

# Appellate Tips for Trial Lawyers

LOS ANGELES COUNTY BAR ASSOCIATION

Volume I, Number 1 • A Publication of the Los Angeles County Bar Association • November 2007

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**California civil and criminal litigation overlap in a crucial area: Preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you've lost.**

### Motion Practice: Admissible Evidence

Many motions, especially motions for summary judgment or summary adjudication, depend entirely on the evidentiary presentation, but the best evidence in the world isn't good enough if you don't present it properly.

#### Testimony

Declarations must meet the same rigorous standards as if the witness were on the stand in court. One standard is that testimony is "inadmissible unless [the witness] has personal knowledge of the matter." ([Evid. Code §702 \(a\)](#))\* ; see also [Code Civ.Proc., §437c, \(d\)](#)\* (summary judgment or summary adjudication declarations must "show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations").) It's common to address this issue solely by an introductory statement like "declarant has personal knowledge of the matters stated." That's not enough. "Where the facts stated do not themselves show [the witness's personal knowledge], such bare statement of the affiant has no redeeming value and should be ignored." ([Snider v. Snider](#), 200 Cal.App.2d 741, 754 (1962).)

Pretend your witness is on the stand—what questions would you ask to set up the key testimony? You wouldn't just ask, "What did Jones say to Green?" You would first establish that the witness was present and heard the conversation. For a declaration, the equivalent would be something like "I was present at the meeting with Jones and Green, and I heard Jones say so-and-so to Green." Anything less invites an objection.

### Authentication of documents

Lawyers often fail to pay sufficient attention to authentication, even though "[a]uthentication of a writing is required before it may be received in evidence." ([Evid. Code, §1400.](#))\* Authentication means "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." ([Evid. Code, §1401 \(a\)](#))\*.) This must be more than counsel's declaration stating that "attached is a copy of ABC Corp.'s minutes for January 15, 2007," because counsel has no personal knowledge of that fact. A corporate executive may have that knowledge, or perhaps there's an admission or deposition testimony (which also has to be authenticated) to that effect. Without that kind of authentication, the evidence is objectionable.

For an object lesson in the consequences, see the nonpublished decision in [Duran v. San Gabriel/Pomona Regional Center](#) 2007 Cal. App. Unpub. LEXIS 1439. There, defense counsel won summary judgment in the trial court on the strength of documents that he submitted only with a declaration describing each item, such as "Attached as Exhibit 'A' is a true and correct copy of records from San Gabriel/Pomona Regional Center." The Court of Appeal reversed, finding that all of the documents—to which plaintiff had properly objected—"lack foundation and all are hearsay." (Id. at 3.)

\***Note:** Links are to the live versions of the statutes, which may have been amended since the article was written.



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