No Reporter's Transcript? Here's What It Means For Your Appeal

By Alana H. Rotter

Failing to designate an adequate reporter's transcript is one of the surest ways an appellant can doom its appeal: It is an appellant's burden to show prejudicial error on appeal, and in many cases it is impossible to show error, much less prejudicial error, without a transcript of the oral proceedings that led to the challenged ruling – absent a transcript, the appellate court will presume that whatever happened at the hearing or trial supported the result.

The importance of reporter's transcripts has become a common theme in California appellate decisions since budget cuts led courts throughout the State to stop providing reporters in civil proceedings. Over and over again, courts have noted that the appellant failed to provide a reporter's transcript and have affirmed based on the principle that the judgment is presumed correct. (*E.g., Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570.)

Given the importance of transcripts, attorneys should arrange for a private court reporter to cover any hearing that might be relevant to a future appeal, and for all days of any trial. If there is any doubt as to whether a hearing will be relevant, err on the side of overinclusiveness. The cost of a reporter is far outweighed by the potential adverse consequences of forgoing a transcript.

But what happens when this lesson comes too late – when, for whatever reason, a hearing was not reported? In that situation, there are two things to consider. First, is this the type of appeal that in fact requires a transcript? And if it is, what, if anything, can be done to fill the gap? Recent decisions, and the California Rules of Court, provide some answers.

Does the appeal require a transcript?

A reporter's transcript is not always critical to an appeal. The California Rules of Court sensibly require a transcript only if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court." (Rule 8.120(b).) Consistent with that standard, courts have held that no transcript is required where an appeal presents a purely legal issue subject to de novo review. *Chodos v. Cole* (2012) 210 Cal.App.4th 692, for example, held that the appellate court does not need the transcript of an anti-SLAPP hearing to determine whether the anti-SLAPP statute applied to the pleadings.

But *Chodos* demonstrates that proceeding without a reporter's transcript can be risky. In addition to challenging application of the anti-SLAPP statute, the appellant also challenged an award of attorney fees. *Chodos* reversed the anti-SLAPP ruling and, on that basis, reversed the fee award. But had it affirmed the anti-SLAPP ruling and reached the reasonableness of the fee award, the record would likely have been inadequate. As the court in *Chodos* acknowledged, many attorney fee issues require a reporter's transcript. (*Id.* at 699-700.)

An oral record of proceedings is particularly critical in substantial evidence appeals. As

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one opinion put it, "There is not much we can do without a reporter's transcript when the appellant challenges the sufficiency of the evidence." (*Portfolio Recovery Associates, LLC v. Majano* (2016) 2016 WL 3064533 (unpublished).) Generally, the appellate court will presume that the transcript would have included evidence supporting the judgment, and will affirm.

Recent appellate decisions also demonstrate that a missing transcript can defeat an argument that the trial court lacked jurisdiction to issue a ruling. The appellate court in one case where no transcript was provided presumed that the appellant had submitted to a commissioner deciding his case. (*Elena S., supra,* 247 Cal.App.4th at 576.) In another, the court found the appellant had made a general appearance, not a special appearance. Any jurisdictional challenge was therefore deemed waived. (*In re Marriage of Obrecht* (2016) 245 Cal. App.4th 1, 9.)

The dissent in *Chodos* recounted numerous other situations in which courts have refused to address the merits of an appellant's arguments based on the lack of an adequate record of oral proceedings, including new trial rulings, nonsuit motions, and claims of instructional error. (*Chodos, supra,* 210 Cal.App.4th at 707-708.) The bottom line: Some appellate arguments don't require a reporter's transcript, but many do.

Overcoming a missing transcript

It is the appellant's burden to provide an adequate record. (*In re Marriage of Obrecht, supra,* 245 Cal.App.4th at 9.) If proceedings relevant to the appeal were reported, the appellant can designate them for inclusion in the appellate record as provided in Rule 8.121. But if some of the relevant proceedings were not reported, all is not necessarily lost. There are two tools that can help fill in the gap: agreed statements and settled statements.]

Agreed statements

An agreed statement is what it sounds like – the parties agree on a statement of what happened. An agreed statement must explain three things: (1) "the nature of the action," (2) "the basis of the reviewing court's jurisdiction," and (3) "how the superior court decided the points to be raised on appeal." (Rule 8.134.) The agreed statement is limited to "only those facts needed to decide the appeal," and must be signed by the parties. (*Ibid*.)

An appellant planning to use an agreed statement must file the statement, or a stipulation that the parties are working on a statement, with the notice designating the record on appeal. If the appellant files a stipulation and the parties subsequently agree on a statement, it must be filed within 40 days after the notice of appeal. If the parties do not agree, the appellant must file a new designation of record within 50 days of filing the notice of appeal. (*Ibid*.)

Settled statements

An appellant who does not anticipate being able to work out an agreed statement can also turn to the court for help, through the settled statement process. This route is a multi-step process.

The appellant's first step is to move for a settled statement. The motion, filed *in the trial court* along with the record designation, must make one of three showings: (1) that the "oral proceedings were not reported or cannot be transcribed"; (2) that a settled statement will save "substantial cost[s]" and can be done "without significantly burdening opposing parties or the court"; or (3) that the appellant cannot afford to purchase a transcript. (Rule 8.137.) The trial court has limited discretion in ruling on the motion. If the statement can be settled with the respondent' suggestions, the judge's memory and notes, or other available resources, the court must grant the motion. (*Mooney v. Superior Court* (2016) 245 Cal. App.4th 523, 531; *Western States Const. Co. v. Municipal Court* (1951)38 Cal.2d 146, 150.)

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If the court denies the motion, the appellant has 10 days to file a new record designation. But if the court grants the motion, the appellant moves on to step two: preparing "a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (Rule 8.137.) The evidence may be presented "by question and answer." (*Ibid.*) If the narrative covers only part of the testimony, the appellant must specify what points will be raised on appeal. Getting this specification correct is important – the appellant cannot raise other points on appeal "unless, on motion, the reviewing court permits otherwise." (*Ibid.*)

An appellant can bolster its proposed narrative by attaching some or all of the following documents: the judgment or order appealed from; documents that were filed or lodged in the trial court; exhibits admitted, refused, or lodged; jury instructions submitted in writing and/or given by the court; and deposition excerpts presented or offered into evidence. (*Ibid.;* Rule 8.122(b).) If the appellant intends to use the settled statement to replace both the reporter's transcript and the clerk's transcript (i.e., to be the entire appellate record), the appellant also must include copies of all of the items that are required for a clerk's transcript: the notice of appeal, the judgment or order appealed from and notice of its entry, any post-trial motion and notice of entry, the notice or stipulation to proceed by settled statement, and the register of actions. (*Ibid.;* Rule 8.137.)

The appellant must file and serve the condensed narrative within 30 days of the court clerk or a party serving the trial court order agreeing to settle the statement. The respondent then has 20 days to propose amendments to the condensed narrative. (Rule 8.137.) The respondent may bolster its amended narrative with the same types of documents that the appellant can use. (*Ibid.*)

Once the parties have filed their respective proposals, the trial court must hold a hearing to "settle the statement." (*Ibid.*) The timeline is short: The hearing is supposed to be within 10 days of the respondent filing its proposed amendments or the deadline for doing so, whichever is earlier. (*Ibid.*)

The appellant then must prepare, serve, and file the statement as settled by the trial court, by whatever deadline the court imposes at the hearing. (*Ibid.*) The statement should conform to the formatting rules for reporter's and clerk's transcripts "insofar as practicable." (Rule 8.144(f).)

Finally, if the respondent does not object to the filed statement within five days, the clerk must "present it to the judge for certification." (*Ibid.*) Alternatively, "[t]he parties' stipulation that the statement as originally served or as prepared is correct is equivalent to the judge's certification. (*Ibid.*) The court rules do not specify what happens if the respondent does object to the filed statement; presumably, the trial court must rule on the objections and then certify the resulting statement.

If the appellant chooses a settled statement in lieu of both the reporter's transcript and the clerk's transcript, the record is deemed complete once the statement is certified. (Rule 8.149.) The same is true if the appellant opts to use a settled statement and an appendix, (*Ibid.*) If the appellant instead opts for a settled statement and a clerk's transcript, the record is complete after both the statement and the clerk's transcript are certified. (*Ibid.*)

Once the record is complete, the trial court clerk must transmit it to the Court of Appeal clerk for filing. (Rule 8.150.) That filing starts the clock running for the appellant's opening brief (Rule 8.212) – and then the real work begins!

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