BY BLYTHE GOLAY AND ANGELA S. HASKINS

The Necessity of Trial Transcripts in Appellate Proceedings

A COMPLETE TRIAL RECORD is essential to presenting an effective appeal because appellate courts have no independent means of obtaining knowledge of the cases brought before them for review. The California court of appeal expressed this fundamental maxim of appellate review in one case: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."[1] Accordingly, a record of the lower court proceedings must be prepared in order for the appellant to establish the claimed error. Error is never presumed on appeal, and the appellant has the burden of overcoming this presumption by affirmatively showing error with an adequate record. The appellant cannot challenge the sufficiency of the evidence supporting a judgment when there is no transcript of the oral proceedings.[2]

Before California's fiscal crisis began to ease over the past few years, the budgets for the state's courts were cut by over $1 billion.[3] This resulted in the closure of 52 courthouses and nearly 4,000 court staff losing their jobs.[4] In addition, most civil courts have terminated their court reporting service to achieve cost savings. In June 2013, Los Angeles County Superior Court eliminated all court reporters for general jurisdiction civil matters (except in the writs departments of the Stanley Mosk Courthouse). As a result, an increasing number of California appellate courts are refusing to reach the merits of an appellant's claims in their decisions and are also warning future litigants that poorly prepared records render the courts' review difficult, if not impossible, to accomplish.[5] Equally important, this brings a cautionary tale to the forefront for all trial attorneys; namely, an attorney's failure to explain to a client the consequences of not retaining a court reporter may be scrutinized if a dispute later arises with that client over the inadequacy of the record and the inability to file an appeal.

A recent appellate decision highlights the significance of the lack of an adequate record. In *Maxwell v. Dolezal*,[6] a pro per plaintiff filed an action for invasion of privacy and breach of contract. The plaintiff alleged that he had agreed to let the defendant use the plaintiff's photograph and website in exchange for the defendant's compensating him with money, food, and housing, which the defendant failed to provide after using the plaintiff's image. The defendant demurred on the grounds that the complaint was uncertain, and it could not be ascertained from the pleading whether the contract was written, oral, or implied. No court reporter was present at the hearing on the demurrer. Nevertheless, the trial court's minute order explicitly sustained the demurrer "[f]or the reasons stated in open court," without further elaboration. The trial court also denied the plaintiff further leave to amend on the ground that he was unable to articulate in open court a reasonable basis for any additional allegations that would remedy the deficiencies in the complaint.

On appeal, the court in *Maxwell* stated it was "profoundly concerned about the due process implications of a proceeding in which the court, aware that no record will be made, incorporates within its ruling reasons that are not documented for the litigants or the reviewing court."[7] The court of appeal cautioned that although the lack of a transcript did not preclude its review of the order sustaining the demurrer, the case was an exception because the operative complaint and demurrer were sufficient to permit effective appellate review. The court affirmed the trial court's decision on the demurrer involving the invasion of privacy claim and reversed the court's sustaining of the demurrer on Maxwell's breach of contract action.

The origin of the *Maxwell* court's due process concerns flow from the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and that prejudicial error must be affirmatively shown. This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error.[8] The California Constitution permits reversal only if an error resulted in a "miscarriage of justice." A court cannot set aside a judgment or grant a new trial based on instructional, evidentiary, pleading, or procedural error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[9]

A miscarriage of justice will be declared only when the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Appellants meet their burden of overcoming the presumption of correctness by submitting an adequate record to the appellate court that identifies the error committed by the trial court.

Another case illustrating the importance of obtaining a transcript of oral proceedings is *Foust v. San Jose Construction Company*[10] The appellant's decision to proceed without a reporter's transcript was fatal when that appellant challenged the sufficiency of the evidence produced at trial on appeal. The court even went so far as to hold the appeal as frivolous because the appellant failed to present a colorable claim that the trial court erred. The appellant had only designated some pleadings, the judgment, and the notice of the appeal and later added two exhibits admitted at trial. The court concluded, "Without a proper record, there is no way for this court to find that the trial court's conclusions were not supported by substantial evidence."[11]

The appellate courts are usually consistent in their application of this rule. For example, in *Vo v. Las Virgenes Municipal Water District*,[12] the court held that the appellant failed to provide an adequate record regarding an attorney's fee award when the record did not contain a copy of the pleadings or a trial transcript. The court reasoned:

> The judgment must be affirmed because the record provided by defendant is inadequate to conclude the trial court abused its discretion in determining the fee was reasonable. As the party challenging a fee award, defendant has an affirmative obligation to provide an adequate record so that we may assess

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whether the trial court abused its discretion. We cannot presume the trial court has erred….The record on appeal does not contain a copy of the pleadings, nor does it contain a trial transcript. The experienced and highly regarded judge who presided over this case was the best judge of what occurred in his courtroom….The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion. It is not possible to judicially and appropriately determine from the inadequate record provided by defendant that the trial court abused its discretion in its conclusion that $470,000 was a reasonable award in comparison to the scope of the litigation as a whole.[13]

Despite this rule, there are instances in which an appellate court may be somewhat more lenient with an appellant who failed to engage a court reporter. As discussed in the unpublished opinion of *Van Halen v. Berkeley Hall School Foundation, Inc.*, the issue on appeal was whether the trial court properly sustained a demurrer to a fraud cause of action without leave to amend. The trial court did not provide any reasons in support of its ruling.[14] The respondent asserted that the court had elaborated on its reasons for sustaining the demurrer and criticized the appellants for failing to hire a court reporter. The court of appeal stated, however, "[i]t does not seem fair to fault [appellants] for the trial court's decision to state its reasons orally in the absence of a court reporter."[15] Nevertheless, as evident in the decisions reached in the *Maxwell*, *Foust*, and *Vo* cases, the court's reasoning in *Van Halen* is clearly the exception and not the rule.

While the most severe consequence for an appellant who fails to secure a court reporter is having the appellate court simply decline to address the issue, other negative outcomes can also result. Most significantly, absent a proper record on appeal, all presumptions are construed to support the decision as to those matters on which the record is silent.[16] The reviewing court conclusively presumes the evidence was ample to sustain the trial court's factual findings. In *City of Pinole v. Lionsgate*, the appellant argued that it was required to provide only "a summary of the relevant evidence sufficient for the court to evaluate the appellate challenges."[17] *Lionsgate* dealt with a trial court order affirming an arbitration award. Under the California Rules of Court, an arbitrator may, but is not required to, make a record of the proceedings.[18] Moreover, an arbitrator must not permit the presence of a stenographer or court reporter unless the arbitrator uses a report to make a record of the proceedings. Thus, arbitration proceedings are not recorded or transcribed unless desired by the arbitrator.

In *Lionsgate*, the arbitrator ordered a record because of the duration of the proceeding. On appeal, the appellant filed a 1,294-page appendix, but the reviewing court noted that there were substantially more documents presented at the arbitration and trial court level (e.g., the reporter's transcript of the arbitration hearing alone was 6,794 pages). The reviewing court found that the appellant had misconstrued its burden on appeal: "As appellant, it had the burden of designating an adequate record for review, a different obligation than the one to set forth 'all the material evidence' in its brief."[19] The court found that based on the record before it, and indulging in presumptions to support the decision, there was substantial evidence to support the arbitrator's decision.

Trial counsel must be familiar with the several types of records available upon which to take an appeal. The California Rules of Court provide an appellant with a choice of several types of records. The choices include: 1) a reporter's transcript, 2) a clerk's transcript or appendix, 3) an agreed statement, and 4) a settled statement.[20] If a court reporter was not used for a hearing, the latter two options may be used. These options allow the appellant to provide the court of appeal with a record of the testimony and evidence at trial. However, these alternatives have strict deadlines and are often time-consuming.

As its name implies, an agreed statement is prepared by agreement of the parties. The statement, or a stipulation that the parties are attempting to agree on a statement, must be filed simultaneously with the notice designating the record on appeal. The agreed statement must explain the nature of the action, the basis for the appellate court's jurisdiction, and how the superior court decided the points to be raised on appeal.[21]

A settled statement may be used if the designated oral proceedings were not reported or cannot be transcribed. A motion to use a settled statement must be filed simultaneously with the notice designating the record on appeal. Preparing and filing the settled statement is a four-step process. First, after the superior court grants a motion to use the settled statement, the appellant must serve and file with that court a proposed statement, which must be a condensed narrative of the oral proceedings the appellant believes necessary for the appeal. At a minimum, the statement should summarize each witness's testimony. Second, the respondent may then propose amendments to the statement. Third, a hearing must be held by the trial judge for settlement of the statement. Lastly, the appel-

lant must file and certify the settled statement subject to the respondent's objections.

Ironically, eliminating the use of court reporters in proceedings may have the unintended consequence of increasing the trial courts' workload because without an official record, those courts may be required to produce a settled statement, a time-consuming and imprecise process.

Each of these options require the cooperation of opposing counsel and trial and appellate counsel and ultimately may prove to be more expensive than simply hiring a court reporter. Moreover, as a practical matter, it is far easier to speak with a client at the outset about securing a court reporter than to ask the court and all counsel to agree on these types of statements after the fact.

In addition to failing to hire a court reporter to transcribe trial proceedings, another example of record omission is sidebar conferences or meetings in chambers. These exchanges may be critical to an appeal, such as when a judge rules on the admissibility of a piece of evidence. If the discussion is not reported, it cannot be reviewed. Thus, whenever possible, counsel should insist that the court reporter record all dialogue with the judge or, alternatively, memorialize unreported dialogue when going back on the record.

Bench trials present additional issues that require planning prior to commencing the trial. Otherwise, there may be significant adverse consequences in obtaining relief on appeal. When a bench trial concludes, there are no jury instructions to review to ensure the trial court followed the law or special verdict form to confirm that the court correctly decided all the necessary ultimate facts. Thus, the parties should request a statement of decision from the court. If the losing party in a bench trial fails to timely request a statement of decision, the appellate court will assume the trial court made whatever findings were necessary to support the judgment.[22] The appeal will then often be reduced to a substantial evidence standard of review.

The process of planning the logistics of a trial is generally straightforward, especially since the litigants usually desire that a transcript of the proceedings be prepared. Arrangements for a court reporter tend to be included on the checklist of other pretrial preparation of joint trial documents and actions required by the majority of California courts. However, individual hearings on law and motion matters can be far more adversarial with no advance direction from the court (i.e., no tentative decision, which may eliminate the need for a reporter).

Court reporting policies and procedures may vary between each county superior court. It is imperative that litigants communicate and cooperate with each other in advance of any hearing that uses a court reporter. Only one official transcript of any proceeding may be prepared.[23] Thus, only one court reporter can transcribe the proceedings of a hearing. Trial courts expect parties to reach an agreement on reporting services before a hearing. Disagreements may arise, for example, when a client will only pay for a particular court reporting service, but proceedings will not be delayed due to a disagreement among the parties as to selection of the court reporter. If necessary, a judicial officer will avoid delay in the proceedings by selecting one of the reporters recommended by the parties.[24]

Most courts provide detailed information on court reporters on their websites, and this should be reviewed thoroughly to ensure compliance with the applicable rules before a hearing. If the parties stipulate, a private reporter may be used as long as the reporter meets the necessary criteria, executes the agreement portion of the order appointing a court-approved reporter as official reporter pro tempore, and if the court executes the order. To avoid any potential issues with a private reporter, it is advisable to review the individual court's official reporter pro tempore lists of approved reporters. These individuals have applied to the court to serve as a court reporter, satisfied the minimum requirements for service, and do not require a stipulation by the parties to report a proceeding. The latter is particularly helpful when only one litigant is interested in having a proceeding recorded. However, the requesting litigant is responsible for the full cost when there is no stipulation.[25]

Litigants may contact an approved reporter and request a fee estimate in advance. The fees must be calculated in accordance with the California Rules of Court, which state that the court reporter will be paid the "statutory rate" for a completed transcript.[26] The statutory rates are set forth in Government Code Sections 69950 and 69954.

Equally important, the pros and cons of having a court reporter need to be explained to a client in clear, nonlegal terms. The significance of having a record for a potential appeal is certainly one important consideration that must be discussed. However, the presence of a court reporter may also have a significant effect on litigation strategy. Attorneys have observed that trial judges appear to be more open or free in their comments and rulings from the bench when no court reporter is present. On the other hand, judges seem to be more restrained when their words are being transcribed. Clients should be made aware of this and what the attorney thinks is the best approach to take given a particular judge's temperament. Once these issues are discussed, counsel should write the client and memorialize how the issue of a court reporter will be addressed. By doing so, attorneys can avoid an expert second-guessing their actions if any misunderstanding arises over this matter and the client files a malpractice action.

With limited exceptions, trial courts are no longer providing court reporters, and there is no sign that they will return anytime soon as full-time employees of the court. At the same time, an appellant cannot meet its burden to a reviewing court unless there is a record to cite to and the issues on appeal have not been waived. California case law stresses the importance for counsel to obtain client approval to incur the expense of retaining a court reporter in both law and motion hearings and trials. The appellate courts will usually refuse to reach the merits of an appellant's argument when no reporter's transcript or suitable substitute is provided. When weighed against the necessity of having an adequate record, the burden of securing a reporter's transcript is relatively de minimis. Further, the failure to have a record prepared could potentially expose an attorney to a malpractice claim. While the court in *Maxwell* had sufficient records without the hearing testimony, reliance upon courts to issue comprehensive orders or rulings is not recommended. Thus, counsel should prepare clients to incur this additional litigation cost. ■

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[1] Protect Our Water v. County of Merced, 110 Cal. App. 4th 362 (2003).
[2] Eisenberg, Horwitz, & Wiener, California Practice Guide: Civil Appeals and Writs ch. 4-A, §4:1 (2013) [hereinafter Eisenberg].
[3] Maura Dolan, *New California Budget Fails To Ease Court Woes, Chief Justice Says*, L.A. Times, June 20, 2014, *available at* http://www.latimes.com.
[4] *In Focus: Judicial Branch Budget Crisis*, California Courts, The Judicial Branch of California, *available at* http://www.courts.ca.gov/partners/1494.htm (last visited May 1, 2015).
[5] Protect Our Water, 110 Cal. App. 4th at 365.
[6] Maxwell v. Dolezal, 231 Cal. App. 4th 93 (2014).
[7] *Id.* at 100.
[8] Foust v. San Jose Const. Co., 198 Cal. App. 4th 181, 187 (2011).
[9] Cal. Const. art. VI, §13.
[10] Foust, 198 Cal. App. 4th at 181.
[11] *Id.* at 189.
[12] Vo v. Las Virgenes Mun. Water Dist., 79 Cal. App. 4th 440 (2000).
[13] *Id.* at 447-48 (citations omitted).
[14] Van Halen v. Berkeley Hall Sch. Found., Inc., No. B252059, 2014 WL 7192559, at *6 (Cal. Ct. App. Dec. 17, 2014).
[15] *Id.* at *13.
[16] Ketchum v. Moses, 24 Cal. 4th 1122, 1141 (2001).
[17] City of Pinole v. Lionsgate, No. A105767, 2005 WL 1525046, at *6 (Cal. Ct. App. June 29, 2005).
[18] Cal. R. of Ct. 3.824(b)(1).
[19] Lionsgate, No. 2005 WL 1525046, at *6.
[20] Cal. R. of Ct. 8.120.
[21] Eisenberg, *supra* note 2, at ch. 4-C.
[22] Code Civ. Proc. §§632, 634.
[23] Code Civ. Proc. §273; *see also* Redwing v. Moncravie, 32 P. 2d 408 (1934).
[24] Code Civ. Proc. §128(a)(3).
[25] Gov't. Code §68086; Cal. R. of Ct. 2.956(b), (c).
[26] Cal. R. of Ct. 8.130(f)(2).