serves and files a valid motion for judgment notwithstanding the
32 verdict and the motion is denied, the time to appeal from the judgment is
33 extended for all parties until the earliest of:

34
35 (A) 30 days after the superior court clerk ~~mails~~, or a party serves, an order
36 denying the motion or a notice of entry of that order;

37
38 (B) 30 days after denial of the motion by operation of law; or

39
40 (C) 180 days after entry of judgment.

1 (2) Unless extended by (e)(2), the time to appeal from an order denying a motion
2 for judgment notwithstanding the verdict is governed by rule 8.104.
3

4 **(e) Motion to reconsider appealable order**
5

6 If any party serves and files a valid motion to reconsider an appealable order under
7 Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that
8 order is extended for all parties until the earliest of:
9

- 10 (1) 30 days after the superior court clerk mails, or a party serves, an order denying
11 the motion or a notice of entry of that order;
12
13 (2) 90 days after the first motion to reconsider is filed; or
14
15 (3) 180 days after entry of the appealable order.
16

17 **(f) Public entity elections or motions under Government Code sections 962, 984, or**
18 **985**
19

20 If a public entity defendant serves and files a valid request for a mandatory
21 settlement conference on methods of satisfying a judgment under Government Code
22 section 962, a motion for a posttrial hearing on reducing a judgment under
23 Government Code section 985, or an election to pay a judgment in periodic payments
24 under Government Code section 984 and rule 3.1804, the time to appeal from the
25 judgment is extended for all parties until the earliest of:
26

- 27 (1) 90 days after the superior court clerk serves the party filing the notice of appeal
28 with a document entitled “Notice of Entry” of judgment or a file-stamped copy
29 of the judgment, showing the date either was served;
30
31 (2) 90 days after the party filing the notice of appeal serves or is served by a party
32 with a document entitled “Notice of Entry” of judgment or a file-stamped copy
33 of the judgment, accompanied by proof of service; or
34
35 (3) 180 days after entry of judgment.
36

37 **(g) Cross-appeal**
38

- 39 (1) If an appellant timely appeals from a judgment or appealable order, the time for
40 any other party to appeal from the same judgment or order is extended until 20
41 days after the superior court clerk mails services notification of the first appeal.
42

1 (2) If an appellant timely appeals from an order granting a motion for new trial, an
2 order granting—within 150 days after entry of judgment—a motion to vacate
3 the judgment, or a judgment notwithstanding the verdict, the time for any other
4 party to appeal from the original judgment or from an order denying a motion
5 for judgment notwithstanding the verdict is extended until 20 days after the
6 clerk ~~mails~~ serves notification of the first appeal.
7

8 ~~(g)(h) Showing date of order or notice~~ Service; proof of service
9

10 ~~An order or notice mailed by the clerk under this rule must show the date it was~~
11 ~~mailed. Service under this rule may be by any method permitted by the Code of Civil~~
12 ~~Procedure, including electronic service when permitted under Code of Civil~~
13 ~~Procedure section 1010.6 and rules 2.250–2.261. An order or notice that is served by~~
14 ~~a party must be accompanied by proof of service.~~

15
16 **Advisory Committee Comment**
17

18 Subdivisions (b)–~~(e)~~(f) operate only when a party serves and files a “valid” motion, election, or notice of
19 intent to move for the relief in question. As used in these provisions, the word “valid” means only that the
20 motion, election, or notice complies with all procedural requirements; it does not mean that the motion,
21 election, or notice must also be substantively meritorious. For example, under the rule a timely new trial
22 motion on the ground of excessive damages (Code Civ. Proc., § 657) extends the time to appeal from the
23 judgment even if the trial court ultimately determines the damages were not excessive. Similarly, a timely
24 motion to reconsider (*id.*, § 1008) extends the time to appeal from an appealable order for which
25 reconsideration was sought even if the trial court ultimately determines the motion was not “based upon
26 new or different facts, circumstances, or law,” as subdivision (a) of section 1008 requires.
27

28 **Subdivision (b).** Subdivision (b)(1) provides that the denial of a motion for new trial triggers a 30-day
29 extension of the time to appeal from the judgment beginning on the date that the superior court clerk
30 ~~mails~~, or a party serves, either the order of denial or a notice of entry of that order. This provision is
31 intended to eliminate a trap for litigants and to make the rule consistent with the primary rule on the time
32 to appeal from the judgment (rule 8.104(a)).
33

34 **Subdivision (c).** The Code of Civil Procedure provides two distinct statutory motions to vacate a
35 judgment: (1) a motion to vacate a judgment and enter “another and different judgment” because of
36 judicial error (*id.*, § 663), which requires a notice of intention to move to vacate (*id.*, § 663a); and (2) a
37 motion to vacate a judgment because of mistake, inadvertence, surprise, or neglect, which requires a
38 motion to vacate but not a notice of intention to so move (*id.*, § 473, subd. (b)). The courts also recognize
39 certain nonstatutory motions to vacate a judgment, e.g., when the judgment is void on the face of the
40 record or was obtained by extrinsic fraud. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on
41 Judgment in Trial Court, §§ 222–236, pp. 726–750.) Subdivision (c) is intended to apply to all such
42 motions.
43

44 In subdivision (c) the phrase “within the time prescribed by rule 8.104 to appeal from the judgment” is
45 intended to incorporate in full the provisions of rule 8.104(a).
46

1 Under subdivision (c)(1), the 30-day extension of the time to appeal from the judgment begins when the
2 superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order.
3 This provision is discussed further under subdivision (b) of this comment.
4

5 **Subdivision (d).** Subdivision (d)(1) provides an extension of time after an order denying a motion for
6 judgment notwithstanding the verdict regardless of whether the moving party also moved unsuccessfully
7 for a new trial.
8

9 Subdivision (d) further specifies the times to appeal when, as often occurs, a motion for judgment
10 notwithstanding the verdict is joined with a motion for new trial and both motions are denied. Under
11 subdivision (b), the appellant has 30 days after notice of the denial of the new trial motion to appeal from
12 the judgment. Subdivision (d) allows the appellant the longer time provided by rule 8.104 to appeal from
13 the order denying the motion for judgment notwithstanding the verdict, subject to that time being further
14 extended in the circumstances covered by subdivision (f)(2).
15

16 Under subdivision (d)(1)(A), the 30-day extension of the time to appeal from the judgment begins when
17 the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that
18 order. This provision is discussed further under subdivision (b) of this comment.
19

20 **Subdivision (e).** The scope of subdivision (e) is specific. It applies to any “appealable order,” whether
21 made before or after judgment (see Code Civ. Proc., § 904.1, subd. (a)(2)–(12)), but it extends only the
22 time to appeal “from that order.” The subdivision thus takes no position on whether a judgment is subject
23 to a motion to reconsider (see, e.g., *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236–1238
24 [postjudgment motion to reconsider order granting summary judgment did not extend time to appeal from
25 judgment because trial court had no power to rule on such motion after entry of judgment]), or whether an
26 order denying a motion to reconsider is itself appealable (compare *Santee v. Santa Clara County Office of*
27 *Education* (1990) 220 Cal.App.3d 702, 710–711 [order appealable if motion based on new facts] with
28 *Rojas v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1160–1161 [order not appealable under
29 any circumstances]). Both these issues are legislative matters.
30

31 Subdivision (e) applies only when a “party” makes a valid motion to “reconsider” an appealable order
32 under subdivision (a) of Code of Civil Procedure section 1008; it therefore does not apply when a court
33 reconsiders an order on its own motion (*id.*, subd. (d)) or when a party makes “a subsequent application
34 for the same order” (*id.*, subd. (c)). The statute provides no time limits within which either of the latter
35 events must occur.
36

37 Under subdivision (e)(1), the 30-day extension of the time to appeal from the order begins when the
38 superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order.
39 The purpose of this provision is discussed further under subdivision (b) of this comment.
40

41 Among its alternative periods of extension of the time to appeal, subdivision (e) provides in paragraph (2)
42 for a 90-day period beginning on the filing of the motion to reconsider or, if there is more than one such
43 motion, the filing of the first such motion. The provision is consistent with subdivision (c)(2), governing
44 motions to vacate judgment; as in the case of those motions, there is no time limit for a ruling on a motion
45 to reconsider.
46

1 **Subdivision (f)(g).** Consistent with case law, subdivision (f)(g)(1) extends the time to appeal after another
2 party appeals only if the later appeal is taken “from the same order or judgment as the first appeal.”
3 (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 704.)
4

5 The former rule (former rule 3(c), second sentence) provided an extension of time for filing a protective
6 cross-appeal from the judgment when the trial court granted a motion for new trial or a motion to vacate
7 the judgment, but did not provide the same extension when the trial court granted a motion for judgment
8 notwithstanding the verdict. One case declined to infer that the omission was unintentional, but suggested
9 that the Judicial Council might consider amending the rule to fill the gap. (*Lippert v. AVCO Community*
10 *Developers, Inc.* (1976) 60 Cal.App.3d 775, 778 & fn. 3.) Rule 8.108(e)(2) fills the gap thus identified.
11

12 **Subdivision (g)(h).** Under subdivision (g)(h), ~~an order or notice mailed by the clerk under this rule must~~
13 ~~show the date on which the clerk mailed the document, analogously to the clerk’s “certificate of mailing”~~
14 ~~currently in use in many superior courts. This provision is intended to establish the date when an~~
15 ~~extension of the time to appeal begins to run after the clerk mails such an order or notice.~~
16

17 ~~Subdivision (g) also requires that an order or notice that is served by a party under this rule must be~~
18 ~~accompanied by proof of service. The proof of service establishes the date when an extension of the time~~
19 ~~to appeal begins to run after the party serves service of such an order or notice.~~
20
21

22 **Division 2. Rules Relating to the Superior Court Appellate Division**

23 **Chapter 2. Appeals and Records in Limited Civil Cases**

24 **Article 1. Taking Civil Appeals**

25 **Rule 8.823. Extending the time to appeal**

26 **(a) Extension of time**

27 This rule operates only to increase the time to appeal otherwise prescribed in rule
28 8.822(a); it does not shorten the time to appeal. If the normal time to appeal stated in
29 rule 8.822(a) would be longer than the time provided in this rule, the time to appeal
30 stated in rule 8.822(a) governs.
31

32 **(b) Motion for a new trial**

33 If any party serves and files a valid notice of intention to move for a new trial, the
34 time to appeal from the judgment is extended for all parties as follows:
35

36 (1) If the motion is denied, until the earliest of:
37

38 (A) 15 days after the trial court clerk mails, or a party serves, an order denying
39 the motion or a notice of entry of that order;
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(B) 15 days after denial of the motion by operation of law; or

(C) 90 days after entry of judgment; or

(2) If any party serves an acceptance of a conditionally ordered additur or remittitur of damages under a trial court finding of excessive or inadequate damages, until 15 days after the date the party serves the acceptance.

(c) Motion to vacate judgment

If, within the time prescribed by rule 8.822 to appeal from the judgment, any party serves and files a valid notice of intention to move to vacate the judgment or a valid motion to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of:

- (1) 15 days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;
- (2) 45 days after the first notice of intention to move or motion is filed; or
- (3) 90 days after entry of judgment.

(d) Motion for judgment notwithstanding the verdict

(1) If any party serves and files a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

- (A) 15 days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order;
- (B) 15 days after denial of the motion by operation of law; or
- (C) 90 days after entry of judgment.

(2) Unless extended by (e)(2), the time to appeal from an order denying a motion for judgment notwithstanding the verdict is governed by rule 8.822.

1 **(e) Motion to reconsider appealable order**

2
3 If any party serves and files a valid motion to reconsider an appealable order under
4 Code of Civil Procedure section 1008(a), the time to appeal from that order is
5 extended for all parties until the earliest of:

- 6
7 (1) 15 days after the superior court clerk mails, or a party serves, an order denying
8 the motion or a notice of entry of that order;
9
10 (2) 45 days after the first motion to reconsider is filed; or
11
12 (3) 90 days after entry of the appealable order.

13
14 **(f) Public entity elections or motions under Government Code sections 962, 984, or**
15 **985**

16
17 If a public entity defendant serves and files a valid request for a mandatory
18 settlement conference on methods of satisfying a judgment under Government Code
19 section 962, a motion for a posttrial hearing on reducing a judgment under
20 Government Code section 985, or an election to pay a judgment in periodic payments
21 under Government Code section 984 and rule 3.1804, the time to appeal from the
22 judgment is extended for all parties until the earliest of:

- 23
24 (1) 60 days after the superior court clerk serves the party filing the notice of appeal
25 with a document entitled “Notice of Entry” of judgment or a file-stamped copy
26 of the judgment, showing the date either was served;
27
28 (2) 60 days after the party filing the notice of appeal serves or is served by a party
29 with a document entitled “Notice of Entry” of judgment or a file-stamped copy
30 of the judgment, accompanied by proof of service; or
31
32 (3) 90 days after entry of judgment.

33
34 **(f)(g) Cross-appeal**

- 35
36 (1) If an appellant timely appeals from a judgment or appealable order, the time for
37 any other party to appeal from the same judgment or order is extended until 10
38 days after the trial court clerk mails notification of the first appeal.
39
40 (2) If an appellant timely appeals from an order granting a motion for a new trial,
41 an order granting—within 75 days after entry of judgment—a motion to vacate
42 the judgment, or a judgment notwithstanding the verdict, the time for any other

1 party to appeal from the original judgment or from an order denying a motion
2 for judgment notwithstanding the verdict is extended until 10 days after the
3 clerk mails notification of the first appeal.
4

5 **~~(g)~~(h) Showing date of order or notice; proof of service**
6

7 An order or notice mailed by the clerk under this rule must show the date it was
8 mailed. An order or notice served by a party must be accompanied by proof of
9 service.
10

Item SPR10-11 Response Form

Title: **Appellate Procedure: Extension of Time to File Notice of Appeal** (amend Cal. Rules of Court, rules 8.104, 8.108 and 8.823)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 18, 2010

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.