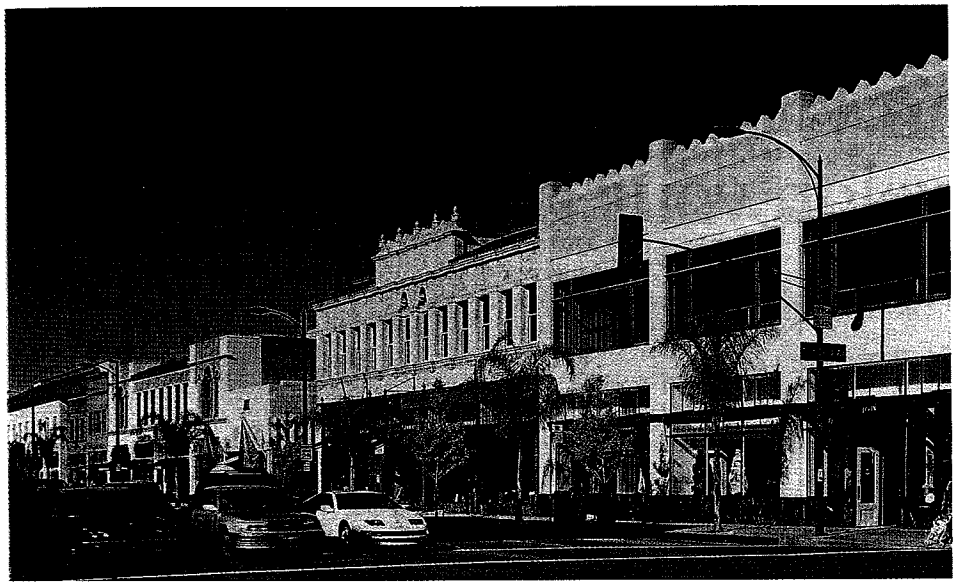
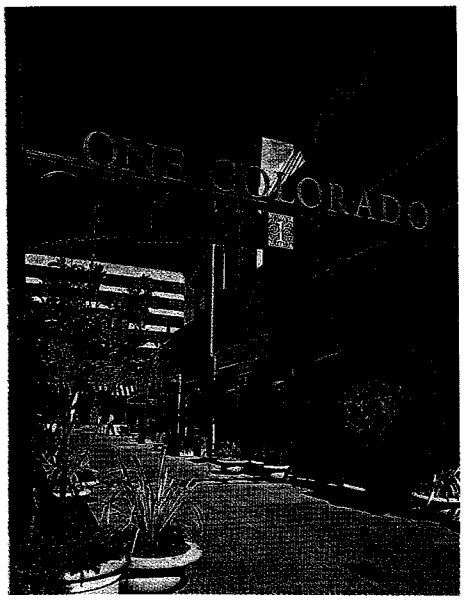


The development of One Colorado—a mixed-use entertainment/retail complex that occupies one full block in Old Pasadena—has spurred the revitalization and preservation of this part of the city and created a "people place" that appeals to residents and visitors alike.

The impact of One Colorado and the continued successful development of Old Pasadena have been recognized by an award from the National Trust for Historic Preservation, which presented its "Great American Main Street" award to Old Pasadena as one of five "visionary communities" that have successfully revitalized their downtowns. Old Pasadena succeeded in this effort by reconstituting its historic district, not replacing it—an approach that has been more financially successful than anticipated. Old Pasadena has seen an increase in sales volume from $35 million in 1987 to almost $100 million in 1994, with growth in sales tax revenue from $350,000 to about $1 million. Many of the initial coalition members are awed by the success of the district. When they started the move to preserve Old Pasadena, they envisioned a successful, quiet neighborhood. Their efforts have seen the revitalization of an entire area, with anchors like One Colorado that have become regional destination shopping and entertainment centers. **—William D'Elia**



JIM SIMMONS/ANNETTE DEL ZOPPO

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Demystifying the Appellate Process

The vagaries of American trial courts are nothing new to the real estate industry. Yet experience suggests that the appellate process is far less well understood than the trial process, most likely because the vast majority of lawsuits settle before trial and many cases that do go to trial do not proceed past judgment.

But understanding the appellate process is crucial to an intelligent trial strategy, which must assume the possibility of appeal. Planning for that possibility requires understanding the fundamental differences between trials and appeals. Post-trial settlement discussions cannot be meaningful unless they account for the parties' relative chances on appeal. And a published appellate decision can establish new law that reaches far beyond the interests of the parties to the case.

The Structure of the Appellate System. There is not just one appellate system, but 51 or more—at least one separate system in each state, plus the federal system, which consists of 13 appellate jurisdictions called "circuits." Although idiosyncracies of nomenclature and practice abound, the basic rules of procedure that distinguish appellate courts from trial courts are far more alike than different among these jurisdictions. This article describes the structure and uses the nomenclature of the California courts, which operate much like the federal courts.

The appellate system has two levels: an intermediate reviewing court called the court of appeal and the supreme court. A party is entitled, as a matter of right, to have a trial court's judgment reviewed by the court of appeal. Review by the supreme court, in contrast, is discretionary and rarely granted. The California Rules of Court limit the supreme court's review to cases "where it appears necessary to secure uniformity of decision or the settlement of important questions of law." (Review by the U.S. Supreme Court is similarly limited and discretionary.) The practical result of this limitation is that the intermediate court is the court of last resort for the overwhelming majority of cases, and most of the law is developed in that court. It also means that different intermediate courts can reach conflicting results that the supreme court may choose to let stand. These conflicts can be substantial.

Most people think of appellate review as something that happens only after a trial. But appellate courts also have the power to intervene earlier—to grant "interlocutory" review. Although parties can obtain review of certain pretrial orders as a matter of right, interlocutory review is usually discretionary and difficult to obtain. It typically requires a showing of unusual prejudice or some public importance of the issue involved.

Regardless of the path taken to the appellate court, the most important thing to recognize is that appellate review is fundamentally different from a trial. Not just the rules, but the game itself has changed.

The Limited Role of the Appellate Court. Of all the rules that distinguish appellate courts from trial courts, probably none is more important than the presumption in favor of the judgment. California courts frequently reiterate that "[a] judgment or order of the lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (In re *Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Among the important corollaries of this rule is that it casts upon the appellant the burden of showing not only that there was an error in the trial, but also that the error was prejudicial—that it is "reasonably probable" that the case would have come out differently without the error. This can be a very heavy burden indeed.

The presumptions favoring the judgment are buttressed by limitations on the scope of review. Appellate courts review only errors of law—errors in admitting or refusing evidence, in instructing the jury, and so on. Review of the facts is almost always off limits. Furthermore, even the commission of a prejudicial error will not secure a reversal unless trial counsel objected to it. This is one of the reasons lawyers spend so much time making objections in the trial court, even when they know the judge is going to rule against them.

Yet another limitation on appellate review is the "substantial evidence rule," which the court applies when the appellant claims the evidence does not support the judgment. In California, the standard formulation of this rule is that "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's findings. We must therefore view the evidence in the light most favorable to the prevailing party, giving [him] the benefit of every reasonable inference and resolving all conflicts in [his] favor. . . ." (*Estate of Leslie* (1984) 37 Cal.3d 186, 201.) One cannot overstate the importance of this rule. It means that no matter how strong a party's evidence may have been at trial, if the other side won and there was any "substantial evidence" supporting its case, the court of appeal may not reverse for lack of evidence. Suppose, for example, a contractor plaintiff testifies that at a weekly site meeting the defendant owner gave oral approval for extra work, but the owner and everyone else at that meeting deny that the owner did so. If the jury finds for the contractor, that is the end of the matter as far as the court of appeal is concerned.

This principle takes on added significance in the context of objections. For example, suppose the contractor was not at the meeting but testifies that his assistant was there and that the assistant later told the contractor that the owner had approved the extra work. This is rank hearsay and properly objectionable. But if trial counsel fails to object, the court of appeal cannot second-guess the result. For obvious reasons, the substantial evidence rule is one of the most frustrating for losing parties, who usually feel that the jury believed the wrong witnesses. It is also one of the rules most frequently ignored or misunderstood by lawyers with little appellate experience.

Another principle that affects the implementation of all others is this: The record is reality. The only thing the court of appeal can look at is the record created at trial—

the typewritten transcript of the witnesses' testimony, the exhibits offered, and any papers filed with the court. With rare exceptions, even the most compelling evidence against a verdict cannot be brought to the reviewing court's attention if it was not presented at trial. It is surprisingly common for clients to ask their appellate counsel to rely on evidence outside the record, but the almost invariable answer is that there is no way to do so. This includes not only events completely external to the trial, but also, in most cases, things that happened during trial that were not captured by the record.

Strategic Issues. The procedural distinctions between appellate and trial courts mean that the strategic environments are also very different. What worked in the trial court may fall flat in the court of appeal. For the appellate lawyer, the trial record is a sealed box. What is in it cannot be removed, and what is missing cannot be added. The overwhelming majority of the appellate lawyer's work goes into writing briefs—typically two (an opening brief and a reply brief) for the party appealing but only one for the party opposing the appeal. Everything the appellate lawyer has to say must find its way into those briefs, which the appellate judges will review in the privacy of their chambers before an oral argument that may last only a few minutes and may well have no impact on the outcome of the case. (It is common in many California appellate courts for the justices to have already reached a tentative decision and sometimes even to have written an opinion before oral argument.)

The reviewing court never sees or hears the witnesses. It reviews testimony solely from a "cold record [that] cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration." (*Maslow* v. *Maslow*, 117 Cal.App.2d 237, 243 (1953), disapproved on other grounds; *Liodas* v. *Sahadi*, 19 Cal.3d 278 (1977).) This is, indeed, one of the reasons appellate courts eschew any effort to second-guess the jury.

An Important California Quirk. California appellate practice has a unique, little-known feature that is extremely important for industries that, like the real estate industry, are affected daily by new appellate decisions. California courts do not publish most of their decisions; opinions are supposed to be published only if they involve important questions of law. This practice is significant because in California, only published opinions have any weight as legal precedent. A nonpublished opinion is a legal nonentity—for purposes of the future

development of the law, it is as if the opinion never existed.

The court of appeal initially decides whether to publish when it first issues an opinion, but that is not the last word. Within a limited period, the court has the power to publish an initially unpublished opinion, and after the opinion becomes final the supreme court may either publish an unpublished opinion or "depublish" an opinion that the court of appeal has certified for publication.

California's heavily overburdened supreme court has resorted more and more frequently in recent years to depublication. Not surprisingly, this practice creates a unique appellate strategy for individuals and groups interested in the effect of a particular decision. If a group believes an unpublished opinion is favorable to its interests, it may ask the court of appeal or supreme court to publish it; more commonly, a group that disagrees with a published opinion may ask the supreme court to depublish it. However, publication and depublication are by far the exception rather than the rule. It is crucial to know whether there is a legitimate basis for a request and to understand how to present it effectively. **—Robin Meadow**

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San Bernardino Fights Crime In Rental Housing

The city of San Bernardino, California, has implemented a comprehensive program to turn around the cycle of decay and crime. After city officials noticed that crime had been rising sharply in areas with high concentrations of rental housing, the city administrator used a computer mapping technique to correlate crime data with the location of rental housing. According to City Administrator Shauna Clark, "The results weren't surprising. There is a clear relationship between crime, blight, and rental property."

The closing of a major military base and other economic setbacks had created a depressed housing market in San Bernardino that forced many owners to convert their single-family houses into rentals when they were unable to sell them. As a result, more than half of the single-family housing stock in the city is rental property; most is managed by absentee landlords. High percentages of rental housing, poor rental property management, and blighted neighborhoods thus combined to create a cycle of decay and an increase in crime in many of the city's neighborhoods.

The San Bernardino Rental Housing Program is modeled after successful programs in other cities, including Azusa, California, and Portland, Oregon. Unlike these other programs, however, San Bernardino's couples an extensive inspection program with a thorough landlord training program.

Managed by staff from six city departments, the program team first compiled a complete inventory of the city's housing stock and then began inspecting rental units. Property owners found in compliance with city codes were sent a letter congratulating them on their compliance. Those not in compliance were sent one or two notices, depending on the severity of their violations. To date, more than 4,000 inspections have been made. Sixty percent of owners receiving notices of violations have complied without further action by the city.

The second part of the program involves landlord training and certification. Phase I of the training program provides property