

# Ten Trial Tips from an Appellate Specialist

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# An appellate attorney is not smarter than a trial attorney

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...they just have different jobs.

# What is an appellate attorney looking for?

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- Why didn't the client win?
- To get reversal, need to find a judge error.
- To show judge error, need a good record.
- **Make a Record!**

# “Rule Zero”: Make a Record!

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- If it isn't on the record, it didn't happen.
- Corollary: the *only* thing that matters is what is in the record.

# “Rule Zero”: Make a Record!

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- Tips & Traps, according to a poll of appellate attorneys:
  - Not fleshing out your opposition because you conferenced the case in chambers, and just saying the court knows my arguments. As a former prosecutor turned appellate litigator, I know the trial courts pressure attorneys to speed things along, but you need that record.
  - Failing to making a record after a MIL is denied.
  - Here's how I once explained this to a trial lawyer: the trial is to me like a deposition is to you. I need clean impeachment just as much as you do.

# “Rule Zero”: Make a Record!

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- Tips & Traps, according to a poll of appellate attorneys:
  - If you leave a trial lawyer in charge of appellate preservation, your results will be similar to what you can expect if you leave an appellate lawyer in charge of closing argument.
  - Engage appellate counsel to review/contribute to your key legal arguments at trial: any dispositive motion, any key evidentiary ruling, arguing jury instructions, motion to strike, any post-trial motion.

# “Rule Zero”: Make a Record!

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- Tips & Traps, according to a poll of appellate attorneys:
  - Generally speaking,
    - A. put the objection/motion in writing, if possible;
    - B. support it with some facts;
    - C. support it with some law;
    - D. get a ruling on it; and
    - E. do it at a time it can make a difference.

# #1 Make sure your theories of the case are captured in your pleadings

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- Only try one theory. But preserve as many as you can.
- If your theories have evolved, consider:
  1. Amend your pleadings
  2. Trial brief
  3. MILs



## #2 Was key evidence excluded? Preserve the issue by making a proffer.

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- "The failure to make a specific offer of proof constitutes waiver of the contention that the court erroneously excluded evidence." (Austin V. v. Escondido Union School District (2007) 149 Cal.App.4th 860, 886.)
- Get the court's refusal to allow a proffer on the record.
- Consider filing a written proffer after the fact, attaching the proffered evidence.

# #3 Keep objecting to evidence if the judge “defers” ruling on your MIL.

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- If your MIL to exclude evidence is denied, great! Your evidentiary objections are preserved via your motion! No need to continue objecting ad nauseam.
- But commonly the judge will give a *deferred* ruling, neither granting nor denying the motion.
- **Beware!** A deferred ruling preserves nothing! You still need to object to every instance of the offending matter. Proceed as though you had never filed your MIL.
- (People v. Morris (1991) 53 Cal.3d 152, 195.)

# #3 Keep objecting to evidence if the judge “defers” ruling on your MIL.

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- What if the judge grants a MIL against you that is tantamount to nonsuit? I.e., your key evidence is excluded?
- Good news! On appeal, the excluded evidence will be reviewed in the light most favorable to you (appellant).

# #4 Object to Jury Instructions

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- Propose your jury instructions.
- File written objections to your opponent's jury instructions.

# #4 Object to Jury Instructions

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- Why bother?!? By law, all jury instructions are “deemed excepted to.” (Code Civ. Proc., § 647.)
- By the statute is a lie! In practice, objections typically are deemed waived if not on the record.
- Why? Off-record hearings. “ ‘ “All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent....” ’ ” “We must therefore presume that what occurred at that [unreported] hearing supports the judgment.” (Hearn v. Howard (2009) 177 Cal.App.4th 1193, 1200-1201.)

# #4 Object to Jury Instructions

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- **What if the court reads erroneous jury instructions over your object? Or refuses your legally correct jury instructions?**
- Good news! On appeal, your evidence related to that instruction will be reviewed in the light most favorable to you (appellant). The court will assume the jury might have believed the evidence upon which appellant's instruction was predicated and would have rendered verdict for appellant concerning issues on which jury was misdirected.

# #4 Object to Jury Instructions

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- Tips and Trap from a poll of other appellate attorneys:
  - Preserve objections to jury instructions. The pressure to have agreed instructions seems to cause some lawyers to abandon important legal arguments. You can help phrase a compromise instruction but still note that you object to it and want your original proposal used. Make sure that there is a clear record of what you proposed, the court's refusal, and your objection to that refusal.
  - And don't just waive reporting of discussions about jury instructions. The court may express frustration with you but should respect your position.
  - A "me, too" about jury instructions. It isn't enough to propose yours; you also must object to the court's chosen instructions and explain why they're incorrect (in your view).

# #5 Review the Verdict for Inconsistences

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- Look for inconsistent verdicts. A judgment based on an inconsistent verdict is reversible!
- The court “is not entitled to draw inferences in favor of the jury's special verdict findings....” (Morris v. McCauley's Quality Transmission Service (1976) 60 Cal.App.3d 964, 973.)
- Where verdicts could support a judgment for either party, “the plaintiff was ‘no more entitled than [the defendant] to have the favorable verdict credited and the unfavorable one disregarded]’”. (Shaw v. Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1345–1346.)



# #5 Review the Verdict for Inconsistencies

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- Tips and Trap from a poll of other appellate attorneys:
  - Scrutinize the verdict before the court discharges the jury. A verdict form that seemed to work before it was given to the jury may prove to be ambiguous or inconsistent when the jury actually fills it out. Failing to object before the court discharges the jury may waive the issue for appeal.
  - Remedying problems with verdicts is another area. If something about verdicts is ambiguous or perhaps irreconcilable, raise it with the trial court before the jury is discharged.

# #6 Request and Object to the Statement of Decision

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- What is the statement of decision? (Not the same as a tentative decision!)
- When to request?
  - Before submitting, if the proceeding is less than 8 hours.
  - Otherwise, within **10 days** of the tentative.

# #6 Request and Object to the Statement of Decision

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- **Step 1: Request the SOD**
- How do you request it?
  - Identify the issues you want decided.
  - Propose the answers you want.
  - No “shotgun” requests or “interrogatory” style.

# #6 Request and Object to the Statement of Decision

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- **Step 2: Object to the Proposed Statement of Decision**
- Why? Preserve objections to omissions or deficiencies.
- What to Look For:
  - Did the court make findings on all the elements of the claims & defenses?
  - Did the court use the proper standard of proof (e.g., fraud requires clear & convincing proof)?

# #6 Request and Object to the Statement of Decision

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- **What does the Statement of Decision do for me?**
- Defeats the doctrine of implied findings.
  - Doctrine helps the prevailing party. So the prevailing party usually does not want a statement of decision!

# #7 File a motion for new trial to preserve challenges to the damages amount

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- “If a party fails to raise the issue of the adequacy of a damages award in the trial court through a motion for a new trial, the party is precluded from raising the issue for the first time on appeal.” (Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 918.)
- Same goes for juror misconduct.

# #7 ...and Watch out for JNOVs!

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- Consider this hypo:
  - Bad news: You lost your jury trial.
  - Good news: The judge granted JNOV in your favor!
  - Bad news: Your opponent appealed and reversed the JNOV.
  - **Really bad news:** You forgot to appeal from the original judgment. Now that judgment is final.
- **Solution:** File a protective cross-appeal.

# #8 Calculate Appellate Deadlines Correctly

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- This is harder than it looks!
- Default deadline: 180 days from entry of judgment
- But this can be shortened to 60 days if there is a “triggering” document under CRC 8.104(a)(1):
  - Notice of Entry
  - File-endorsed copy of the judgment showing the date of service



# #8 Calculate Appellate Deadlines Correctly

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- Why is this complicated? Because the clerk sometimes mails a file-endorsed copy of the judgment as one of multiple documents, leaving ambiguity whether the judgment shows the date of service.
- Key case on this: *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894:
  - SOD was filed stamped: but no POS.
  - Order denying class cert: POS, but not filed stamped.

# #8 Calculate Appellate Deadlines Correctly

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- Holding from *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894:
- The Supreme Court held CRC 8.104(a) requires a single document must meet all the requirements, and that Appellants could not be made to glean appealability from multiple documents. In other words, when the clerk serves the appealable order, it must be file-stamped, and it must have a POS attached.

# #8 Calculate Appellate Deadlines Correctly

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- Side Note: A conundrum about appealing from a Statement of Decision.
  - A Statement of Decision normally is NOT appealable.
  - But *Alan v. American Honda Motor Co.* stated that "Reviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits." "
  - But," the Court continued, "a statement of decision is not treated as appealable when a formal order or judgment does follow."
- So, what should you do if there is a SOD, but no judgment?

# #9 Avoid Common Appellate Briefing Mistakes

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- Failing to include the entire record.
- Failing to put each argument under its own heading.
- Failing to cite every fact statement to the record.

# #9 Avoid Common Appellate Briefing Mistakes

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- Addressing only one of the trial court's reasons. The ruling will be affirmed on ANY ground!
- Fighting the trial court's factual findings. Unless you are challenging the factual findings (and this is almost impossible to succeed at), accept the court's findings, and explain why the judgment should be reversed anyway.
- Delete all your adverbs. The court will ignore them anyway, with the only difference that the court will not only be unpersuaded, but also annoyed.

# #10 Advise your client about important post-judgment issues

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- **Attorney fees and costs**
  - Don't wait for a fee/cost award before appealing.
  - Appeal from the minute order on fees/costs (don't wait for a formal order).
  - Offer to stipulate to extend your opponent's time to file their motion = defer accrual of interest!

# #10 Advise your client about important post-judgment issues

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- **Attorney fees and costs**
  - If you win the underlying appeal, what happens to the fees and costs award?
    - (It goes away automatically...in theory.)
  - Are fee/cost awards stayed automatically pending appeal?
    - (Yes, but it's complicated.)

# #10 Advise your client about important post-judgment issues

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- **SLAPP fees:**
  - There is a split of authority whether an award of SLAPP fees is automatically stayed pending appeal:
  - The upshot: If you want an anti-SLAPP fee award to be automatically stayed on appeal, cite *Quiles v. Parent* (2017) 10 Cal.App.5th 130 . It is the better reasoned case (IMHO) and more consistent with the statutes.
  - But until the Supreme Court resolves this split, litigants who want to enforce anti-SLAPP fee awards pending appeal may still rely on *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, which holds SLAPP fees are “non-routine” costs and thus not automatically stayed pending appeal.
  - (Find my article on this, Google: Tim Kowal stay of SLAPP fees)



# #10 Advise your client about important post-judgment issues

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- Bonds and Stays of Judgment-Enforcement
- How to stay?
  - Temporary discretionary stay under CCP 918.
  - Post a bond of 150% judgment amount.
  - Personal surety? 2+ with CA property worth 400% judgment.

# #10 Advise your client about important post-judgment issues

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- **Post-judgment interest = 10%**
  - Only way to cut off interest is to pay the judgment
  - Beware of “waiving” appellate rights by satisfying the judgment!

# Evergreen Tip: Get a Court Reporter!

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And don't take them for granted!

Over the past five years at LASC, the court-reporter workforce dropped almost 25%. Court-reporter retirements continue to outpace their replacements.

As of November 2022, LASC no longer provides reporters in probate and family law matters.

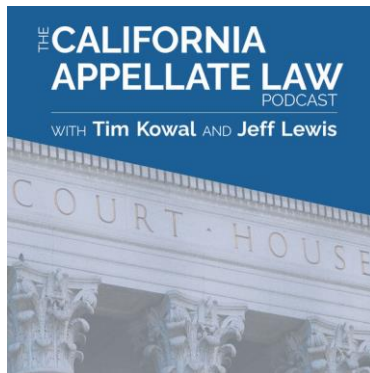
# Questions?

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Tim Kowal summarizes recent CA appellate court cases that inform, surprise, anger, or elate.