

SOLO AND SMALL FIRM SUMMIT

Top Ten Appellate Tips

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CALIFORNIA
LAWYERS
ASSOCIATION





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Goal of Today's Presentation

Answer common questions and mistakes on appeal:

- Not spotting appealable orders
- Blowing the deadline to appeal
- Failing to request a statement of decision
- Not designating the record properly
- Misunderstanding the standard of review
- What orders are stayed? How do you get a stay?

Today's Presentation

1. Top Ten Appellate Tips for Trial Lawyers
2. Bonus Tips for Respondents
3. Statistics
4. Cases Before the California Supreme Court

1. If it is not in the appellate record it does not exist

- If it is not in the record, it did not happen
- Corollary: The only thing that matters is what is in the record
- Your mission: become the master of “recapping” sidebar or in chambers chats with the court

1. If it is not in the appellate record it does not exist

- Have a court reporter
- If you did not have a court reporter, have a substitute form of record
- Transcripts of audio and video files played in court (Rule 2.1040)

More on Court Reporters

- 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.
- Use of court room recording equipment pending before the California Supreme Court

2. File a Timely Notice of Appeal

Rule #1: Assume 60 days
(CRC 8.104)

Rule #2: Deadline is 180 days if no Notice of Entry or file-endorsed copy showing date of mailing was served.
What if it's unclear? **See Rule #1.**

Rule #3: You get 30 extra days if you move for new trial (CRC 8.108)
What if there are procedural defects in the motion? **See Rule #1.**
(Appeal does not impact court's ability to rule on motions for new trial/vacate.)

2. File a Timely Notice of Appeal

Bonus Tips:

“Notices of Ruling” do nothing to trigger appellate deadlines.

There is a judicial council form Notice of Entry of Judgment or Order which we recommend.

There is a judicial council form notice of appeal which we do not recommend.

2. File a Timely Notice of Appeal

Bonus Tips:

- No additional time for mail/email service.
 - No extra 5 days for mail.
 - No extra 2 days for email.
 - 60 days means 60 days.
- If the deadline falls on a non-court day your deadline is extended to next court day.

3. Request a Statement of Decision

Why do you need a SOD?

To defeat the doctrine of implied findings.

Good Example: *Abdelqader v. Abraham* (Cal. Ct. App. Mar. 10, 2022 No. D078652) --
- Cal.Rptr.3d ---- [F.C. 3044 presumption of unfitness triggered by prior DV finding
may be rebutted only by written findings—lack of SOD required reversal].

3. Request a Statement of Decision

When to request?

- Trials <8hrs: Before matter is submitted.
- Longer trials: 10 days after court's tentative decision. (CRC 3.1590.)
- *Bonus Tips:* Prepare & file a written request before the trial/hearing.

3. Request a Statement of Decision

How to request?

- Identify “principal controverted issues” (i.e., ultimate facts)...and propose findings
- Don’t harass the trial court with ten thousand interrogatories on why you lost
- Focus on omitted issues

4. File Post Trial Motions

- Certain issues cannot be addressed on appeal for the first time and can only be addressed by way of post trial motion.
- Excessive or inadequate damages as an example. *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918.
- Post trial motions can help close the gap in the appellate record.

5. Make Sure Your Pleadings Match Your Theories

- If your theories have evolved, amend your pleadings before trial, or even during trial.
- Emphasize those theories again in trial brief and motions in limine.

6. Motions in Limine – Motion Granted!

- If your evidence is excluded prior to trial via motion in limine or in the middle of trial, make an on the record proffer.
- There is nothing harder for an appellate lawyer or justice than trying to imagine or speculate as to prejudice from an incorrect evidentiary ruling.

6. Motions in Limine – Motion Granted!

- Absent prejudice, no evidentiary ruling will be reversed.
- Proffers of evidence help appellate lawyers demonstrate prejudice.
- A successful appeal requires more than spotting a trial court error: It requires a showing that the error was impactful on the outcome.

6. Avoid the trap of a deferred MIL ruling

- If a motion in limine is **granted**, you have preserved your objection for appeal. But be sure to ask for a curative instruction or mistrial if the in limine order is violated.
- If a motion in limine is deferred, you must still object during trial. Act as though no motion was filed. (*People v. Morris* (1991) 53 Cal.3d 152, 195.)

6. Avoid the trap of a deferred MIL ruling

- If evidentiary rulings before or during trial are made at sidebar or in chambers, be sure to “recap” for the record.

7. Monitor Minute Orders

- During trial the clerk will prepare minute orders regarding exhibits admitted, witnesses examined, and motions heard.
- Monitor them during trial so that any errors can be addressed by the trial court rather than tasking appellate counsel to explain inconsistencies between the minute order and reporter's transcripts.

8. Appellate Briefing Mistakes

- Failing to include the entire record.
- Failing to put each argument under its own heading.
- Failing to cite every fact statement to the record.
- Using the wrong standard of review.
- Addressing only one of the trial court's reasons. (The ruling will be affirmed on ANY ground!)
- Tim's article on this: "Attorney who ignored appellate rules hit with \$50k in sanctions". Case is *Mandir, Inc. v. Tiwari* (D4d3 Mar. 27, 2023 No. G060437) (nonpub. opn.).

9. Advise client about post-judgment issues

- Attorney's fees motions
- Memos of costs / motions to strike or tax
- Motions for new trial, JNOV, etc.

9. Advise client about post-judgment issues

Motions to stay or posting a bond:

- Temporary discretionary stay under CCP 918.
- Post a bond of 150% judgment amount.
- Personal surety? 2+ with CA property worth 400% judgment.

9. Advise client about post-judgment issues

Post-judgment interest = 10%

- Only way to cut off interest is to pay the judgment.
- Beware of “waiving” appellate rights by satisfying the judgment!

10. Role of Appellate Counsel

Use appellate counsel:

- Embedded during trial
- Draft post trial motions
- Draft jury instructions

Part 2: Representing the Winner on Appeal

- Best practices to represent the respondent on appeal.

1. Start the clock!

- Serving a notice of entry of judgment (or appealable order) starts at the 60-day deadline to appeal.
- Serving a notice of ruling does not.

2. Move to dismiss!

Not all orders and judgments are appealable..

Only final judgments or those orders specified by Legislature are appealable.

1. Orders **granting MSJ** are **not** appealable, judgments are.
2. Orders **sustaining demurrer** are **not** appealable.
3. Orders **granting or denying a SLAPP** are **appealable**.
4. Orders granting or denying a SLAPPback are **not** appealable.

2. Move to dismiss!

Certain orders must be reviewed only by a writ:

1. Orders on motions to expunge lis pendens
2. Denials of motions to quash service
3. Proceedings to disqualify judges
4. Proceedings for Public Records Act requests
5. Orders denying special motions to strike a SLAPPback

2. Move to dismiss!

Certain orders must be reviewed only by a writ:

1. Mootness
2. Disentitlement Doctrine
3. Waiver / Acquiescence to the Judgment

2. Designation and Counter Designation of Record

Has appellant filed designation?

- Due 10 days after notice of appeal
- Filed in trial court

Should you file a counter designation?

- Has appellant designated all the relevant documents if using a clerk's transcript?
- Has appellant designated all the relevant reporter's transcripts?

3. Borrow the Record and Save a Few Bucks

- If there is a clerk's transcript or many volumes of a reporter's transcripts, consider asking to borrow the record.
- It is mandatory for appellant to lend the record if timely request is made.
- It can save the client thousands of dollars.

Part 3: Statistics

- Percentage of civil cases affirmed on appeal?
 - **70-80 percent.**
- Percentage of civil writs summarily denied?
 - **90-95 percent.**
- Percentage of civil petitions for review denied?
 - **97 percent.**
- Trial lawyers should manage client expectations.

Part 4: Interesting Cases Pending Before the California Supreme Court

City of Gilroy and Law Foundation of Silicon Valley

Is there a duty to preserve public records in the context of public records act litigation?

Cohen v. Superior Court

Does Government Code section 36900,
subdivision (a) confer upon private citizens' right
to redress violations of municipal ordinances?

Fuentes v. Empire Nissan, Inc.

Is the form arbitration agreement that the employer here required prospective employees to sign as a condition of employment unenforceable against an employee due to unconscionability?

Hearn v. Pacific Gas & Electric Co.

May a terminated employee bring a defamation claim against a former employer when the defamation allegedly contributed to the reasons for the termination of that employment, or must such a claim be pursued under a wrongful discharge theory?

Hohenshelt v. Superior Court

Does the Federal Arbitration Act (9 U.S.C. § 1 et seq.) preempt state statutes prescribing the procedures for paying arbitration fees and providing for forfeiture of the right to arbitrate if timely payment is not made by the party who drafted the arbitration agreement and who is required to pay such fees?

Maniago v. Desert Cardiology Consultants' Medical Group, Inc.

Is a voluntary dismissal with prejudice an
appealable order if it was entered after an adverse
ruling by the trial court in order to expedite an
appeal of the ruling?

In re Spielbauer on Discipline,

If a victim of attorney misconduct suffers damages recoverable in tort and incurs attorney fees as a result of the misconduct, under what circumstances may the State Bar Court order restitution based on such damages and fees as a condition of the attorney's probation?

Taking Offense v. State of California

- (1) Is a law that criminalizes the willful and repeated failure to use a resident of a long-term care facility's chosen name and pronouns unconstitutional on its face under the First Amendment?
- (2) Whether California recognizes a common law taxpayer standing doctrine to bring actions against state officials?
- (3) If the common law provides taxpayer plaintiffs with standing to sue state officials, whether the plaintiff in this case has established any such standing?

Questions?



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