



Appealing without a transcript

An "agreed statement" or "settled statement" may be your only options if there was no court reporter at trial

By Donna Bader

By now, trial attorneys are aware of the scarcity of court reporters. The courts' budgets have been slashed. The lack of court reporters is a sad reality of these cost-cutting measures. As a result, the parties must fill this void and supply their own reporters. Quite frequently, clients cannot afford the costs of a court reporter for a lengthy trial. Or they are not convinced a transcript may be necessary for an appeal, particularly if they succeed in trial.

Failing to have a court reporter present to take down the proceedings may cost the client dearly if an appeal is filed by either party. After all, the failure to have a transcript of the proceedings prevents the Court of Appeal from conducting a meaningful review. To protect your client's rights, you may have to consider preparing an agreed or settled statement. Because you probably will not have an appellate attorney to help prepare the agreed or settled statement – not a bad idea, really! – this task will fall on you as the trial attorney. In this article, I'll explore the differences between the two and describe the steps necessary to prepare them.

Let's start with the basics

An appellant must provide an adequate record to the appellate court that shows the error below and prejudice. (*Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1209.)

A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



(*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

If the record fails to show error and prejudice, the appeal is probably DOA. The loss of a court reporter can mean the loss of the ability to appeal a judgment because the error would have been on the typed pages of the transcript. At trial, both parties will hope to present enough of a record to carry their burden on appeal.

If an appeal is filed, the respondent will want to provide enough of the record to show there was no error, and even if there was, the appellant was not prejudiced.

The agreed statement

An "agreed statement," which comprises all or part of the record, is prepared by agreement of the parties. (Cal. Rules of Court, rule 8.134.) The cooperation of all the attorneys is required, which is often hard to obtain because the trial concluded and there now is a winner and a loser. According to California Rules of Court, rule 8.134(a)(1):

> The statement must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal. The statement should recite only those facts needed to decide the appeal and must be signed by the parties.

The format of the agreed statement must conform to the same requirements for clerk's or reporter's transcripts "insofar as practicable." (Cal. Rules of Court, rule 8.144(f).)

If the parties intend that the statement will replace a clerk's transcript, it must include the mandatory contents of the clerk's transcript (Cal. Rules of Court, rule 8.122(b)) as well as optional contents. (8.134(a)(2) and (3).) What optional contents are included will be based on the burden each must carry on appeal.

Once the notice of appeal is filed, the notice designating the record on appeal must be filed in Superior Court within 10 days thereafter. (Cal. Rules of Court, rule 8.121.) At that point, the appellant must either file an agreed statement or a stipulation that the parties are attempting to come up with an agreed statement. (Cal. Rules of Court, rule 8.134(b)(1).) If the parties opt to file the stipulation, the agreed statement must be filed within 40 days after the filing of the notice of appeal, not the notice of designation. (Cal. Rules of Court, rule 8.134(b)(2).)

If the parties still cannot agree on a statement, the appellant must then file a new notice designating the record on appeal within 50 days after filing the notice of appeal. (Cal. Rules of Court, rule 8.134(b)(3).)

If a reporter was present and cannot transcribe the notes, the designating party must file the agreed statement or a stipulation within 10 days after the clerk mails notice that the designated proceedings cannot be transcribed. If the party files a stipulation, that party has 30 more days to file an agreed statement, move to use a settled statement, or proceed without a statement. (Cal. Rules of Court, rule 8.130(h)(1)(A).)

The settled statement

Getting the other side's cooperation may prove difficult. If so, then the appellant must resort to obtaining a settled statement. The settled statement starts with the appellant's proposal of a statement. The respondent will also prepare a proposal of amendments, and the trial court "settles" the statement. Such a settled statement may replace either the reporter's transcript or the clerk's transcript, or both. (Cal. Rules of Court, rule 8.137.)

The settled statement is permitted in the following circumstances (Cal. Rules of Court, rule 8.137(a):

- By indigent appellants who are unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund, which is administered by the Court Reporters Board. (Cal. Rules of Court, rule 8.137(a)(2)(C).)
- The oral proceedings were not reported or cannot be transcribed. (Cal. Rules of Court, rule 8.137(a)(2)(B).) If the reporter was present but the proceedings cannot be transcribed, the clerk will mail a notice specifying the portions of the proceeding that cannot be transcribed, showing the date of mailing the notice. The party who designated the proceedings then has 10 days to serve and file an agreed statement or a motion to use a settled statement. (Cal. Rules of Court, rule 8.130(h)(1).)
- The settled statement is authorized where "a substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court." (Cal. Rules of Court, rule 8.137(a)(2)(A).)

Before proceeding with the settled statement, the appellant must first serve and file with the superior court a motion to use a settled statement. This motion is filed simultaneously with the notice designating the record on appeal. (Cal. Rules of Court, rule 8.137(a)(1).) The motion should indicate whether the appellant will rely on the settled statement to replace the reporter's AND clerk's transcripts. (Cal. Rules of Court, rule 8.137(a)(1).) The motion must also show the appellant is entitled to proceed under one of the three circumstances stated above. (Cal. Rules of Court, rule 8.137(a)(2).) If the motion is denied, the appellant must then file a new notice designating the record on appeal within 10 days after the order denying the motion is served. (Cal. Rules of Court, rule 8.137(a)(3).)

The preparation of the settled statement involves a four-step process. First, the appellant prepares a proposed statement within 30 days after the motion to use a settled statement is granted. (Cal. Rules of Court, rule 8.137(b)(1).) The statement must contain "a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (Cal. Rules of Court, rule 8.137(b)(1).) Keep in mind the goal is to provide the appellate court with a meaningful record of what occurred below. The statement should contain each witness's testimony so the appellate court can understand the underlying dispute.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



(*Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 637-638.) The trial court may approve a format that sets forth the evidence in a question and answer format. (Cal. Rules of Court, rule 8.137(b)(1).)

If the statement only covers a portion of the oral proceedings, the appellant must state the points to be raised on appeal. The appeal will then be limited to such points unless otherwise permitted by the appellate court on appellant's motion. (Cal. Rules of Court, rule 8.137(b)(2).) If the settled statement is to be used instead of both the reporter's and clerk's transcripts, it must contain the mandatory documents included in a clerk's transcript. (Cal. Rules of Court, rules 8.122(b)(1) and 8.137(b)(3).) "The purpose of a settled statement is 'to provide the appellate court with an adequate record from which to determine contentions of error.'" (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549.) The optional contents of a clerk's transcript should be included. (Cal. Rules of Court, rule 8.137(b)(5).)

Once the appellant has served a proposed statement, the respondent can file and serve proposed amendments within 20 days, including the optional contents. (Cal. Rules of Court, rules 8.137(b)(4) and (5).)

Within 10 days after the respondent files, the proposed amendments (or within ten days after the deadline has expired), the trial court will hold a hearing – giving five days' notice – to "settle" the statement. (Cal. Rules of Court, rule 8.137(c)(1).) Disagreements as to what happened and what was said at trial are bound to arise, so it is incumbent on all parties and the judge to keep detailed notes to assist in settling the statement. The trial court will fix a time for the appellant to prepare, serve and file the settled statement. (Cal. Rules of Court, rule 8.137(c)(2).) The settled statement's format is required to conform to the format requirements for the clerk's and reporter's transcripts "insofar as practicable." (Cal. Rules of Court, rule 8.144(f).)

The trial court may rely on several factors in settling the statement, including:

- The trial court's recollection of what happened;
- Any notes taken by the trial court;
- Respondent's suggestions;
- Rereading any notes taken and retained by the court reporter, if one attended the trial; and
- Retaking witness testimony to "aid" the trial court in remembering and reconstructing the testimony. (*Western States Const. Co. v. Municipal Court of City & County of San Francisco* (1951) 38 Cal.2d 146, 150-151, *Weinstein v. E.F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 370 [The taking of testimony is done to aid the court as to the old testimony, not to allow the taking of new testimony that would stand independently in place of the old]; *Ace Beverage Co. v. Municipal Court* (1993) 16 Cal.App.4th 703, 710.)

The final step in the process is the filing and certification of the settled statement. The appellant must file and serve the final statement settled by the trial court within the time fixed by the court at the hearing. The respondent has five days (from the date of filing) to serve and file objections to the statement. (Cal. Rules of Court, rule 8.137(c)(3).) If there are no timely objections by the respondent, the statement is deemed properly prepared and the trial court will certify it. (Cal. Rules of Court, rule 8.137(c)(3).) The parties may also stipulate the statement, as originally served or prepared, is correct. That stipulation has the same effect as the trial court's certification. (Cal. Rules of Court, rule 8.137(c)(4).)

If the settled statement is used because part of the designated oral proceedings cannot be transcribed, the settled statement is prepared pursuant to the four-step process above, except the times for service, filing and settling the statement are fixed by the superior court. (Cal. Rules of Court, rule 8.130(h)(1)(B).)

Problems with the use of agreed or settled statements

Despite the fact that court reporters are disappearing from the courtroom, the reality is that most parties will not rely on agreed or settled statements. I would encourage you and your client to obtain a reporter's transcript if at all possible. There is no great substitute for a reporter's transcript. The reviewing court prefers to see what was actually said, not what you, your opposing counsel or even the judge, think was said. Although the use of settled and agreed statements are slowly increasing, they are still rare in appellate court proceedings.

Justice William Bedsworth of the Court of Appeal, Fourth Appellate District, Division Three, expresses his concern that "they lead to so much bad feelings between attorneys and between the bench and the bar. The judge has power to eviscerate or boost the appeal, and the parties can experience legitimate (or not so legitimate) failing memories."

In preparing the statements, Justice Bedsworth recommends you be "as forceful and persuasive as possible, but always be civil and temperate in the settled statement conference." He encourages attorneys to make sure they get everything in the settled statement that pertains to or might be relevant to the issue. "You don't want to decide later that something is a better appellate issue than you thought and realize you didn't put enough into the settled statement to support you," he says. You will not be able to later introduce facts and issues not covered by the statement.

Appellate attorney William Zulch is very careful in crafting settled statements, trying to mirror policy or contract language when applicable, and keeping out facts that might blur or confuse the issues. He says, "In my experience, each side has their own power words describing their themes of the case. For example, in an automobile accident case, plaintiff says the rear-end collision was a 'crash' but the defendant will describe it as a

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



'bump.' The choice of words for an agreed or settled statement provides flavor to the story you tell and can be packed with as much, or little, emotional as you can muster."

Justice William Rylaarsdam of the Court of Appeal in the Fourth Appellate District, Division Three, remembers when he was a Superior Court judge. He encountered bad experiences, especially if the lawyer waited "weeks and then expected the trial court to remember what happened."

If a judge knows a settled statement will be requested, perhaps the better practice is to settle the record after each day of trial. Judge Deidre Hill of the Los Angeles Superior Court has implemented a policy that may help. Judge Hill requires the parties to provide a court reporter or submit agreed or proposed settled statements daily.

Judge Hill's notice, posted outside her courtroom, provides that if the parties do not provide a court reporter for trial, "this Department requires parties to provide initial drafts of partial proposed agreed statements or proposed statements of proceedings on the morning following each day of trial. Consequently, there will be less time allotted each day for testimony and argument in order to facilitate efficient preparation of the record."

While the preparation of these statements is useful on appeal, Judge Hill requires them for her work at the trial level, including preparing statements of decision. While this policy may add to the workload of attorneys and the courts, it is a good technique to summarize what happened at trial and should be useful in preserving memories that might fade with the passage of time. Other judges have adopted Judge Hill's policy or developed their own variations to fit their needs.

Conclusion

If you have any inkling of a potential appeal or you have a valuable case, bring a court reporter to trial. If you can't, be sure to discuss all options with your client, and if necessary, have the client acknowledge the risks involved in not having a reporter's transcript. If they do not want to obtain a reporter, make sure you have documented this decision. If you must rely on an agreed or settled statement, let the judge know at the beginning of trial and try to come up with a settled statement on each day of trial before memories have faded and you have nothing but a pile of incomprehensible notes. If you can't settle the statement of the proceedings on a daily basis, then don't delay too long in making your request known.


Bader

Donna Bader, a certified appellate specialist, has practiced for over 35 years in Orange County. She and trial attorney Jon Mitchell Jackson were recipients of a 2013 CLAY Award for litigation by California Lawyer *magazine. Bader is the author of* An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial, *which was written to help trial attorneys protect their cases before they reach the appellate stage. www.AnAppealtoReason.com.*

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**