

Parts of this sample form in blue print are instructions to the user, not to be included in filed document unless so noted. [Parts and references in green font, if any, refer to juvenile proceedings. See Practice Note, this web page, for any guidance in adapting forms to juvenile cases.]

### **PRACTICE TIPS**

This sample applies to appeals in which the notice of appeal was timely filed, the 60-day filing period has expired, and the case has been assigned a Court of Appeal number, but the notice is defective, and the defect is correctable. For example, if the notice of appeal fails to identify the correct date of the appealable judgment or order, or to include the signature of the defendant or counsel, or to include the case number of an additional case which was part of the sentencing orders and which defendant wishes to appeal, it may be possible to amend the notice to include those matters. (See Calif. Rules of Court, rule 8.304(a)(1), (3), and (4).) All three Divisions of the Fourth Appellate District accept such motions. (To include a challenge to the guilty plea as a basis of the appeal, see [Forms & Samples: "Certificate of Probable Cause - Benoit"](#) and [ADI Manual](#), § 2.115: "Constructive Filing Doctrine.")

**California Rules of Court, rule 8.304(b)(3), amended effective January 1, 2022:** In guilty plea cases, the rule deems a notice of appeal operative and "limited to issues that do not require a certificate of probable cause" (CPC), where the defendant has failed to seek a CPC or the superior court denies the CPC and there is no other ground for appeal noted in the notice of appeal, such as the sentence. Therefore, no motion to amend is necessary.

**Manual guidance:** See chapter 2 of the [ADI Appellate Practice Manual](#), § 2.101 et seq., for background on notices of appeal and § 2.113 et seq., for additional information on remedies for defective notices of appeal. See also section II.B.2. of ADI's [Guide to Motion Practice \(PDF\)](#), found under APPELLATE PRACTICE<Nuts and Bolts of Panel Practice.

**Sample notice of appeal filings from ADI:** Amendment of a notice of appeal can be based on a variety of grounds. ADI staff attorneys file most of these petitions, because often they are a prerequisite to appointment of counsel. ADI therefore has a substantial bank of sample notice of appeal type pleadings. Panel attorneys should ask the assigned staff attorney for assistance and any sample briefing related to the particular situation of the case.

**Stay of appeal:** Stays are generally unnecessary and tend to be disfavored, unless the court decides to stay the appeal on its own motion. Counsel should not ask for a stay unless it is necessary to avoid some kind of prejudice. An extension of time to file the brief usually is sufficient.

*[Attorney's Name, bar number]*  
*[Address and telephone number]*  
*[Email address and fax number if available]*  
Attorney for Defendant *[Name]*

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT, DIVISION *[NUMBER]***

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff and Respondent,

v.

*[Appellant's name]*,  
Defendant and Appellant.

Court of Appeal  
No. *[number]*

Superior Court  
No. *[number]*

FROM THE SUPERIOR COURT OF *[NAME]* COUNTY

Honorable *[Name trial judge]*, Judge

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**APPELLANT'S MOTION FOR LEAVE TO FILE  
AN AMENDED NOTICE OF APPEAL**

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TO THE HONORABLE *[NAME]*, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION *[NUMBER]*:

Defendant *[name]* hereby moves this court for an order deeming his timely filed notice of appeal after his plea of guilty to include *[indicate the needed correction]* in accordance with California Rules of Court, rule 8.304(a) (hereinafter "rule(s)"). This motion is based upon the above-stated rule, the accompanying memorandum of points and authorities, the attached

exhibits *[such as declarations and other documentary evidence]*, and the files and records in Fourth Appellate District case number *[number]*.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF THE CASE

*[Set forth procedural history relevant to the claim.]*

### II. ARGUMENT

#### A. AMENDMENT OF THE NOTICE OF APPEAL TO INCLUDE *[identify the needed correction, such as, the correct date of the judgment or order appealed, or the signature of defendant or counsel, or the case number of a companion case]* IS JUSTIFIED BECAUSE *[briefly state the reason]*.

Trial counsel, *[Name]*, undertook to file a notice of appeal, and *[he or she]* did so in a timely manner. However, the notice of appeal may be inoperative because *[set forth the reason, such as the notice of appeal does not identify the date of the judgment or order appealed so as to identify the basis of the appeal (rule 8.304(a)(4)), or the signature of the defendant or counsel is absent (rule 8.304(a)(3)), or the notice of appeal fails to include a companion case in which the defendant was also sentenced in the same proceeding (rule 8.304(a)(1))]*. Trial counsel has a duty not only to timely file a notice of appeal, but to also properly identify appropriate grounds for appeal (See Pen. Code, § 1240.1, subd. (b)) and comply with the filing requirements.

The right to effective assistance of counsel, guaranteed by the Sixth Amendment of the United States Constitution and made applicable to the state through the due process clause of the Fourteenth Amendment of the United States Constitution (U.S. Const., 6th & 14th Amends.; *Gideon v. Wainwright* (1963) 372 U.S. 335, 339-340), applies both at trial and at the first appeal as of right (see *Douglas v. California* (1963) 372 U.S. 353, 355-

356 [a criminal defendant has a Fourteenth Amendment right to appointed counsel in his or her first appeal as of right]; *People v. Osband* (1996) 13 Cal.4th 622, 664 [principles pertaining to effective representation apply on appeal]; *People v. Cudjo* (1993) 6 Cal.4th 585, 615 [criminal defendant is entitled to effective representation at every stage of criminal proceedings]; see also *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003-1004 [federal constitution is not the sole source of a defendant's right to be afforded representation; under the California Constitution a defendant has a right to appointed counsel at all critical stages of the criminal process].)

A defendant claiming ineffective assistance of counsel must demonstrate that *[his or her]* attorney's representation failed to meet an objective standard of reasonableness and that the attorney's deficient performance prejudiced him. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 476-477; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694-695; *Rodriguez v. United States* (1969) 395 U.S. 327, 476-477 [if counsel fails to file requested appeal, defendant entitled to new appeal without showing appeal likely has merit]; *Garza v. Idaho* (2019) \_\_\_ U.S. \_\_\_ [139 S.Ct. 738] [even if the plea includes an appellate waiver, prejudice is established if counsel fails to file the notice of appeal when asked to do so by defendant].) Here, trial counsel timely filed a notice of appeal but failed to properly execute the notice resulting in prejudice *[applying the standard, ante, set forth the circumstances supporting ineffectiveness by trial counsel]*.

Further, rules 8.100(a)(2) and 8.304(a)(4) declare that notices of appeal shall be liberally construed in favor of their sufficiency. "This power [to grant relief from default in filing notes of appeal] is to be liberally construed to protect the right to appeal." (*People v. Ribero* (1971) 4 Cal.3d 55, 65, superseded by statute on other grounds as stated in *In re Chavez*

(2003) 30 Cal.4<sup>th</sup> 643, 656.) This advances the state’s “strong public policy in favor of hearing appeals on their merits . . .” (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853-854.)

### III. CONCLUSION

The right to appeal is “one of the most important rights possessed by a convicted defendant, and every legitimate element should be exercised in its favor.” (*In re Pickett* (1972) 25 Cal.App.3d 1158, 1166, quoting *People v. Serrato* (1965) 238 Cal.App.2d 112, 115 and citing *People v. Casillas* (1964) 61 Cal.2d 344.) For all the foregoing reasons, defendant requests this court to grant leave to amend the notice of appeal so that it may comply with rule 8.304(b)(4).

Dated: *[date]*

Respectfully submitted,

*[Attorney Name]*

State Bar No. *[number]*

Attorney for Defendant *[Name]*

## **PROOF OF SERVICE**