Can You Read It Back?

TACKLING COURT REPORTER SCARCITY IN CALIFORNIA

Presenter: Tim Kowal

February 22, 2024

Tim Kowal

KOWAL LAW GROUP

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Current Developments

There is a critical shortage of court reporters in California and across the nation. The shortage is not due to a lack of funding, but a lack of new court reporters replacing those retiring.

A court reporter's transcript is the primary way to create an oral record of trial court proceedings for an appeal.

State Sen. Susan Rubio is planning to introduce a bill that would allow California's 58 trial courts to digitally record civil and family law cases.

Gov. Newsom recently signed new legislation (A.B. 156) that allows the Court Reporters Board (Board) to license voice writers to work as certified court reporters.

Agenda

1. Introduction to the problem: "Get a court reporter…… *if you can find one!*"
2. Why can't we electronically record our proceedings?
3. Why is there a shortage of court reporters?

You really *shouldn't* need an oral record for most hearings, but as a practical matter, you do.

The good news: settled statements aren't as hard as you think.

The Legislature could solve the crisis, but there are some other measures that could help.

Introduction to the problem: "Get a court reporter…… *if you can find one!*"

- 25% drop in court reporter workforce at LASC in past 5 years
- LASC no longer provides reporters in probate and family law matters
- Electronic recordings are not allowed (except in limited civil and criminal misdemeanors/infractions).
  - (Gov. Code, § 69957, subd. (a). *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15; *California Court Reporters Assn. v. Judicial Council of California* (1997) 59 Cal.App.4th 959.)

Introduction to the problem: "Get a court reporter…… *if you can find one!*"

- An oral record is usually required for an appellate challenge.
- "'[I]f the record is inadequate for meaningful review, **the appellant defaults** and the decision of the trial court should be affirmed.' [Citation.] 'Consequently, [the appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue **requires that the issue be resolved against [the appellant]**.' [Citation.]"
  - (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-09.)

Introduction to the problem: "Get a court reporter…… *if you can find one!*"

- What about non-evidentiary hearings? Still need an oral record:
  - attorney fee motion hearing
  - new trial motion hearing
  - hearing to determine whether counsel was waived and the minor consented to informal adjudication
  - surcharge hearing
  - nonsuit motion
  - special jury instructions
  - hearing to dissolve preliminary injunction
  - demurrer hearing
  - argument to the jury

Introduction to the problem: "Get a court reporter…… *if you can find one!*"

- The California Supreme Court has recognized that access to a record is access to justice:
  - "The right of appeal cannot lie in that discriminatory morass in which it is accessible to the rich and denied to the poor. Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent"
  - (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-09, quoting *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 87–88.)

Introduction to the problem: "Get a court reporter…… *if you can find one!*"

- The California Supreme Court has recognized that access to a record is access to justice:
  - Noting the fact that many states have authorized electronic recordings, the Court discussed a 2017 report of the Commission on the Future of California's Court System about "recent technological advances in digital recording of court proceedings," and **recommending "implementing a pilot program to use comprehensive digital recording** . . . ."
  - The Court then lamented: "In view of the restriction imposed by current legislation, **however, legislative authorization is required** to proceed with this recommendation."
  - (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-09

Electronic recordings are not included among the statutory methods to create an oral record, but there are two other methods.

Is a CSR transcript the “gold standard”?

Answer: Probably true.

But, also probably true that electronic recordings may be nearly as good.

Feasible methods of creating an oral record:

- **CSR transcript**
- **Voice-writer transcript**
- Electronic recording overseen by a qualified monitor (later transcribed by a CSR)
- Electronic recording (submitted to the appellate court in audio form [not ideal])
- Settled statement or agreed statement

Electronic recordings are not included among the statutory methods to create an oral record, but there are two other methods.

"In fact, the battle over use of certified shorthand reporters versus electronic recording appears to be more political than factual." (*People v. Turner* (1998) 79 Cal. Rptr. 2d 740, 745 (citing Don J. DeBenedictis, *Excuse Me, Did You Get All That?*, 79 A.B.A. J., May 1993, at 84).)

Electronic recordings are not included among the three statutory methods to create an oral record

Gov. Code § 69957 prohibits the use of electronic recordings.

But there are still two statutory alternatives to a verbatim CSR transcript:

1. Agreed Statements

2. Settled Statements

What we'll discuss

1. The importance of making a record
2. Why is there a court-reporter shortage?
3. Why do I need an oral record for law-and-motion hearings?
4. There are alternatives to a reporter's transcript: the settled statement, and the agreed statement.
5. Application: Using settled/agreed statements to solve common problems in making the record.
6. What can be done…
   - by the Legislature?
   - by the Judicial Council?
   - by courts?
   - by attorneys?

The appellate attorney's #1 rule: Make a Record!

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."
- "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."

The appellate attorney's #1 rule: Make a Record!

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.

The appellate attorney's #1 rule: Make a Record!

"When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."
(*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

Why is there a shortage of court reporters?

Short answer: No one knows.

Some possible factors:

- CA excluded voice-writers (until 2022)
- The licensing exam is rigorous:
- 2021: 175 exam-takers; only 36 passed
- Note our current shortage: 2,750

Court Reporters Board
Dictation Examination Statistics - Nov 2022

School Name	Total # Apps	Overall # Pass	Overall % Pass	First Time Applicants	First Time # Pass	First Time % Pass
Charles A. Jones (CLOSED)	4	0	0.0%	0	0	n/a
College of Marin	4	0	0.0%	1	0	0.0%
Cypress	0	0	n/a	0	0	n/a
Downey	9	1	11.1%	3	1	33.3%
Humphreys University	5	1	20.0%	1	0	0.0%
South Coast	11	1	9.1%	3	1	33.3%
Taft	6	0	0.0%	0	0	n/a
Tri-Community	3	0	0.0%	0	0	n/a
West Valley	0	0	n/a	0	0	n/a
School Total	42	3	7.1%	8	2	25.0%
Five Plus	13	1	7.7%	n/a	n/a	n/a
Out of State	1	1	100.0%	1	1	100.0%
RPR	19	12	63.2%	15	10	66.7%
CVR	6	4	66.7%	6	4	66.7%
Working Reporter	0	0	n/a	0	0	n/a
TOTAL	*81*	*21*	*25.9%*	*30*	*17*	*56.7%*

What is being done to address the court-reporter shortage?

The average age of a CA CSR is 60!

State Sen. Susan Rubio introduced a bill, SB 662, that would allow California's 58 trial courts to digitally record civil and family law cases.

UPDATE Jan. '24: SB 662, backed by the Judicial Council, was opposed by politically powerful labor groups representing court reporters.

New legislation in 2022 (A.B. 156) now allows the Court Reporters Board to license voice writers to work as certified court reporters.

What is being done to address the court-reporter shortage?

LASC is offering signing bonuses and tuition credit for new court reporters

Superior Court of California,
County of Los Angeles
Media Relations
111 N. Hill St., Room 107,
Los Angeles, CA 90012

NEWS RELEASE

www.lacourt.org | publicinfo@lacourt.org | @LASuperiorCourt

Media Relations
publicinfo@lacourt.org

FOR IMMEDIATE RELEASE:
February 1, 2023

NATION'S LARGEST TRIAL COURT OFFERS SUBSTANTIAL INCENTIVES TO RETAIN AND RECRUIT OFFICIAL COURT REPORTERS AMID STAFFING SHORTAGE

Signing Bonus, Finder's Fees, Student Loan Assistance Among Solutions Made Possible by State Funding

Increased Signing Bonus for Newly Hired Official Court Reporters

- $20,000 total over two years. This incentive is retroactive to all new court reporters with a start date on or after July 1, 2022.

Court Reporter School Student Loan Forgiveness

- Up to $27,500 total over four years. This incentive is retroactive to all new court reporters with a start date on or after July 1, 2022.

Retention Bonus for Current Full-time Court Reporters

- $2,500 if a current full-time court reporter is still employed as of May 1, 2023.
- $5,000 if a current full-time court reporter is still employed as of May 1, 2024.
- $10,000 if a current full-time court reporter is still employed as of May 1, 2025.

Retention Bonus for Court Reporters with 25 Years or More of Service

- $2,500 payment at end of every quarter if reporter agrees to stay for at least 12 months.
- Bonus remains available quarterly going forward.

Finder's Fee for Court Employees who Refer Official Court Reporters to the Court

- $15,000 total incrementally ending on court reporter's one-year hiring anniversary.

What happened to the electronic-recording program?

In 1986, the Legislature authorized a demonstration project in selected counties to assess the feasibility of using electronic means of producing a verbatim record of these proceedings. (CCP § 270, subd. (a).)

By January 1992, the Judicial Council was to report to the Legislature on the feasibility of electronic recording of official superior court proceedings. ([§ 270, subd. (g).)

In 1992, the Judicial Council sponsored a bill that would have allowed electronic recording to be used after January 1, 1994. The Assembly Judiciary Committee rejected the bill and it was never reported from committee to the full Assembly. (See Assem. Bill No. 2937 (1991-1992 Reg. Sess.) §§ 1-3; see also *Los Angeles County Court Reporters Assn. v. Superior Court** (1995) 31 Cal.App.4th 403, 408-409

What happened to the electronic-recording program?

- The Final Report of the Legislature's Electronic Recording Project Advisory Committee concluded: "In civil litigation, a litigant should be able to choose the record making system at the litigant's cost. ... In *civil* litigation, it should be the litigant's decision which method (ER or CSR) will be used to make the record." Electronic Recording Project Advisory Committee, Final Report of the Electronic Recording Project Advisory Committee 1, 7 (1992).
- Despite California's 17-year experience with electronic recording in municipal courts and 6-year experience in selected superior courts under the demonstration project, as well as a favorable evaluation of the demonstration project in the Judicial Council's report to the Legislature, the bill died in committee on its first hearing.

What happened to the electronic-recording program?

Litigation:

1994: Under the terms of the statute, the demonstration project was to end on January 1, 1994. (§ 270, subd. (a).)

In November 1993, the Judicial Council adopted rules of court allowing official electronic recording of superior court proceedings after January 1, 1994.

In December 1993, appellants CCRA, Alameda County Official Court Reporters Association and five individuals petitioned the Alameda County Superior Court for a writ of mandate to preclude the Judicial Council and Alameda County officials from implementing the electronic recording rules.

In March 1994, the trial court issued a statement of intended decision, upholding the challenged rules as "not inconsistent with statute."

What happened to the electronic-recording program?

Litigation:

January 1995, the 5th Dist. issued *LACCRA v. Sup. Ct.* (1995) 31 Cal.App.4th 403. The court held that the Superior Court was **not** prohibited from using electronic recording.

October 1995, the 1st Dist. issued *California Court Reporters Ass'n v. Judicial Council* (1995) 46 Cal. Rptr. 2d 44 (CCRA I). Declared the Judicial Council's ER rules invalid.

December 1997, the 1st Dist. issued *California Court Reporters Ass'n v. Judicial Council* (1997) 69 Cal. Rptr. 2d 529 (CCRA II). Declared the Legislature prohibited "the creation of an official superior court record by electronic means under any circumstances." Restrained the Judicial Council from authorizing or funding any nonstenographic method for preparing the verbatim record.

What happened to the electronic-recording program?

Litigation:

Gandall v. Grimes (D4d3 1998) No. G017121 (nonpub. opn.).

- After losing his malpractice case, Gandall argued that the lack of a reporter's transcript deprived him of his right to appeal.
- There was an electronic recording, but Gandall argued the court was prohibited from using it.
- The court held that "**nothing in the rules of appellate practice, as best we can discern, precludes the use of electronic recordings in the production of reporter's transcripts for purposes of appeal**."
- The court characterized CCRA I as "dubious" and interpreted it narrowly.

People v. Turner (1998) 79 Cal. Rptr. 2d 740 also left open whether an electronic recording could be used when the parties expressly waive a court reporter.

What happened to the electronic-recording program?

But then the Legislature amended Gov. Code § 69957 to prohibit electronic recording for any purpose (except monitoring judicial officers in training)

- "court shall not … use electronic recording technology or equipment to make an unofficial record… or to make the official record … in circumstances not authorized by this section."

At least 10 bills were proposed between 1971 and 2000 to provide alternatives to verbatim stenographers, all of them failed.

California is one of the few states where the legislature dictates court administration and civil procedure. States where the judiciary sets its own rules seem to have a more nuanced approach toward allowing electronic recordings.

You really *shouldn't* need an oral record for most hearings, but as a practical matter, you do.

A Sensible Rule: When the trial court does not hear evidence at the hearing; a reporter's record is not necessary to the appeal.

- Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 782 (**Tex**. 2005) ("What is clear is that a reporter's record is required only if evidence is introduced in open court; **for nonevidentiary hearings, it is superfluous**.")

You really *shouldn't* need an oral record for most hearings, but as a practical matter, you do.

But that is <u>not</u> the rule in California:

"On issues . . . involving the **abuse of discretion** standard of review, a reporter's transcript or an agreed or settled statement of the proceedings is indispensable." (*Hood v. Gonzales* (2019) 43 Cal.App.5th 57, 79; see Cal. Rules of Court, rule 8.120(b) ["If an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings"].)

The absence of a reporter's transcript of the hearing on the **in limine motion** requires affirmance of the judgment. A reporter's transcript of the hearing on any motion involving **factual issues or discretionary rulings** is required in order to obtain relief on appeal. (Lemelle v. Superior Court (1978) 77 Cal.App.3d 148, 156-157.)

You really *shouldn't* need an oral record for most hearings, but as a practical matter, you do.

Hearings that have been found to require an oral record:

- attorneys' fees motion hearing
- new trial motion hearing
- hearing to determine whether counsel was waived and the minor consented to informal adjudication
- surcharge hearing
- nonsuit motion
- special jury instructions
- hearing to dissolve preliminary injunction
- demurrer hearing
- argument to the jury

The good news: **settled statements** aren't as hard as you think.

A "condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (CRC 8.137(b).)

Good uses of an agreed or settled statement:

- Hearings not involving testimony (e.g., law-and-motion, MILs, discussion of jury instructions or verdict forms)
- Short trials with limited testimonial disputes
- RT missing for portions of a trial

Poor uses:

- Multi-day trials
- Large number of testimonial disputes

The good news: **settled statements** aren't as hard as you think.

Steps for an Agreed Statement:

- Must have a good working relationship with opposing counsel!
- When filing the Designation of Record, file either the agreed statement or a stipulation that counsel are attempting to agree. CRC 8.134(b)(1).
- File the agreed statement within 40 days of the Notice of Appeal.
- (If unsuccessful, file a new Designation of Record within 50 days of the Notice of Appeal.)
- The statement must explain the nature of the action, the basis of the appellate court's jurisdiction, and how the superior court decided the points to be raised on appeal. The statement should recite only the facts necessary to decide the appeal; and it must be signed by the parties. (CRC 8.134(a)(1).)

The good news: **settled statements** aren't as hard as you think.

Steps for a Settled Statement:

- Contents of motion:
  - Statement of eligibility (e.g., no CSR available) (CRC 8.137(a).)
  - Indicate whether the statement is for oral proceedings only or documents also
- **Deadline**: Same as Designation of Record (10 days after Notice of Appeal)
- Within 30 days of order granting the motion: File the proposed statement, including a "condensed narrative" (CRC 8.137(b)(1).)
- Within 20 days: Respondent must propose amendments
- Within 10 days: Trial court to hold a hearing
- File and serve the settled statement in the trial court.

The good news: **settled statements** aren't as hard as you think.

DEFENDANT/RESPONDENT:
OTHER PARENT/PARTY:

APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)

SUPERIOR COURT CASE NUMBER:

RE: Appeal filed on *(date)*:

COURT OF APPEAL CASE NUMBER *(if known)*:

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. **RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT**

I choose to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court *(check a, b, c, or d, and fill in any required information)*:

a. ☐ A clerk's transcript under rule 8.122. *(You must check (1) or (2) and fill out the clerk's transcript section (item 4) on pages 2 and 3 of this form.)*

(1) ☐ designating the record on appeal.

(3) ☒ A settled statement under rule 8.137. *(You must check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.)*

(2) ☐

(a) ☒ The oral proceedings in the superior court were not reported by a court reporter.

(a)
(b) (b) ☐ The oral proceedings in the superior court were reported by a court reporter, but I have an order waiving fees and costs.

b. ☐ A

c. ☐ T
A
y (c) ☐ I am asking to use a settled statement for reasons other than those listed in (a) or (b). *(You must serve and file the motion required under rule 8.137(b) at the same time that you file this form. You may use form APP-025 to prepare the motion.)*

Superior court file instead of a clerk's transcript in this case? Attach a copy of this stipulation.)

d. ☐ An agreed statement under rule 8.134. *(You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)*

2. **RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT**

I choose to proceed *(you must check a or b below)*:

a. ☐ WITHOUT a record of the oral proceedings (what was said at the hearing or trial) in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was

The good news: **settled statements** aren't as hard as you think.

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO.:
E-MAIL ADDRESS:
ATTORNEY FOR (*name*):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PLAINTIFF/PETITIONER:
DEFENDANT/RESPONDENT:
OTHER PARENT/PARTY:

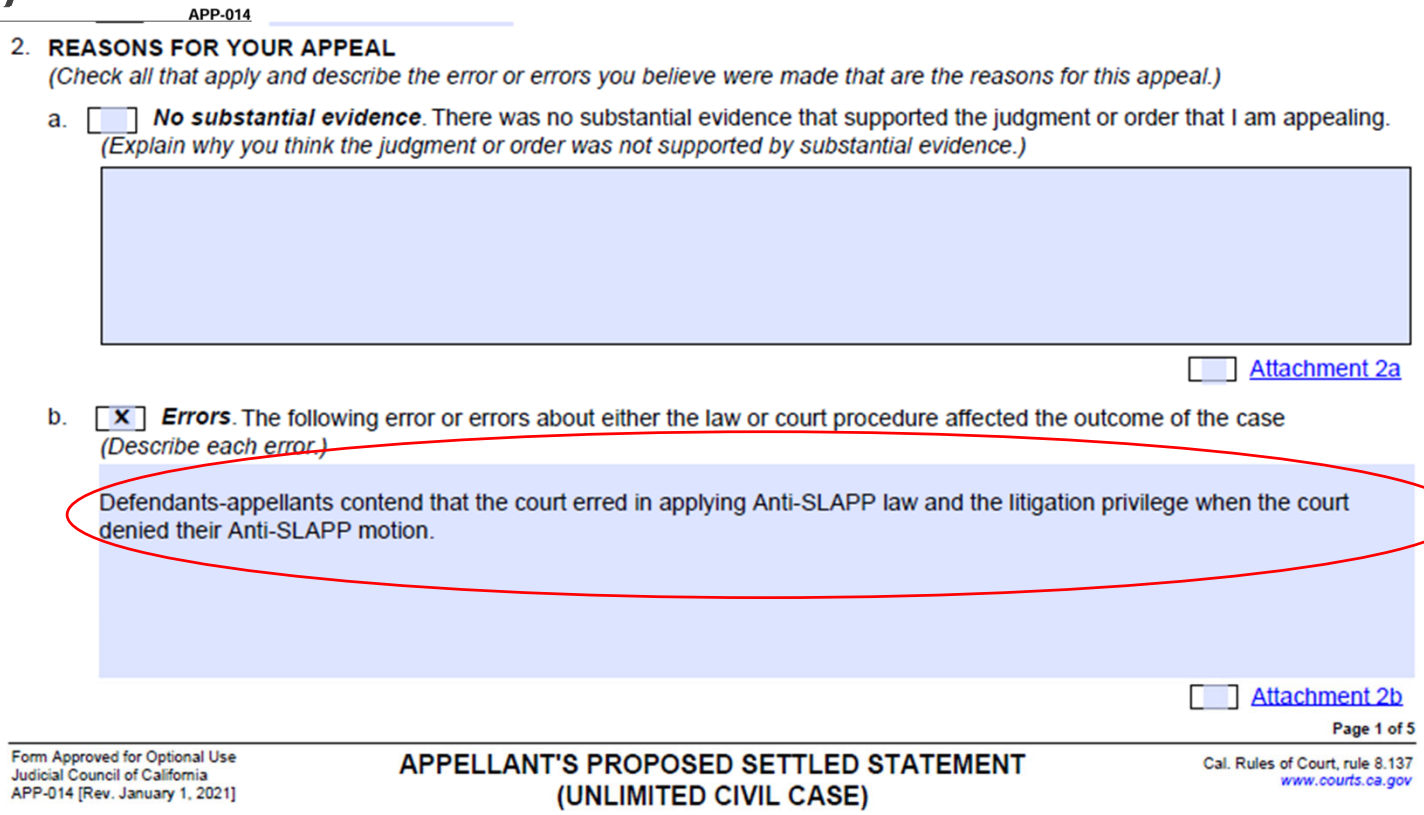
APPELLANT'S PROPOSED SETTLED STATEMENT (UNLIMITED CIVIL CASE)

Re: Appeal filed on (*date*):

Notice: Please read *Information Sheet for Proposed Settled Statement* (form … this form. You must file this form in the superior court, not in the Court of Ap

1. **PRELIMINARY INFORMATION**
   a. I am appealing *(check one):* ☐ an order filed on ☐ a judgment entered
   b. On *(date):* , I filed a notice of appeal. A copy of the judgment
   c. On *(date):* , *(check the one that applies):*
      (1) ☐ I filed a notice designating the record on appeal, choosing to use a settled
      (2) ☐ The court sent me ☐ I was served with an order granting my requ
   d. ☐ On *(date):* , the court ordered me to modify or correct m
2. **REASONS FOR YOUR APPEAL**
   (Check all that apply and describe the error or errors you believe were made that are the
   a. ☐ ***No substantial evidence***. There was no substantial evidence that supported th
   (Explain why you think the judgment or order was not supported by substantial evid

b. ☐ ***Errors***. The following error or errors about either the law or court procedure affected the outcome of the case
(Describe each error.)



APP-014

2. **REASONS FOR YOUR APPEAL**
(Check all that apply and describe the error or errors you believe were made that are the reasons for this appeal.)

a. ☐ ***No substantial evidence***. There was no substantial evidence that supported the judgment or order that I am appealing.
(Explain why you think the judgment or order was not supported by substantial evidence.)

☐ Attachment 2a

b. ☒ ***Errors***. The following error or errors about either the law or court procedure affected the outcome of the case
(Describe each error.)

Defendants-appellants contend that the court erred in applying Anti-SLAPP law and the litigation privilege when the court denied their Anti-SLAPP motion.

☐ Attachment 2b

Page 1 of 5

Form Approved for Optional Use
Judicial Council of California
APP-014 [Rev. January 1, 2021]

APPELLANT'S PROPOSED SETTLED STATEMENT (UNLIMITED CIVIL CASE)

Cal. Rules of Court, rule 8.137
www.courts.ca.gov

The good news: **settled statements** aren't as hard as you think.

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO.:
E-MAIL ADDRESS:
ATTORNEY FOR (*name*):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PLAINTIFF/PETITIONER:
DEFENDANT/RESPONDENT:
OTHER PARENT/PARTY:

APPELLANT'S PROPOSED SETTLED STATEMENT (UNLIMITED CIVIL CASE)

Re: Appeal filed on *(date):*

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   b. On *(date):* , I filed a notice of appeal. A copy of the judgn
   c. On *(date):* , *(check the one that applies):*
      (1) ☐ I filed a notice designating the record on appeal, choosing to use a se
      (2) ☐ The court sent me ☐ I was served with an order granting my
   d. ☐ On *(date):* , the court ordered me to modify or corr
2. **REASONS FOR YOUR APPEAL**
   (Check all that apply and describe the error or errors you believe were made that ar
   a. ☐ ***No substantial evidence.*** There was no substantial evidence that suppor
   (Explain why you think the judgment or order was not supported by substantial

☐ Attachment 2a

b. ☐ ***Errors.*** The following error or errors about either the law or court procedure affected the outcome of the case
(Describe each error.)

APP-014

5. **TRIAL COURT'S FINDINGS**
   a. Did the judge make findings at the hearing or trial in the case? ☒ No ☐ Yes *(Complete item 5b.)*
   (A judge makes a "finding" when the judge decides that something is a fact, is true, or is relevant.)
   b. What are the findings that the judge made that are relevant to the reasons for the appeal?

The court did not make any findings orally, or issue any rulings orally, other than what is reflected in the written minute order.

☐ Attachment 5

6. **SUMMARY OF MOTIONS**
   a. Are any of your reasons for appeal based on your disagreement with the court's ruling on a motion or motions?
   ☒ Yes *(Fill out b.)* ☐ No *(Skip to item 7.)*
   b. Describe the motion. *(State which party made the motion. Then, write a complete and accurate summary of what was said (any testimony and arguments) and what the court decided (whether the court granted or denied the motion).)*

Defendants filed an Anti-SLAPP motion. All arguments and evidence in support of the motion were made in the moving and reply papers. All arguments and evidence in opposition to the motion were made in the opposition papers. The hearing involved no testimony. The arguments at the hearing were the same as the arguments in the moving and opposing papers. The court issued its ruling in the October 2, 2023 minute order. The court did not make any findings orally, or issue any rulings orally, other than what is reflected in the written minute order.

Application: Was key evidence excluded? Preserve the issue by making a proffer.

- "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.
- Tip: Consider filing a written proffer after the fact, attaching the proffered evidence.
- Tip: If a CSR did not report the proffer, put it in a settled/agreed statement.

Application: Keep objecting to evidence if the judge "defers" ruling on your MIL.

- 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. (See People v. Morris (1991) 53 Cal.3d 152, 195.)
- Tip: If the proceedings are more than a day, this will be difficult to capture in a settled/agreed statement.

Application: Object to Jury Instructions.

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

Application: Object to Jury Instructions.

- Why bother?!? By law, all jury instructions are "deemed excepted to." (Code Civ. Proc., § 647.)
- But 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.)

Application: Object to Jury Instructions.

- **What if the court reads erroneous jury instructions over your objection? 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.

Application: Object to Jury Instructions.

- **The Problem**: Jury instructions are often discussed in chambers or off-record. So, your objections will not be reflected on a reporter's transcript.
- **The Solution**: Use a settled/agreed statement to capture your objections to the jury instructions on the record.

Application: Object to Jury Instructions.

- Tips and Traps 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."

Application: Object to Jury Instructions.

- Tips and Traps from a poll of other appellate attorneys:
  - “And don’t just waive reporting of discussions about jury instructions. The court may express frustration with you but should respect your position.”
  - “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).”

Application: Review the Verdict for Inconsistences.

- 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.)

Application: Review the Verdict for Inconsistences.

- Tips and Traps 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**."
  - "If something about verdicts is ambiguous or perhaps irreconcilable, raise it with the trial court before the jury is discharged."

Application: Review the Verdict for Inconsistences.

- **The Problem**: Discussions about the verdict might not be captured on a verbatim record.
- **The Solution**: Use a settled/agreed statement to capture your objections to the verdict.

Application: Request and Object to the Statement of Decision.

- 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.

Application: Request and Object to the Statement of Decision.

- **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.

Application: Request and Object to the Statement of Decision.

- **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)?

Application: Request and Object to the Statement of Decision.

- **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!

Application: Request and Object to the Statement of Decision.

- **The Problem**: For proceedings concluding within a day, the request for a SOD has to be made before the end of the hearing. And if there is no CSR present, there will not be a record.
- **Solution 1**: File a written request beforehand.
- **Solution 2**: Use a settled/agreed statement to capture your request for a SOD on the record. Be prepared to identify the specific findings you want the court to make.

Application: Posttrial motions and other law-and-motion hearings.

- A motion for new trial is required to preserve challenges to the damages amount
  - "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.

Application: Posttrial motions and other law-and-motion hearings.

- **The Problem**: Without a CSR, your attempt to preserve issues in law-and-motion may fail.
- **The Solution**: Use a settled/agreed statement to reflect what happened during the proceedings. Questions of law do not require an oral record. But be sure the settled/agreed statement reflects any discussions relevant to the court's factual findings or discretionary rulings.

The Legislature could solve the crisis easily, but there are also many other measures that could help.

1. Urge the Legislature to act. Amend GC 69957 to allow using remote tech.
2. Courts could better manage court-reporter resources we have. There are still hearings where multiple reporters sit around each for their own case. Or where two court reporters appear on the same case.
3. Appellate courts might rethink whether an oral record is really needed for non-testimonial hearings like law-and-motion.
4. Judicial Council can incentivize agreed statements, e.g., imposing cost-shifting against respondents who refuse to stipulate to attempt an agreed statement.
5. Arbitrators could help preserve availability of court reporters by encouraging litigants to opt for electronic recording.

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